MEMORANDUM OF LAW ON THE NEED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT IN CONNECTION WITH EXTENSION OF THE BAILLY CONSTRUCTION PERMIT

I. Introduction

In response to a May 27, 1980, letter from the former Attorney General of Illinois, the CEQ has forwarded a reply dated August 12, setting forth its views on the need to prepare an environmental impact statement (EIS) or an EIS supplement for the Bailly construction permit extension. The CEQ has alleged that new information since the issuance of the Bailly Final Environmental Statement (FES), have rendered that document inadequate and that a "new or supplementary EIS must therefore be prepared" before the Bailly construction permit may be extended. As Permittee demonstrates below, the CEQ letter, which fails to address the NRC regulations and case law relevant to this issue, does not set forth any grounds to support its assertion that the granting of an extension for the Bailly construction permit would be a major federal action significantly affecting the quality of the human environment pursuant to Section 102(2)(c) of NEPA. In fact, the relevant precedents establish that this construction permit extension is not a "major federal action" requiring preparation of a formal environmental impact statement.

The CEQ appears to cite the existence of "new developments" as an independent basis for preparing a supplement to the FES in connection with the extension. However, the CEQ has failed to identify a sufficient nexus between the issues to be addressed in this limited proceeding and the alleged "new developments" to bring consideration of the latter within the scope of this proceeding.

Finally, the CEQ has misapplied the Commission's June 13, 1980, Interim Policy Statement on the consideration of Class 9 accidents in NRC NEPA reviews. (45 Fed. Reg. 40,101.)

Therefore, notwithstanding the CEQ's allegations, there is no legal requirement that an FES or supplemental FES be prepared in connection with the construction permit extension.

II. Extension of the Bailly Construction Permit Is Not A Major Federal Action Significantly Affecting the Quality of the Human Environment

The NRC Staff has set out to determine pursuant to NEPA whether the granting of an extension for the Bailly permit constitutes "major federal action significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(c) (1976).) If it is, NEPA requires the Staff to prepare and circulate an environmental impact statement. As the licensing agency, the NRC has sole responsibility for making this threshold determination. (Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974).)

The NRC's regulations implementing NEPA distinguish between agency actions, such as the issuance of a construction permit, which require preparation of an environmental impact statement (10 C.F.R. § 51.5(a) (1979)) and more limited agency actions which "may or may not" require preparation of an EIS. (10 C.F.R. § 51.5(b) (1979).) Although an amendment extending a construction permit is not specifically listed in either category, it is apparent that the NRC intends the decision whether to prepare an EIS in limited proceedings such as this one to be made on a case-by-case basis after the impacts of the proposed action have been "evaluated" by the Staff. (10 C.F.R. § 51.5(c) (1979).)

Guidance in making this determination is provided by the many NRC cases which identify the proper scope of NEPA review in a limited proceeding such as the one at bar. These cases establish that the only impacts which the Staff is to consider in making its threshold NEPA determination are those which will occur as a result of extension of the construction period, i.e., the impacts which are in excess of those considered in the original FES prepared for the Bailly facility and which will accrue from the limited regulatory action under consideration at this time.

In Boston Edison Co. (Pilgrim Nuclear Power Station), LBP-74-57, 8 AEC 176 (1974), Applicant sought an amendment to its operating license to allow the use of 8 x 8 fuel assemblies

(rather than 7 x 7) in the reactor core. One of the issues considered by the Board was whether "[t]he proposed change in the Applicant's technical specifications represents a major federal action with significant potential impact on the environment, a circumstance in which an environmental impact statement is required." (8 AEC at 182.) The Board concluded that the impacts arising from the issuance of the amendment were not "significant" and that the Staff was therefore not required to prepare an EIS.

