

September 24, 1980



Mr. Joseph Ahearne  
Chairman  
Nuclear Regulatory Commission  
Washington, D. C. 20555

Re: Application of Northern Indiana Public Service Co. for  
an Extension of its Construction Permit for the Bailly  
Generating Station Nuclear-1, Docket No. 50-367.

Dear Mr. Chairman:

As you know, the Northern Indiana Public Service Company ("NIPSCO") has submitted an application for an extension of the Construction Permit for a nuclear powered electrical generating station to be known as the Bailly Generating Station Nuclear - 1 ("BGSN-1"), adjacent to the Indiana Dunes National Lakeshore in Porter County, Indiana. That application is presently pending before an Atomic Safety and Licensing Board.

The purpose of this letter is to advise you and the other members of the Commission that in the opinion of the undersigned organizations the granting of the extension of the Construction Permit for BGSN-1 as requested by NIPSCO would constitute a major federal action significantly affecting the quality of the human environment. See, 40 C.F.R. §§ 1508.18 and 1508.27 and NRDC v. NRC, 547 F.2d 633 (1976, reversed on other grounds, 435 U.S. 519) at p. 638. It cannot, therefore, be done without the issuance of a revised or supplemental environmental impact statement ("RES") which takes into

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consideration information which has become available and the changes in circumstances that have occurred since the final environmental statement (FES) was prepared and issued in February 1973.

#### STATEMENT OF FACTS

The original application for a construction permit for a nuclear powered electrical generating station at the Bailly site was submitted in August 1970. The FES, issued by AEC in February 1973, does not consider the environmental impacts which could result from the sort of event which occurred at a nuclear generating station at Three Mile Island in March 1979 or a major Class 9 accident.

The electrical power needs of the NIPSCO service area during the anticipated life of BGSN-1 were projected from pre-1972 figures which do not reflect the dramatic lowering in the rate of growth in the demand for electrical energy that has occurred since 1974.

In the seven years since the FES was issued the impact of energy conservation has increased dramatically, the projected demand for power has dropped significantly, the cost of BGSN-1 has risen to over one billion dollars, and unresolved construction problems have developed at the Bailly Site. In addition, public concern about reactor siting and safety--in the wake of the incident at Three Mile Island--has increased sharply.

In February of 1979 NIPSCO, after having completed only 1% of the construction at BGSN-1, requested that the NRC extend its construction permit for eight years and three months. The original 5 1/3 year permit period expired in September, 1979.

### ARGUMENT

#### A.

#### NEPA Case Law Requires an RES When New Information Or Events Render The Original EIS Inadequate

The essential and undisputed purpose of NEPA is to require that agencies take a close look at all environmental costs of major projects so that any decision to proceed is made with complete awareness of the environmental consequences. See, National Helium Corp. v. Morton, 455 F. 2d 650 (10th Cir. 1971); Monroe County v. Volpe, 472 F. 2d 643, 697 (2d Cir. 1972).

Moreover, an agency's duties under NEPA do not end with the production and acceptance of its initial EIS. In Sierra Club v. Froelke, 359 F. Supp. 1289, (D. Tex. 1973), rev'd on other grounds, 499 F. 2d 982 (5th Cir. 1974), the court found the original environmental impact statement inadequate.

" . . . agencies . . . must continue to re-evaluate such aspects as mitigation, impact, and the scope of a proposed project, even if an acceptable impact statement has been prepared, reviewed and accepted." Id. at p. 1345.

In Libby Rod & Gun Club v. Poteat, 457 F.Supp. 1177, 1188 (D. Mont., 1978), modified 594 F. 2d 742 (9th Cir., 1979), the court found that a Corps of Engineers' EIS (concerning construction of electricity generating dam) was inadequate and stated:

The Court sympathizes with the fact that some of the necessary information was not available to the Corps at the time EIS-Supplement I was compiled. Nonetheless, an agency is under an obligation to reassess a project as more information becomes available . . . . This is especially true when construction on those projects is in the infant stages . . . . Id. at p. 1188.  
(emphasis added)

See also: Society for Animal Rights, Inc. v. Schlesinger 512 F. 2d 915 (D.C. Cir., 1975) in which the Court stated that the Army has "continuous responsibility to gather information . . . and to incorporate new findings of significance into its analysis."

