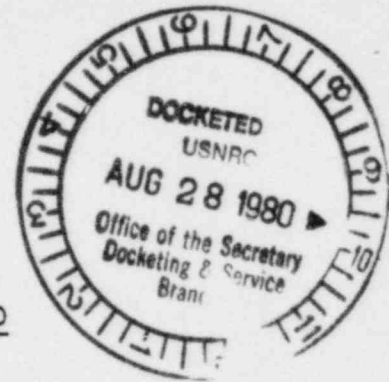


UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
NORTHERN INDIANA ) Docket No. 50-367  
PUBLIC SERVICE COMPANY )  
(Bailly Generating Station, ) (Construction Permit  
Nuclear-1) ) Extension)

STATE OF ILLINOIS' MOTION  
TO COMPEL STAFF DETERMINATION

The State of Illinois, by its attorney Tyrone C. Fahner, Attorney General of the State of Illinois, moves the Board to compel the NRC Staff to make and inform the Board of its determination whether, pursuant to the National Environmental Policy Act, it will prepare and circulate an Environmental Impact Statement (EIS) with respect to NIPSCO's application for an amendment to its construction permit. This determination is particularly essential in light of the changes in circumstances which have occurred since the preparation of the EIS issued with respect to the Bailly construction permit.

The State of Illinois previously agreed to defer a ruling on its Contention One of the "Supplemental Petition of the State of Illinois," which, in general, asserts that an EIS is required. That agreement to defer was based on the Staff's indication, at the Special Prehearing Conference, that by June it expected to complete its evaluation of NIPSCO's application for a construction permit extension.

(Tr. of March 13, 1980, pp. 302-305). As of the date of filing

this motion, no Staff evaluation has been made.

The State of Illinois submits that this is the appropriate time for such a determination to be made as to whether the Staff will prepare an EIS in order to fulfill the mandate of NEPA.


The change in circumstances since the issuance of the EIS dated February 13 covering the Bailly construction permit has rendered that EIS inadequate and a new or supplemental EIS must be prepared. These circumstances are detailed in the letter dated May 27, 1980 from William J. Scott, then Attorney General, to J. Gustave Speth, Chairman of the President's Council on Environmental Quality, attached hereto as Exhibit A. The Council has concluded that a new or supplemental EIS is required, as reflected in the letter from chairman Speth to Tyrone C. Fahner, Attorney General, dated August 12, 1980, attached hereto as Exhibit B.

For all of the foregoing reasons, as well as the reasons set forth in the exhibits, Illinois submits that the Staff should be compelled to make its determination forthwith.

Respectfully submitted,

TYRONE C. Fahner  
Attorney General  
State of Illinois

BY:

  
\_\_\_\_\_  
MARY JO MURRAY  
Assistant Attorney General

OF COUNSEL:

Susan N. Sekuler  
Environmental Control Division  
188 West Randolph Street, Suite 2315  
Chicago, Illinois 60601

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
NORTHERN INDIANA PUBLIC )  
SERVICE COMPANY )  
 ) Docket No. 50-367  
 ) (Construction Permit Extension)  
(Bailly Generating Station )  
Nuclear-1) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "STATE OF ILLINOIS MOTION TO COMPEL STAFF DETERMINATION in the above-captioned proceeding haveing served on the folowing by deposit in the United States mail, first class postage prepaid this 26th day of August, 1980.

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Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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Atomic Safety and Licensing Appeal  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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CYNTHIA DUMAS

SUBSCRIBED AND SWORN TO  
BEFORE ME THIS            DAY  
OF AUGUST, 1980.

---

Notary Public



State of Illinois  
Office of the Attorney General  
Chicago 60601

William J. Scott  
Attorney General

May 27, 1980

J. Gustave Speth, Chairman  
Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, D.C. 20006

Dear Chairman Speth:

I am writing to you on behalf of the People of the State of Illinois (Illinois) to call to the attention of the Council on Environmental Quality (CEQ) a matter of significance related to compliance with the National Environmental Policy Act.

The Nuclear Regulatory Commission (NRC) is currently considering an application from the Northern Indiana Public Service Company (NIPSCO) to extend the construction permit for its Bailly Generating Station, Nuclear-1 (Bailly) (NRC Docket No. 50-367) from September 1, 1979 to December 1, 1987. NIPSCO received its initial construction permit to build Bailly on May 2, 1974 and the original environmental impact statement (EIS) was completed in February of 1973.