The Board based its analysis on the court of appeals' widely-followed opinion in Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972). The court there had articulated a conceptual framework within which a proposed federal action is to be assessed to determine whether it might bring about "significant" environmental impacts. The court directed that, in assessing the environmental significance of a particular action, the responsible agency must begin with a "present reality" that some impacts have already been realized at the location under consideration. After quoting at length from the Hanly opinion, the Pilgrim Licensing Board stated:

> Employing the test set out in Hanly v. Kleindienst, supra, we look first for those adverse effects, if any, that are in excess of those presently resulting from the operation of the plant. Is there an extent to which the proposed licensing action will augment the adverse environmental effects resulting from operation of the facility with the

> 7 x 7 fuel? Only if such augmentation can be found will it be necessary to go further and consider the absolute quantitative environmental effect of the proposed action for the purpose of determining its significance.

(8 AEC at 184. (emphasis in original).) Thus, the Board considered only those impacts which would accrue from the use of the modified fuel elements and concluded that the proposed action would not cause adverse impacts "in excess of those already existing by virtue of the operation of the Pilgrim Nuclear Power Station." (Id.)

The Appeal Board affirmed this principle several years later and upheld the NRC Staff's determination that an EIS need not be prepared in conjunction with an operating license amendment authorizing expansion of the spent fuel pool at the Prairie Island plant. (Northern States Power Co. (Prairie Island Nuclear Generating Plant), ALAB-455, 7 NRC 41 (1978).) Intervenors there argued that, absent expansion of the spent fuel pool, the Prairie Island facility would soon be required to shut down because the pool was nearly full and no off-site storage facilities were available. For this reason, intervenors contended, what was being licensed was "in reality plant operation" and the NRC was required to prepare an EIS assessing the impacts of plant operation for the remainder of the 40-year license term. The Appeal Board rejected this position.

> The issuance of operating licenses for the two Prairie Island units was preceded by a full environmental review, including the consideration of alternatives. See LBP-74-17, 7 AEC 487 (1974), affirmed on all environmental questions, ALAB-244, 8 AEC 857 (1974). Nothing in NEPA or in those judicial decisions to which our attention has been directed dictates that the same ground be wholly replowed in connection with a proposed amendment to those 40-year operating licenses. Rather, it seems manifest to us that all that need be undertaken is a consideration of whether the amendment itself would bring about significant environmental consequences beyond those previously assessed and, if so, whether those consequences (to the extent unavoidable) would be sufficient on balance to require a denial of the amendment application. This is true irrespective of whether, by happenstance, the particular amendment is necessary in order to enable continued reactor operation (although such a factor might be considered in balancing the environmental impact flowing from the amendment against the benefits to be derived from it).

(7 NRC at 46, n. 4.) This interpretation of the required scope of NEPA review has been consistently adopted in NRC proceedings to consider amendments to construction permits and operating licenses. (Portland General Electric Co. (Trojan Nuclear Plant) LBP-78-40, 8 NRC 717, 744, n.9, aff'd, ALAB-531, 9 NRC 263, 266, n.6 (1979); Georgia Power Co. (A.W. Vogtle Nuclear Plant), ALAB-291, 2 NRC 494, 515 (1975); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393 (1978); Virginia Electric and Power Co. (Surry Station), DD-79-19, 10 NRC 625, 630-31 (1979).)

The memorandum of law supporting CEQ's "advisory" letter simply concludes, without supporting analysis, that:

> 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.

(Memorandum, p. 3 (emphasis added).) CEQ cites its own regulations, 40 C.F.R. §§ 1502.3 and 1508.18, to support this conclusion. However, these provisions are nothing more than general restatements of the law and do not address any of the considerations that dictate whether an EIS must be prepared in connection with review of a construction permit extension.

The CEQ also cites Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974), wherein the court held that U.S. Forest Service contracts and contract extensions permitting timber harvesting in certain federal forest areas constituted major federal action significantly affecting the human environment. The NEPA issue there before the court was whether Forest Service involvement in timber sales after the effective date of NEPA implicated that statute's EIS requirement even though the agency's involvement had commenced before the enactment of NEPA. No earlier environmental review had been undertaken by the Forest Service. The issue presented in the instant case is whether a construction permit extension proceeding is the proper forum for reopening a previously completed NEPA review. The CEQ did

not attempt to explain the relevance of Minnesota PIRG to the instant proceeding and, indeed, it is difficult to perceive any relevance to the issue here.