The basis of these decisions is the seminal NEPA decision Calvert Cliffs' Coordinating Committee v. USAEC 449 F. 2d 1109,1118 (2d Cir. 1971), in which the Court noted that:

"Compliance to the 'fullest' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action--at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs"

Courts have regularly required agencies to issue an RES when significant or important new information or circumstances exist which bear on the environmental impacts of the proposed action.

In Libby Rod and Gun Club, Inc. v. Poteat, 457 F.Supp. 1177, (D. Mont., 1978) modified 594 F. 2d 742 (9th Cir. 1979), the court issued a preliminary injunction against the construction of a re-regulating dam because, inter alia, the 1974 impact statement was deficient in that it did not consider the environmental impacts on the bald eagle (listed as an

endangered species after issuance of the FES) or on five archeological sites eligible for inclusion on the National Register of Historic Places which were discovered after issuance of the FES. The balancing of alternatives was also found deficient because of the Corps' failure to recognize the potentials of energy conservation or consider the present energy production capacity of other sources.

In Nelson v. Butz, 377 F.Supp. 819, 822 (D. Minn 1974) the court issued an injunction stopping further construction of a dam by the Soil Conservation Service ("SCS") until an adequate RES had been submitted. After the original environmental statement was prepared several important archeological sites were discovered in the impoundment area. "At this point," the Court declared, "it became necessary for the SCS to include this new and important information as a supplement to the EIS."

In Essex County Preservation Association v. Campbell, 399 F.Supp. 208 (D. Mass. 1975), aff'd 536 F. 2d 956 (1st Cir. 1976), an action to enjoin work on an interstate highway widening project, the court held that an RES was required in order to analyze the environmental effects of the governor's post-FES moratorium on the construction of an intersecting highway.

The first circuit noting that "the . . . project at issue . . . is not yet completed" and that the agency's decision may "remain open to revision," affirmed the holding of the Court below in regard to the need for a RES. The project was from 10-30% completed.

In Cape Henry Bird Club v. Laird, 359 F.Supp. 404 (D. Va. 1973), aff'd 484 F.2d 453 (4th Cir. 1974) a supplement to an FES on a 30% complete dam project was ordered to satisfy the statutory "informational requirements" of NEPA. See also Monarch Chemical Works, Inc. v. Exxon, 452 F.Supp. 493 (D. Neb. 1978) where siting of state prison in redevelopment area for which FES had been prepared triggered agency responsibility to consider any new environmental impact.

If revised EISs are required when new information on the environmental impacts of on-going projects becomes available, surely a revised or supplemental EIS must be prepared when an agency is asked to make a second decision to proceed with a project that is only 1% complete, there is important new information available on the site and there has been a substantial change in the circumstances used to justify the project.

B.

Regulations Issued by the Council on Environmental Quality Require The Issuance Of A Supplemental Environmental Statement When The Original Draft Or Final Environmental Statement Becomes Obsolete

The Council On Environmental Quality ("CEQ"), Pursuant To Executive Order 11514, "Protection and Enhancement of Environmental Quality," issued March 5, 1970, as amended by Executive Order 11991 on May 24, 1977, has issued uniform NEPA regulations, 40 C.F.R., Sec. 1500, et seq. The regulations essentially codify the NEPA case law on RESS, 40 C.F.P. Sec. 1502.9, and are expressly applicable to and binding on all Federal agencies, Sec. 1500.3, with certain exceptions. The regulations require agencies to prepare supplements to

either draft or final environmental statements if there are significant new circumstances or if new information on the environmental impacts of the proposed action becomes available, Sec. 1502.9(c)(1)(ii). They also remove previous agency discretion in this area, see former CEQ guidelines 36 Fed. Reg. 7724, (Apr. 23, 1971) Sec. 1500.11(b), except that an agency may prepare a supplement if it determines that the purposes of NEPA would be furthered by so doing, 40 C.F.R. Sec. 1502.9(c)(2).

Although the NRC has taken the position that it is not bound by the CEQ uniform regulation, it has stated that it would "voluntarily undertake to develop regulations" which take account of and are consistent with the CEQ regulations. See Letter from Joseph M. Hendrie, Chairman, Nuclear Regulatory Commission, to Charles H. Warren, Chairman, Council on Environmental Quality (May 31, 1979).

C.

