

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

August 14, 1980

The Honorable John Ahearne
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Ahearne:

The Council was gratified by the positive response informally expressed by the Commission for the views set forth in our letter and attachment to you, dated March 20, 1980, concerning accident analyses in the Commission's environmental impact statements ("EISs") for nuclear reactors. We believe that the subsequent formal announcement of Interim Policy on the issue by the Commission is the most significant and encouraging step you have taken to rectify the serious problems in accident analysis inherited from the Atomic Energy Commission. I am writing to you at this time to convey the Council's specific views on the Interim Policy and the steps which must be taken to fulfill the Commission's obligations under the National Environmental Policy Act ("NEPA").

The accident considerations to be included in future NEPA reviews described by the Commission in the June 13th policy statement (45 Fed.Reg. 40101, at 40103) appear to conform to the basic outline for the required accident analysis prescribed in the Council's letter of March 20, 1980. However, such an analysis is difficult to describe accurately in purely abstract terms. For that reason we look forward to the issuance of the first such NEPA analysis for a reactor in the licensing process. The Council will carefully examine the draft of that analysis and public comments thereon with a view toward providing the Commission with comments that would be useful in the preparation of a final analysis for NEPA review purposes.

As the Interim Policy indicates, consideration of the environmental consequences of severe reactor accidents might warrant the need "for additional features or other actions which would prevent or mitigate the consequences of serious accidents." 45 Fed.Reg. at 40103. Consideration of such information might indicate, among other things, the need to modify plant design, select an alternative site, implement emergency preparedness measures, or reconsider a construction permit altogether. In this regard, the Council strongly disapproves of the Commission majority's statement that such new NEPA reviews "will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices" 45 Fed.Reg. at 40103. Two members of the Commission disagreed with the majority on this point and concluded that that position is "absolutely inconsistent with an even-handed reappraisal of the former erroneous position on Class 9 accidents." 45 Fed.Reg. at 40103. The Council agrees. The two sentences

8/19...To OGC for Appropriate Action...Cpys to: RF, EDO, Docket....80-1598

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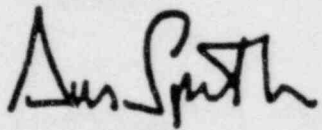
at issue in the Commission's Interim Policy inappropriately prejudge the NEPA analysis yet to be performed on a site-by-site basis by staff. Not only is the position contrary to the purposes of the NEPA to provide information which serves as a guide to the decisionmaker, but it would appear to require powers of prediction that the Commission simply does not possess with regard to the multitude of factual variables at each site.

Two other points of importance to the Council concern (a) the timing of the disclosure under NEPA of this new information on reactors for which a final EIS has been issued at the construction permit stage, but for which the operating license review stage will not be reached for some time, and (b) the indications in the Interim Policy that, for such reactors, the NRC may choose not to prepare the requisite NEPA documents for public review and comment.

Our Office of the General Counsel has prepared an opinion on the NRC's obligation to discuss major accident analyses and significant new developments under NEPA for reactors which have not yet reached the operating license stage. On the basis of that opinion, it is our conclusion that where reactor construction is still in the initial stages, the NRC should prepare supplemental EISs containing analyses of major accidents as early as possible rather than waiting until the operating license review. By ensuring the timeliness of such analyses, this approach will be of greatest use to the public, the NRC and the utilities. Significantly, the Commission has acknowledged that "substantive changes in plant design . . . may be more easily incorporated in plants when construction has not yet progressed very far." Id.

The Council, of course, is not of the view that construction on reactors must stop pending these supplemental NEPA reviews. Our purpose, and NEPA's, is to ensure that public disclosure of the significant new information and considerations regarding reactor accidents, and their review by the Commission, occur to the maximum extent possible while there is still time to correct earlier decisions based on the Commission's "former erroneous position on Class 9 accidents" (45 Fed.Reg. at 40103).

As in the past, we would be pleased to discuss the Council's views with you at any time. Please let me know how we can be of assistance.

Sincerely,

GUS SPETH
Chairman

cc: Members of the Commission

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WASHINGTON, D. C. 20006

August 14, 1980

MEMORANDUM FOR THE CHAIRMAN

THROUGH: Foster Knight, Acting General Counsel *FK*
FROM: John Shea, Counsel *JS*
SUBJECT: The Need to Supplement NRC EISs on Unconstructed and Partially
Constructed Reactors to Disclose Significant New Information

This memorandum analyzes the Commission's responsibilities under NEPA with respect to reactors which are in large part or completely unconstructed. It specifically addresses the obligation of the NRC to supplement EISs, so as to disclose significant new information and provide the necessary analysis of nuclear reactor accidents.

Background

1. The NRC's Recent Statement of Interim Policy Concerning Accident Analyses.

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 announced "the Commission's position that its EISs shall 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.

The Commission specifically addressed how its new policy would be phased in to licensing proceedings:

"It is the intent of the Commission in issuing this Statement of Interim Policy that the staff will initiate treatments of accident considerations, in accordance with the foregoing guidance, 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

"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 the Construction Permit stage but for which the Operating License review stage has not yet been reached." 45 Fed.Reg. 40101, 40103.

In carrying out this policy, the staff is directed to consider relevant site features associated with accident risk, including population density. Staff is also directed to "consider the likelihood that substantive changes in plant design features . . . may be more easily incorporated in plants when construction has not yet progressed very far." Id.

2. Status of Reactors Under Construction.

There are a number of nuclear reactors for which construction permits have been issued, but no significant construction has taken place. According to the NRC's Program Summary Report, dated September 21, 1979 (NUREG-0380, vol. 3, number 9, at 35), a total of 95 reactors have either limited work authorizations or construction permits. Approximately 10 of those reactors are less than 10% complete. A total of 9 other reactors are between 10 and 20% complete. The NRC figures generally have been optimistic as to current stage of completion and projected completion date.