In concluding that this extension is "major federal action," the CEQ has failed to address the NRC cases discussed above which set forth the considerations by which the Staff is to be guided in making this determination. In addition, CEQ appears not to understand the limited nature of a permit extension proceeding and to misconstrue the precise activity which is being authorized here.*/ Simply put, the NRC is not now considering authorization to construct the Bailly facility but rather an extension of the period of construction.**/

A fundamental error in the CEQ's analysis is that it fails to acknowledge the licensing framework within which the dictates of NEPA are carried out in individual NRC proceedings. As part of this framework, the Commission has promulgated regulations which are designed to satisfy the requirements of NEPA

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*/ Perhaps typical of CEQ's misunderstanding of the posture of this proceeding is its statement that "the construction permit has expired." In fact, the permit has not expired; it continues in effect as explicitly provided in 10 C.F.R. § 2.109 (1980).

**/ Similarly, the court in San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) held that agency action which merely extended a previous authorization did not constitute "major federal action" for purposes of NEPA.

in conjunction with its responsibility to license the construction and operation of nuclear power plants (10 C.F.R. Part 51), and NRC adjudicatory panels have formulated a large body of case law applying and interpreting these regulations. A central element of this framework is the concept that the Commission will focus upon different issues at different stages of its licensing process. (See Power Reactor Development Corp. v. International Union of Electrical Workers, 367 U.S. 396 (1961).) Thus, in the course of determining whether to issue an operating license, the NRC conducts another full NEPA review. Any analysis of the applicability of NEPA to a particular proceeding must recognize the purpose of that proceeding in the Commission's overall licensing scheme.

The NRC's consistent interpretation of NEPA, within the context of its unique licensing framework, is undoubtedly correct. A thorough and comprehensive environmental impact statement addressing a broad range of potential impacts which might accrue from construction and operation of the Bailly facility has already been prepared, circulated, and approved by the NRC. (Northern Indiana Public Service Co. (Bailly Generating Station), ALAB-224, 8 AEC 244 (1974).) The NRC's NEPA review of this plant has also withstood judicial scrutiny. (Porter County Chapter v. A.E.C., 533 F.2d 1011 (7th Cir.), cert. den., 429 U.S. 945 (1976).) Nothing in NEPA requires the NRC to reconsider, in a subsequent limited proceeding concerning the same plant, the broad range of environmental impacts alleged to flow from nuclear power plant construction

and operation which were considered at an earlier licensing stage. All that need be considered in determining whether an EIS is to be issued are the limited environmental impacts, if any, that would arise from the extended period of construction.

The NRC Staff has applied this rule in issuing negative declarations in conjunction with the granting of numerous construction permit extensions.*/ Based upon the NRC's consistent interpretation of NEPA, we submit that the incremental environmental impacts arising from extension of the Bailly construction permit are not significant. These impacts are the minimal effects which a prolonged construction period might have on

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*/ Examples of this practice include the following. Georgia Power Co. (Alvin W. Vogtle Nuclear Plant), Order and Negative Declaration of November 5, 1976; Virginia Electric & Power Co. (North Anna Power Station, Unit 1), Order and Negative Declaration of September 28, 1977; Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), Order and Negative Declaration of August 18, 1977; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), Negative Declaration of December 27, 1977; Order of January 16, 1978; Commonwealth Edison Co. (La Salle County Station), Order and Negative Declaration of May 31, 1978; Washington Public Power Supply System (WPSS Nuclear Project No. 2), Order and Negative Declaration of August 29, 1978; Duke Power Co. (William B. McGuire Nuclear Station), Order and Negative Declaration of December 26, 1978; Virginia Electric & Power Co. (North Anna Power Station, Units 3 and 4), Negative Declaration of April 18, 1979; Order of May 14, 1979; Commonwealth Edison Co. (La Salle County Station), Negative Declaration of December 26, 1979; Order of January 17, 1980.

nearby populations and the local environment. The principal allegations by intervenors in the extension proceeding have concentrated on the effects of the extended period of construction dewatering. Dewatering effects were fully litigated at the construction permit stage and prolonged dewatering will not produce impacts different from those earlier assessed. Therefore, the incremental effects of the construction permit extension are minimal and the extension is not a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. In our view, the appropriate course is for the Staff to complete its evaluation and issue a negative declaration, recording that no environmental impact statement will be prepared.