Pursuant to Section 185 of the Atomic Energy Act of 1954, 42 U.S.C. §2235 all construction permits must specify a latest completion date. If construction is not completed by that completion date "the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date." Section 50.55(b) of the NRC's Regulations, 10 C.F.R. §50.55(b) contains a similar requirement.

Letter to:  
J. Gustave Speth, Chairman  
Page Two

Through a series of circumstances, which Illinois will not detail here, almost no construction has taken place on Baily since it received its construction permit on May 1, 1974, six years ago. The NRC estimates that the plant is less than one percent complete, consisting merely of a large hole in the ground with support pilings driven for the non-critical buildings. No construction has taken place on the plant since September, 1977 during which time the NRC staff has reviewed a change in the foundation design of the plant from long support piles going to bedrock or the glacial lacustrine till immediately above bedrock to short piles.

Pursuant to Petitions filed by Illinois and a number of other petitioners the NRC has formed an Atomic Safety and Licensing Board for the purpose of determining whether a hearing should be held regarding the renewal of the construction permit for Baily. A special prehearing conference was held in March to consider the various Petitions to Intervene. At that hearing the NRC staff announced that it was reviewing NIPSCO's application for the purpose of determining inter alia, whether an EIS or a supplemental EIS would be necessary.

Illinois believes that an EIS or a supplement must be prepared for the renewal of the construction permit and that the decision related to the Baily Plant must be based upon a consideration of environmental factors. If the NRC were to approve NIPSCO's petition for construction permit renewal it would be giving NIPSCO permission to build 99% of the nuclear power plant. In fact, the length of time requested for the extension is even longer than the time provided in original construction permit.

The February, 1973 EIS prepared for Baily does not take into consideration the considerable environmental developments which have occurred since it was issued even seven years ago. Among these significant developments to Baily are:

1. The issuance of WASH 1400, the Reactor Safety Study (October, 1975) and the reevaluation by H.W. Lewis' Risk Assessment Review Group.
2. Three Mile Island, the Kemeny Commission Report and the Rogovin Commission Report.

Letter to:  
J. Gustave Speth, Chairman  
Page Three

3. The March 30, 1980 letter from Gus Speth, Chairman of CEQ to John Ahearne, Chairman of the NRC attaching the Report the Environmental Law Institute NRC's Environmental Analysis of Nuclear Accidents: Is It Adequate?

4. A September 26, 1979 memo from R. Wayne Houston, Chief, Accident Analysis Branch, NRC to Daniel R. Muller, Acting Director, Division of Site Safety and Environmental Analysis (attached hereto) which concludes that of six proposed siting criteria contained in NUREG 04.5 Report of the Siting Policy Task Force Baily alone of all active nuclear power plant sites in the nation fails to meet all six criteria. That study also determines that Baily had the smallest exclusion area of any active nuclear power plant in the United States.

5. Because of the high water table at Baily extensive dewatering must take place. Immediately adjacent to the Baily site is the Indiana Dunes National Lakeshore which contains the fragile Cowles Bog Wetland Complex, a national landmark. This dewatering has occurred for about five years instead of the eighteen months initially contemplated and will continue during most if not all of the 98 month period needed to complete the plant. This will result in a drawdown of the water in the National Lakeshore and at Cowles Bog which will cause irreparable environmental harm.

6. The estimated costs of Baily have gone up from about 150 million dollars to over 1.1 billion dollars and NIPSCO estimates that its costs are increasing by at least seven million dollars a month.

7. At the time the construction permit was issued the level of peak demand for electricity in the NIPSCO service area was assumed to increase by 6 to 8% per year. Actual experience has shown an average annual increase in peak demand of about 4.05% with no increase in peak demand occurring from 1978 to 1979.

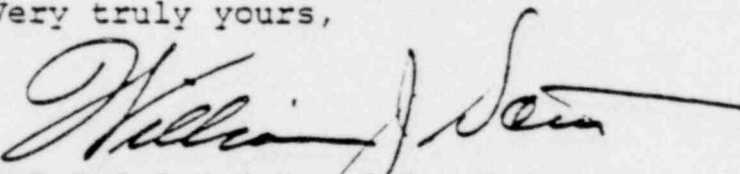
Letter to:  
J. Gustave Speth, Chairman  
Page Four

The NEPA issue related to Bailly will have broad implications for other nuclear power plants in the early stages of construction when their construction permits expire. For example, the Jersey Central Power and Light Company on August 31, 1978 applied for an extension to its construction permit for the Forked River Nuclear Generating Station issued on July 10, 1973. That plant is only 38% complete with work currently halted due to financial problems experienced by the utility which is part owner of Three Mile Island-2. The Company seeks a seven year extension of its construction permit.