The Legal Issues Under NEPA

The Council's NEPA regulations specifically 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."

The Supreme Court has ruled that the Council's regulations and interpretations of NEPA are "entitled to substantial deference." Andrus v. Sierra Club, ___ U.S. ___, 47 U.S.L.W. 4676, 4679 (June 11, 1979). See also Alaska v. Carter, 462 F.Supp. 1155, 1164 (D.Alas., 1978) in which the district court relied heavily on the Council's interpretation of the section of its former guidelines on supplemental EISs. 40 CFR §1500.11(b) (1978). That section provided that:

An agency may at any time supplement a draft or final environmental statement, particularly when substantial changes are made in the proposed action, or significant new information becomes available concerning its environmental aspects. 40 CFR §1500.11(b)(1978).

In Essex County Preservation Association v. Campbell, which was decided prior to the adoption of the Council's new regulations, the First 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 highway expansion that was at issue in the case. The Court of Appeals affirmed the district court, stating that:

. . . 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).

Significant new circumstances and information have developed since the issuance of most of the Commission EISs on reactor construction permits, including:

- a) The reevaluation of WASH-1400, the Reactor Safety Study (October 1975) by H. Lewis' Risk Assessment Review Group in NUREG/CR 0400 (1978).
- b) 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 to the Nuclear Regulatory Commission by the Special Inquiry Group.
- c) The issuance on September 26, 1979, of a memorandum from R.W. Houston, Chief of the NRC Accident Analysis Branch, to Daniel P. Muller, Acting Director of the NRC's Division of Site Safety and Environmental Analysis, indicating that 31 nuclear power plants under active review do not meet certain proposed siting criteria.
- d) The transmittal of 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?

The review of NRC EIS's by the Environmental Law Institute for the Council released in March 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 urged the Commission to move quickly to revise its policy on accident analysis in EISs and to require the discussion in NEPA reviews of the environmental and other consequences of the full range of accidents that might occur at nuclear reactors, including core melt events. As noted in our March 20th letter to the NRC, under the Atomic Energy Act the NRC has a continuing obligation to review information which may indicate a need to reconsider or modify a construction permit or an operating license for a proposed reactor. 42 U.S.C. §2232(a). This responsibility is supplemented by NEPA's requirements. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, at 1112 (D.C. Cir., 1971), cert. denied, 439 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.

As acknowledged by the Commission in its Interim Policy, consideration of information such as the environmental and other consequences of major nuclear accidents might indicate the need for "additional features or other actions which would prevent or mitigate the consequences of serious accidents." 45 Fed.Reg. at 40103. Obviously, the new data developed as a result of the Three Mile Island accident might also warrant reevaluation of prior plans. 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 a construction permit altogether.

The NRC concluded that such analyses must be initiated in its ongoing NEPA reviews on proposed reactors, "i.e., for any proceeding at a licensing stage where a Final Environmental Statement has not yet been issued." Id. This means that if a final EIS has already been issued at the construction permit stage, such a review must eventually be done for

the operating license EIS. The basic issue then is not whether, but when the NRC should consider environmental and other factors concerning the full range of accidents that might occur at nuclear power reactors, including core melt events. The Commission recognizes that, should such accident analyses indicate the need for modifications, "substantive changes in plant design features . . . may be more easily incorporated in plants when construction has not yet progressed very far." Id. In addition, NEPA's "action-forcing" procedures for EISs must be carried out by the NRC "to the fullest extent possible" so as to achieve the substantive requirements of the Act. NEPA §102(2)(c); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, supra; 40 CFR §1500.1 (1979). The Council's regulations, which direct all agencies to commence the NEPA process at the earliest possible time (40 CFR §1501.2(d)(3)), provide that an EIS "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§1500.2(c), 1501.2, and 1502.2)." 40 CFR §1502.5 (1979). The purpose of the EIS process is to ensure "meaningful consideration of environmental factors at all stages of agency decisionmaking." Scientists' Institute For Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418, 1425 (D.C. Cir., 1973) (emphasis added).

To delay the NEPA review and consideration of new accident analysis information until operating license EISs are prepared would thwart the purposes of NEPA. Id. at 1427. While an EIS "drafted by the Commission can be amended to reflect newly obtained information as the program progresses," id. at 1430, the consideration of information pursuant NEPA must be given "at the earliest possible time to insure that planning and decisions reflect environmental values." 40 CFR §1501.2 (1979).

Conclusion

Accordingly, the supplemental EISs for plants under construction should be prepared at the earliest possible time in the construction stage, while the Commission's prior permit actions "remain open to revision," (Essex County Preservation Association v. Campbell, supra), so that the Commission has the greatest ability to make necessary substantive changes in its decisions regarding proposed reactors. 42 U.S.C. 2232(a).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 50-367
)	
NORTHERN INDIANA PUBLIC SERVICE COMPANY)	(Construction Permit Extension)
)	
(Bailly Generating Station, Nuclear-1))	September 5, 1980
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of NIPSCO's Response to Motions Concerning Staff Determination of Whether or Not to Prepare Environmental Impact Statement and letter to Harold Denton, Director, Nuclear Reactor Regulation, NRC from Kathleen H. Shea with attached memorandum of law on the Need to Prepare an Environmental Impact Statement in Connection with Extension of the Bailly Construction Permit were served on the following by deposit in the United States mail, postage prepaid, on this 5th day of September, 1980:

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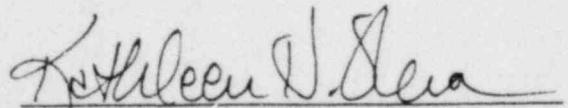
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