III. CEQ's Alleged "Significant New Developments" Do Not Require An FES Supplement In This Proceeding

The CEQ argues that NEPA requires the NRC to consider the effects of Class 9 accidents in a supplement to the Bailly FES. Preparation of a supplement is allegedly required because "there have been significant new developments" since the Bailly FES was issued. The CEQ lists several developments which have occurred during the past few years and which it believes require preparation of such a supplemental FES. In support of its position the CEQ cites (1) Section 1502.9(c) of its regulations implementing NEPA and, (2)

cases alleged to hold that new information such as that listed in the letter require preparation of an FES Supplement.*/

As discussed below, the alleged "new developments" do not require that the Bailly FES be supplemented. Even if they did, however, the fact remains that CEQ has failed to recognize that such "developments" (and the alleged resulting need for FES supplementation) are not related to the subject matter of this proceeding and do not give rise to a requirement for supplementation here. Under NRC precedent the issues to be considered in a license amendment proceeding are limited to those which have a sufficient nexus to the amendment. (Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974); Tennessee Valley Authority (Browns Ferry Nuclear Plant), LBP-76-10, 3 NRC 209, 221 (1976).) Since the alleged "new developments" referenced by CEQ do not have a sufficient nexus to the extension, they cannot properly be considered in this forum. Furthermore, the Appeal Board in Indiana and

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*/ The CEQ also addresses the Commission's Interim Policy Statement (IPS) on the issue of Class 9 accident consideration in NRC environmental reviews. We discuss the applicability of the IPS in the next section of this memorandum.

Michigan Electric Co. (Donald C. Cook Nuclear Plant), ALAB-129, 6 AEC 414 (1973) has made clear that the timing of consideration of issues which are normally considered at the operating license stage is not affected by the "fortuitous circumstance" of a pending construction permit extension proceeding. (6 AEC at 421.)

In any event, CEQ is incorrect in its assertion that NEPA requires the NRC to issue a supplement to the Bailly FES. CEQ points to its regulation at 40 C.F.R. § 1502.9(c) which provides that:

> Agencies:
> (1) Shall prepare supplements to either draft or final environmental 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 and bearing on the proposed action or its impacts.

The CEQ has consistently argued before the Commission that its regulations are binding on the NRC. Since NEPA does not confer power upon the CEQ to promulgate regulations which are binding upon other federal agencies, the only basis for such authority which has been cited by the CEQ is Executive Order No. 11,991. (3 C.F.R. 123 (1977), reprinted in 42 U.S.C. § 4321 (1977).) However, we submit

that the President is not authorized to direct an independent regulatory agency in the conduct of its substantive responsibilities.*/

Even if the President had such authority, Section 1 of Executive Order No. 11,991 only grants CEQ the power to promulgate "regulations to Federal agencies for the implementation of the procedural provisions" of NEPA.**/ Section 1502.9 of the CEQ regulations states that agencies must consider

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*/ The Nuclear Regulatory Commission is such an independent regulatory agency. (Energy Reorganization Act of 1974, § 201, 42 U.S.C. § 5841 (1976).) "Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." (See Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).) In the absence of explicit statutory authorization, the principle of separation of powers forbids the President from exercising control over an independent regulatory agency. (Id.; Wiener v. United States, 357 U.S. 349 (1958).) Since NEPA does not give the President the authority to issue executive orders requiring the Commission to comply with the regulations of CEQ, Executive Order No. 11,991 is not binding upon the Commission, and the scope of the Order should be narrowly interpreted as applying only to executive agencies. Moreover, a narrow interpretation would not be inconsistent with the Order, since Section 2 of the Order states that agencies are bound by CEQ regulations, "except where such compliance would be inconsistent with statutory requirements."