Illinois believes that the Nuclear Regulatory Commission must prepare an Environmental Impact Statement or a supplement in conjunction with the determination of whether to extend the construction permit for the Bailly Nuclear Power Plant. If there was ever a circumstance in which the preparation of an environmental impact statement or a supplement is necessary it is this circumstance.

The construction permit for the Bailly plant will be extended by the NRC upon a showing of good cause by the applicant for extension. Illinois also believes that NEPA and Calvert Cliffs Coordinating Committee v. AEC 449 F. 2d 1109 (D.C Ct. App. 1971) require that the decision be based upon a consideration of these environmental consequences of the construction of the power plant which were not and could not have been considered at the initial construction permit proceeding.

Very truly yours,

  
A T T O R N E Y   G E N E R A L



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
722 JACKSON PLACE, N. W.  
WASHINGTON, D. C. 20006

August 12, 1980

RECEIVED

AUG 18 1980

WILLIAM J. SCOTT  
ATTORNEY GENERAL

Honorable Tyrone C. Fahner  
Attorney General  
State of Illinois  
Chicago, Ill. 60601

Dear Attorney General Fahner:

The Council has reviewed your office's letter, dated May 27, 1980, regarding the application of the National Environmental Policy Act ("NEPA") to the future decisions concerning the Bailly Generating Station, Nuclear-1 ("Bailly-1").

Our review of the matter indicates that the initial construction permit for Bailly-1 was issued on May 1, 1974. Since that time virtually no construction has taken place, and the construction permit has expired. Pursuant to the intent of the Atomic Energy Act, unless the permit is extended by order of the Nuclear Regulatory Commission ("NRC"), the Northern Indiana Public Service Company ("NIPSCO") will forfeit all rights to construct Bailly-1.

Your office has suggested that there have been certain significant new developments since the final EIS on Bailly-1's construction permit was issued in 1973, such as:

1. The issuance of WASH-1400, The Reactor Safety Study (October, 1975) and its reevaluation by H. Lewis' Risk Assessment Review Group in NUREG/CR-0400 (1978).
2. The accident at Three Mile Island and the subsequent studies of the accident, including the Report by the President's Commission on The Accident At Three Mile Island, and the report of the Special Inquiry Group to the Nuclear Regulatory Commission.
3. The September 26, 1979, NRC memorandum from R. W. Houston, Chief of the NRC's Accident Analysis Branch, to Daniel P. Muller, Acting Director of the NRC's Division of Site Safety and Environmental Analysis, indicating that the Bailly-1 facility failed to meet proposed siting criteria contained in the report of the NRC Siting Policy Task Force (NUREG-0625) (1979).
4. The Council's letter of March 20, 1980, to the NRC and the Council's report entitled, NRC's Environmental Analysis of Nuclear Accidents: Is it Adequate?

In our letter of March 20, 1980, we urged the Commission to move quickly to revise its policy on accident analysis in environmental impact statements. The review of NRC EISs by the Environmental Law Institute for

the Council had revealed that none of the EISs prepared to date by the NRC for land based reactors has included an analysis of what were formerly known as "Class 9" or worst case accidents. We stated our conclusion that the NRC's new accident analysis policy should require discussion in EIS's of the environmental and other consequences of the full range of accidents that might occur at nuclear reactors, including core melt events. Such analyses, we noted, could improve the Commission's siting, design, licensing, and emergency planning decisions.

On June 13, 1980, the Commission published a new Interim Policy for the consideration of environmental consequences of nuclear accidents under NEPA. The NRC concluded that there is a need to include in EISs a discussion of the "site specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in the . . . melting of the reactor core." 45 Fed.Reg. 40101. The Interim Policy was ambiguous on whether supplements must be prepared for existing EISs that have already been issued for construction permits. However, the Commission stated:

" . . . it is the intent of the Commission that the staff take steps to identify additional cases that might warrant early consideration of either additional features or other actions which would prevent or mitigate the consequences of serious accidents. Cases for such consideration are those for which a Final Environmental Statement has already been issued at the Construction Permit stage but for which the Operating License review stage has not yet been reached." 45 Fed.Reg. 40101, 40103.

The NRC acknowledged that substantive changes in plant design features as a result of such analyses "may be more easily incorporated in plants when construction has not yet progressed very far." Id.