**/ In a joint memorandum to the Commissioners the NRC's General Counsel and Executive Legal Director have taken the position that "NRC can be bound by CEQ's NEPA regulations as a matter of law insofar as those regulations are solely procedural or ministerial in nature." (SECY-79-305, "NRC Compliance With CEQ NEPA Regulations," p. 17 (May 1, 1979).)

"significant new circumstances, or information relevant to environmental concerns, and bearing on the proposed action or its impacts" in EIS supplements. Such a requirement describes what must be considered and not the method by which the consideration is to be accomplished. Thus, the requirement contained in Section 1502.9 is manifestly substantive in nature, and the NRC is not bound thereby.*/

CEQ also relies upon Essex County Preservation Association v. Campbell, 536 F.2d 956 (1st Cir. 1976). In that case the court considered whether the Federal Highway Administration, which had earlier approved a request to widen Interstate 95 north of Boston from four to eight lanes, was required to supplement its earlier environmental statement in light of new information affecting the need for the expansion. Specifically, a moratorium on adjacent highway construction was alleged to "call into question the original estimates relied on to justify the highway's expansion from four to eight lanes" (536 F.2d at 960) in the segment under consideration by the court. Since it represented a challenge

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*/ Moreover, even if this regulation were binding on the NRC, by its own terms it only applies to "proposed actions." Since the original "proposed action," i.e., the granting of a construction permit, has already been taken, the regulation would appear no longer to apply. As explained above, the alleged "new developments" have no nexus or relevance to the particular action proposed here -- the extension of a construction permit.

to the basic need for the project, this fact was held by the court to constitute the type of information which would necessitate preparation of an EIS supplement under applicable FHA regulations implementing NEPA.*/

In Essex County, the FHA had not altered its previous position based upon the new information nor had it even considered that information. As discussed below, the NRC has fully considered the "new developments" referred to in the CEQ letter and has changed its NEPA policies following that consideration. Furthermore, the information at issue in Essex County was very different from that cited by the CEQ here to justify preparation of a supplemental FES, since the new information in that case challenged the basic need for the expanded highway on the basis of changed facts relevant to that particular action alone.

Essex County is the only case cited by CEQ in which a court has required that an agency reopen its NEPA record to consider significant new information.**/ That case is consistent with other precedent which requires the new information to

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*/ The relevant FHA regulations provided that a "new or changed environmental effect of significance to the quality of the environment" would require EIS supplementation. (536 F.2d at 960 and n.5.)

**/ Several additional cases are cited in this portion of the CEQ memorandum; however, none addresses the question of EIS supplementation based upon new informati

[footnote continued on next page]

fundamentally affect the project. In Inman Park Restoration v. Urban Mass Transit Administration, 414 F. Supp. 99, 117-19 (N.D.Ga. 1975), the court rejected plantiff's assertion that the environmental impact statement issued for a mass transit system was required to be supplemented after construction on the project had begun because of new information regarding one of the stations in the transit system. The court found that supplementation is required "only when there has been a significant change in the entire project on which the EIS was prepared or when significant new information has arisen which changes the environmental impact of the entire project." The court believed that plaintiff's view would serve to delay the project which could move forward only between the creation of new impact statements. "Such a view," the court said, "might best serve the wishes of those opposed to the project in its entirety." (414 F. Supp. at 118.)

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which has come to light after the initial NEPA review was complete. For instance, the memorandum cites Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), and Hudson River Fisherman's Ass'n. v. FPC, 498 F.2d 827, 832-33 (2d Cir. 1974), in a context which indicates they support the CEQ proposition that EIS supplements must be prepared whenever "significant new data and developments" are identified. These cases do not support that proposition. In fact, neither case poses any issue under NEPA at all, or even discusses this statute.

In NRC decisions concerning this issue, a stringent standard has also been applied. In order to justify reopening the NEPA record after a Final Environmental Statement has been completed and a construction permit issued, the new information must represent "a significant new environmental impact or information which would clearly mandate a change" in result. Public Service Electric and Gas Co., (Salem Nuclear Station), DD-80-17, 11 NRC 596, 599 (1980); Georgia Power Co. (A.W. Vogtle Nuclear Plant), DD-79-4, 9 NRC 582 (1979). It is the express position of the NRC Staff that this strict standard is consistent with NEPA as interpreted in light of the recognized need for administrative finality. (Salem, supra, 11 NRC at 599 n.6, citing Greene County Planning Board v. FPC, 599 F.2d 1227, 1233 (2d Cir. 1976), cert. den., 434 U.S. 1086 (1978).)

In Warm Springs Dam Task Force v. Gribble, 14 Envir. Rep. (BNA) 1744, 1748 (9th Cir., June 23, 1980), the court recognized that an agency has a "continuing duty to gather and evaluate new information" but that the existence of new information does not always necessitate the preparation of a supplemental EIS. Initially, the agency must determine whether the new information passes a threshold of significance before any further consideration of it is necessary.

Moreover, the court there indicated that, given the late date at which the relevant information became available, i.e., after preparation and circulation of a final EIS, the most important consideration is that the agency take a "hard look" at this information to determine whether it alters the previous conclusion to proceed with the project. (14 Envir. Rep. (BNA) at 1748-50.) In that case the agency had considered the new information in detail without preparing a formal supplement to the EIS and satisfied the court that no additional consideration was required by NEPA.

Similarly, the Commission has thoroughly considered the new information which CEQ alleges to require preparation of an EIS supplement for the Bailly facility and has decided to alter its existing policy on the issue of Class 9 accidents. ("NRC Statement of Interim Policy on the Consideration of Accidents in Environmental Impact Statements and Environmental Reports," (45 Fed. Reg. 40,101 (1980).) This is not a case, therefore, in which allegedly significant new information has been ignored by the responsible agency. It is a case in which the agency has considered the information in substantial detail, and has responded by modifying its previous policies accordingly. Therefore, whether or not NEPA would require the Commission to consider the impacts on previous decisions and current proceedin s of new information such as that alleged in the CEQ letter, the Commission has done precisely that.

The Commission's actions therefore fully satisfy NEPA's obligations. While the CEQ may disagree with aspects of the NRC's Interim Policy Statement, including the Commission's handling of ongoing proceedings, it cannot argue that "new developments" have been ignored by the Commission.*/ Thus, whatever may be the significance of the alleged "new developments," they are not properly considered in this proceeding and they do not give rise to the need for a supplemental EIS.

Finally, we shall consider the applicability of the Commission's Interim Policy Statement to this construction permit extension proceeding.

IV. The Commission's Interim Policy Statement Does Not Require the Preparation of an FES Supplement on the Issue of Class 9 Accidents in this Construction Permit Proceeding

In its Interim Policy Statement (IPS) (45 Fed. Reg. 40,101 (1980)), the Commission has set forth the manner in which Class 9 accidents are to be considered for plants at

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*/ In fact, another, separate letter to NRC Chairman Ahearne from CEQ Chairman Speth dated August 14, 1980 (copy attached), takes issue with several provisions in the Interim Policy Statement. CEQ challenges the NRC's policy generally with regard to plants that have not reached the operating license stage. That letter attaches a legal memorandum which is, in large part, identical to the memorandum attached to the letter to the Attorney General of Illinois.

various stages in the licensing process.*/ In so doing it has provided the Staff and licensing boards guidance for determining whether an FES supplement should be prepared in a particular proceeding.

In issuing the IPS, the Commission has decided to alter its policy on the consideration of Class 9 accidents from that provided in the previously proposed Annex to Appendix D. The Commission recognized that this change might have an adverse impact upon the progress of ongoing proceedings and expressed a desire for an "orderly transition" to the new policy.**/ The IPS therefore includes a carefully delineated timetable for the preparation of Class 9 accident analyses in on-going proceedings. (45 Fed. Reg. at 40,103.)