As indicated in the memorandum enclosed with this letter from our General Counsel's Office, in determining whether to act to extend NIPSCO's construction permit, the NRC's responsibilities under the Atomic Energy Act are supplemented by the National Environmental Policy Act. NEPA requires the NRC to consider environmental factors to the fullest extent possible in its new decision about Bailly-1. The Council is of the view that for this decision, the NRC may simply adopt all or portions of its prior final EIS pursuant to 40 CFR §1506.3 and prepare a supplement dealing with the developments indicated above. Consideration of this new information might indicate, among other things, the need to modify plant design, select an alternative site, implement certain emergency preparedness measures, or reconsider the construction permit altogether. As stated by the U.S. Court of Appeals for the Second Circuit:

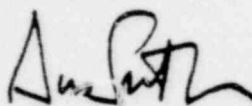
"Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated,

considered and discussed in the light of alternatives, not before. Otherwise, the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir., 1975).

In summary, the Council has concluded that the NRC should prepare and circulate a supplement to the EIS on the Bailly-1 construction permit prior to rendering a decision on the pending request for a permit extension. The NRC must also issue a record of its new decision in compliance with 40 CFR §1505.2.

By a copy of this letter, we are providing our conclusions on this issue to the NRC and NIPSCO.

Sincerely,



GUS SPETH  
Chairman

Enclosure

cc: Members of the Commission  
President of NIPSCO

EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
722 JACKSON PLACE, N. W.  
WASHINGTON, D. C. 20006

MEMORANDUM FOR THE CHAIRMAN

THROUGH: Foster Knight, Acting General Counsel **FK**  
FROM: John Shea, Counsel **JS**  
SUBJECT: The Need To Supplement NRC's EIS On the Bailly-1 Reactor  
Construction Permit

On May 27, 1980, the Attorney General of the State of Illinois wrote to the Council concerning the application of the National Environmental Policy Act ("NEPA") to a decision by the Nuclear Regulatory Commission ("NRC") on a request for an extension of the construction permit for the Bailly Generating Station, Nuclear-1 ("Bailly-1").

Background

The final environmental impact statement on the construction permit for Bailly-1 was issued in February 1973. The initial construction permit for Bailly-1 was issued on May 1, 1974. Since that time, virtually no construction has taken place and the construction permit has expired. Pursuant to the intent of the Atomic Energy Act, unless the permit is extended by order of the NRC, the Northern Indiana Public Service Company ("NIPSCO") will forfeit all rights to construct Bailly-1 (Section 185 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2235).

1. The Attorney General's Letter.

The Attorney General identified a number of developments and items of information which are relevant to environmental concerns and the NRC's decision to allow the construction of Bailly-1. Several of these items were discussed at length in the Council's letter and attachment to the NRC, dated March 20, 1980. These include:

1. The issuance of WASH-1400, The Reactor Safety Study (October 1975) and its reevaluation by H. Lewis' Risk Assessment Review Group in NUREG/CR-0400 (1978).
2. The accident at Three Mile Island and the subsequent studies of the event, including the Report by the President's Commission on The Accident At Three Mile Island and the report of the Special Inquiry Group to the NRC.
3. The Council's release of the report by the Environmental Law Institute entitled, NRC's Environmental Analysis of Nuclear Accidents: Is it Adequate?

One other related development discussed in the Attorney General's letter\* involves a memorandum to Daniel R. Muller, Acting Director of the NRC's Division of Site Safety and Environmental Analysis, from R. Wayne Houston, Chief of the NRC's Accident Analysis Branch, DSE, concerning the development of siting criteria for nuclear reactors. That memorandum indicates that the Baily-1 facility failed to meet all six of the proposed siting criteria contained in the report of the NRC's Siting Policy Task Force (NUREG-0625) (1979).

2. CEQ's Letter of March 20, 1980, to the NRC Concerning Accident Analysis.

In our letter of March 20th, we told the NRC that its long-standing approach to accident analysis in EISs was inadequate to meet the full disclosure requirements of NEPA. We also stated that all future EISs would have to include an accident analysis which fulfilled the requirements indicated in our letter and discussed further in the ELI report. We went on to say that the NRC should perform supplemental accident analyses for operating nuclear reactors giving highest priority to high risk reactors, particularly those near densely populated areas or reactors with unique features having a greater potential for accidents.