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*/ It is important to note that the Commission's determination on the precise handling of Class 9 accidents represented an appraisal of highly technical issues by the agency in which "a virtually unique . . . degree of . . . broad responsibility is reposed." Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968); see also Power Reactor Development Co. v. International Union of Electrical Workers, supra.

**/ See Transcript of Commission Meeting of April 16, 1980, on "Discussion of SECY-80-131 - Accident Considerations Under NEPA" (hereinafter referred to as Tr.), Tr. 53. It is worthy of note that that Commission meeting discussed what ultimately became the Commission's Interim Policy Statement. The proposed Statement of Interim Policy contained in SECY-80-131 and the actual Statement of Interim Policy differ substantively only in that the actual Statement added the first full paragraph in the last column of 45 Fed. Reg. at 40,103.

The Interim Policy Statement directs the Staff to "initiate treatments of accident considerations in accordance with" the new guidance only "in its on-going NEPA reviews, i.e., for any proceeding at a licensing stage where a Final Environmental Impact Statement has not yet been issued." (45 Fed. Reg. at 40,103.) This statement expresses the Commission's intent to maintain the existing two-stage process for licensing new nuclear plants. In accordance with the Commission's regulations in 10 C.F.R. § 51.26, a Final Environmental Statement has been issued for the Bailly facility and this Statement formed part of the basis for the Commission's issuance of a construction permit for the Bailly facility. Under the Interim Policy Statement, NIPSCO's Environmental Report submitted in conjunction with its application for an operating license must include a discussion of the risks associated with Class 9 accidents. (45 Fed. Reg. at 40,103.) The Commission has therefore determined that, in order to maintain an orderly transition between policies, the Staff's NEPA review of Class 9 accidents for plants with existing construction permits shall be undertaken at the operating license stage.*/

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*/ See, 45 Fed. Reg. at 40,103; Tr. 44-45, 70-88.

The Commission further clarified its intent with respect to the applicability of the Interim Policy Statement to "on-going proceedings:"

> It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices, particularly for cases involving special circumstances where Class 9 risks have been considered by the staff, as described above. Thus, this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding. 5/

5/ Commissioners Gilinsky and Bradford disagree with the inclusion of the preceding two sentences. They feel that they are absolutely inconsistent with an even-handed reappraisal of the former, erroneous position on Class 9 accidents.

(45 Fed. Reg. at 40,103)(emphasis added).) Thus, the Commission has directed that the NEPA review in this case is not to be "expanded" on the basis of the Commission's new policy, nor is the consideration of accidents in the original Bailly FES to be "reopened." The Staff's threshold determination as to the applicability of NEPA to this proceeding should be based on the existing law governing

NEPA reviews in limited proceedings, unaffected by the Commission's new Class 9 policy.*/

The CEQ letter to Illinois conveniently ignores the above-cited portions of the Commission's IPS which demonstrate a clear desire to prevent a disruptive transition. CEQ instead states that the Policy Statement is "ambiguous" on the need to prepare a supplement for EISs that have already been issued at the construction permit stage.

The only portion of the IPS from which the CEQ letter quotes is addressed to the NRC Staff:

> However, it is also 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

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*/ The Commission's belief that incorporation of its new guidance would cause a delay in on-going proceedings was well-founded. The NRC Staff has estimated that the initial preparation of an accident analysis pursuant to the Interim Policy Statement will require four to six man-months. (Tr. 9-10.) Further delay could be occasioned in the Bailly extension proceeding by the submission of new contentions regarding Class 9 accidents and the proceeding could be substantially disrupted.

> the Construction Permit stage but for which the Operating License review stage has not yet been reached.

(45 Fed. Reg. at 40,103.) */ This provision mirrors the Commission's earlier directive in Offshore Power Systems (Floating Nuclear Plants), CLI-79-9, 10 NRC 257 (1979), that the Staff should bring to the Commission's attention any individual cases in which it believed the environmental consequences of Class 9 accidents should be considered. Of course, CEQ provides no reason why this directive should be applied in this proceeding. In fact, the CEQ letter focuses only upon "national issues" and does not even examine issues specific to the Bailly facility. In any event the Commission has clarified that this statement in Offshore Power Systems was directed at the Staff alone--the Commission's licensing and appeal boards have no authority to direct the Staff to make the called-for determination. (Public Service Co. of Oklahoma (Black Fox Station), CLI-80-8, 11 NRC 433 (1980).)

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*/ The CEQ misquotes this portion of the Policy Statement. The first sentence, as repeated in the CEQ letter, leaves out the words "However" and "also". The omission is not insignificant; these words refer to the preceding sentence in the Policy Statement in which the Commission states that its new policy is not to be the basis for expanding or reopening the NEPA analysis in ongoing proceedings--a directive which is central to the issue at hand and which the CEQ has chosen to ignore.

Most importantly, even if the Staff were ultimately to decide to consider Bailly among the plants affected by this portion of the Interim Policy Statement, such consideration would not play any part in this proceeding. The appropriate resulting steps would be determined by the Staff and the Commission within the context of the Interim Policy Statement. As stated above, the "fortuitous circumstance" of a construction permit extension proceeding does not provide a basis for injecting the issue here. (Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant), ALAB-129, 6 AEC 414 (1973).)

In NIPSCO's view, the CEQ letter is simply a reiteration of its consistent position that Class 9 accident effects must be considered for all plants licensed by the NRC. In fact, as we have shown, the CEQ letter provides no grounds for reopening the Bailly NEPA review in this construction permit extension proceeding.

In a March 20, 1980, letter to the NRC, the CEQ expressed its opinion that NEPA requires the NRC to assess the consequences of Class 9 accidents in its licensing reviews for nuclear power plants. The CEQ's letter (and a Report from the Environnmental Law Institute) were before the Commission when the Commission adopted its Interim Policy Statement. To be sure, the IPS does represent a change in policy; however, not every recommendation of the CEQ has been

adopted. For instance, the decision not to reopen previously-issued final environmental statements was deliberate. The Director, Office of Nuclear Reactor Regulation explained:

> The final part of the report presents a number of recommendations for improving the content of EIS accident analyses, as well as methods for implementing the recommendations. I am happy to note that a recent staff paper transmitted to the Commission (SECY-80-131) contains a staff proposal that is very largely in accord with the recommendations given in the CEQ report. A detailed listing of these, vis-a-vis the recent staff paper, is attached. A major point of disagreement should be noted, however. The CEQ report recommends that a supplementary EIS containing a revised accident analysis treatment should be prepared for every operating plant, with priority given to those plants located near high populations, having other unique features making them "higher risk," or undergoing license amendments. The staff has recommended that, absent a showing of special circumstances the discussion in previously issued EIS's not be reopened. */

The Interim Policy Statement issued by the Commission incorporates the Staff's recommendation.

V. Conclusion

The CEQ has not set forth any grounds for preparing an FES supplement in connection with this construction permit

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*/ Memorandum for Chairman Ahearne from Harold R. Denton, Office of Nuclear Reactor Regulation, through the Executive Director for Operations, "Environmental Law Institute Report of February 4, 1980, on the Adequacy of NRC's Environmental Analysis of Nuclear Accidents," pp. 1-2 (March 28, 1980) (emphasis added).

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extension proceeding. No basis is identified for the conclusion that extending the Bailly construction permit is a "major federal action" within the meaning of NEPA. In fact, a substantial body of case law discussing the scope of the NEPA review in a limited NRC licensing proceeding establishes that this proceeding is not a "major federal action."

The CEQ letter also fails to demonstrate that the "new developments" cited in its letter have any nexus to this construction permit extension which would require the Bailly FES to be supplemented in connection with this proceeding. Finally, the Commission's Interim Policy Statement, which sets forth the manner in which Class 9 accidents are to be examined in on-going and future licensing reviews, does not require the Bailly FES to be supplemented at this time.