3. The NRC's Recent Statement of Interim Policy Concerning Accident Analysis.

On June 13, 1980, the NRC published an Interim Policy for the consideration of severe reactor accidents in EISs. 45 Fed. Reg. 40101. The statement of policy announced the withdrawal of the old classification system for nuclear accidents and set forth the Commission's direction that NRC EISs "include considerations of the site specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core." Id. In carrying out this policy, the NRC staff was instructed to consider relevant site features associated with accident risks, including population density. The staff was also directed to "consider the likelihood that substantive changes in plant design features which may compensate further for adverse site features may be more easily incorporated in plants when construction has not yet progressed very far." 45 Fed.Reg. at 40103.

The Legal Issues Under NEPA

As with its other actions and decisions, the NRC's responsibilities under the Atomic Energy Act regarding its decision on NIPSCO's application for an extension of the construction permit are supplemented by the NEPA. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d

\* This memorandum focusses only on the developments cited by the Attorney General's Office that are national in scope. Several other developments referred to in the Illinois letter, which are more of a local nature, may be appropriate for discussion and consideration in a supplement to the Baily-1 EIS, depending upon their significance. These "local" developments include (1) the drawdown of water during plant construction from the Indiana Dunes National Lakeshore and Cowles Bog, (2) increases in plant costs, and (3) decreases in the need for power.

1109, 1112 (D.C. Cir., 1971), cert. denied, 404 U.S. 942 (1972); Public Service Co. of New Hampshire v. Nuclear Regulatory Commission, 582 F.2d 77 (1st Cir., 1978), cert. denied, 439 U.S. 1046. A decision to extend the NIPSCO construction permit and thereby allow the construction of Bailly-1, would be a major federal action necessitating compliance with NEPA's requirement for an EIS review. 40 CFR §§1502.3 and 1508.18; Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir., 1974). In this case the NRC could adopt its prior EIS or portions thereof and issue a supplement to that EIS to disclose the significant new information discussed above. 40 CFR §§1506.3 and 1502.9(c).

The Council's new NEPA regulations provide at 40 CFR §1502.9(c) (1979) that

"(c) Agencies:

(1) Shall prepare supplements to either draft or final impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information, relevant to environmental concerns, bearing on the proposed action or its impacts."

In Essex County Preservation Association v. Campbell, which was decided prior to the adoption of the Council's new regulations, the Second Circuit affirmed a district court's order directing the Federal Highway Administration to prepare a supplemental EIS on significant new circumstances involving a moratorium on certain highway extension work. The moratorium purportedly called into question the need for other highway construction at issue in the case. The Court of Appeals affirmed the district court, stating:

" . . . the [district] court held that a supplemental EIS had to be prepared in order to effectuate the basic aims of NEPA which favor disclosure of all relevant factors affecting agency decisions. See Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir., 1972). We are inclined to agree with this judgment. While we cannot determine with certainty what the ultimate environmental effects [of these new circumstances] will be, it would seem to constitute the type of 'significant new information...concerning [an] action's environmental aspects' that makes a supplemental EIS necessary. 23 CFR §771.15. Such a supplemental statement, which receives the same type of public comment and exposure as an original EIS, is likely to facilitate the 'complete awareness on the part of the actor of the environmental consequences of his action . . . ,'  
National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir., 1971), mandated by NEPA." Essex County Preservation Association v. Campbell, 536 F.2d 956, 8 ERC 2156, 2159 (1st Cir., 1976).

The Court went on to hold that:

"In view of the fact that the reconstruction project at issue here is not yet completed and that certain agency decisions may 'remain

open to revision,' [citation omitted] we cannot say it was improper for the district court to require appellees to prepare and circulate a supplemental EIS . . . ." Id.

In the past the Council has advised agencies to prepare supplemental EISs in order to fulfill the NEPA mandate identified by the Court of Appeals in the Essex County case, i.e., that agencies must be aware of the potential consequences of their actions and that agencies such as the NRC should weigh all of their decisions in light of significant new data and developments. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir., 1965), cert. denied, 384 U.S. 941 (1966); Hudson River Fishermen's Association v. FPC, 498 F.2d 827, 832-33 (2d Cir., 1974). This should be done only after preparation of a supplemental EIS. As stated by the Second Circuit in interpreting 40 CFR §1500.11 of the Council's former guidelines:

Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated, considered and discussed in the light of alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it. NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir., 1975).

#### Conclusion

Consideration of the significant new information relating to the environmental consequences of severe reactor accidents might indicate, among other things, the need to modify plant design, select an alternative site, implement certain emergency preparedness measures, or reconsider a construction permit altogether. It is essential, therefore, that this information be discussed in a supplemental EIS and considered prior to the NRC's critical decision on the extension of the Baily-1 construction permit.