Significant New Information And Circumstances Exist  
Which Require The Preparation Of A Revised or  
Supplemental ES (RES)

A great deal has occurred in the world of nuclear power in general, and in relation to BGSN-1 in particular, since the FES was issued in February, 1973. When new events are measured against the thresholds of significance and importance as established by the above mentioned cases and the CEQ NEPA regulations, it is apparent that the FES must be thoroughly

revised to evaluate the environmental impacts of each and all of the following:

1. Events at Three Mile Island Nuclear Generating Plant Unit 2 ("TMI-2") on March 28, 1979 and information developed in its aftermath.

On March 28, 1979 a small loss of coolant accident at TMI-2, compounded by operator error, developed into the worst commercial reactor accident ever to occur in the U.S. In addition to engendering numerous health and safety concerns, the March 28 event at "TMI-2" has had negative economic consequences for the utility and its investors in large part due to the utilities need to purchase outside power.

The NRC staff has concluded that the incident at TMI-2 was a class 9 accident. Memo From Roger J. Mattson, Director TMI-2 Lessons Learned Task Force to Guy H. Cunningham III, acting Deputy Chief Hearing Counsel (August 16, 1979).

The accident spawned many investigations and reports among which are the Report of the President's Commission on the Accident at Three Mile Island (October 1979); ("Kemeny Report"); the "TMI-2 Lessons Learned Task Force Final Report" (USNRC Report NUREG-0585, August 1979); Nuclear Regulatory Commission Special Inquiry Group, Three Mile Island; A Report to the Commissioners and to the Public (USNRC Report NUREG/CR-1250, Vol. 1,) (January 1980), the "Rogovin Report."

Conclusions drawn in these reports indicate that the probability of the occurrence of a class 9 or other major

accident cannot be dismissed as inconsequential and insignificant.

. . . the work done by the special Inquiry Group . . . has led us to conclude that unless fundamental changes . . . are made in the way commercial nuclear reactors are built, operated, and regulated in this country, similar accidents are likely to recur.

Rogovin, at 91 (emphasis added)

A potentially insignificant incident grew into the TMI accident . . . Since such combinations of minor equipment failures are likely to occur much more often than the large accidents, they deserve extensive and thorough study.

Kemeny, at 9 (emphasis added)

"Modification is definitely needed in the current philosophy that there are some accidents ("Class Nine accidents") so unlikely that reactor designs need not provide for mitigating their consequences."

Rogovin, at 151

.... we must not assume that an accident of this or greater seriousness cannot happen again, even if the changes we recommend are made. Therefore . . . we must be fully prepared to minimize the potential impact of such an accident on public health and safety should one occur in the future.

Kemeny, at 15 (emphasis added)

NRC's Report of the Siting Policy Task Force, NUREG-6-0625, taking into account "new concepts" developed after TMI-2, concluded that "the risk associated with accidents beyond those for which the plant is designed" should be considered in siting a nuclear generating station.

These reports, based on current information and in depth studies, are in marked contrast to pre-TMI-2 estimates of the likelihood of a class 9 accident and have rendered the pre-TMI-2 holdings that an ES need not consider the environmental impacts of a class 9 accident devoid of any substantive basis. Because the consequences of a meltdown would be the same regardless of whether the accident developed as described in the cases decided prior to the March 28 event at TMI-2 or whether similar to what occurred at TMI-2, the consideration of the results in an RES is required.

The conclusions and recommendations of the TMI-2 investigations are tremendously significant and relevant to the potential environmental, health, safety and economic impacts of BGSN-1 and must be analyzed in an RES. Such revision should at the very least consider:

- a. The conclusions and findings of the Report of The President's Commission on the Accident at Three Mile Island, John G. Kemeny Chairman, October 1979;
- b. The conclusion and findings of the Nuclear Reg. Comm. Special Inquiry Group, NUREG/CR-1250, Mitchell Rogovin, Director, January, 1980;
- c. The conclusions and recommendations of the Report of the Siting Policy Task Force, NUREG-0625, August 1979;
- d. Necessary revisions of the cost/benefit analysis after factoring in the possibilities of a TMI-2 type of accident;

e. Rebalancing of the alternatives after considering the possible costs and effects of a TMI-2 type of accident. (This rebalancing is especially crucial to the site choice in light of the fact that the Bailly site was determined to have only a "slight advantage" over an alternative, more remote site. FES, at XI-13.)

2. New Information Concerning the Need for Power

As the ASLB stated in its original construction permit decision RAI-74-4:

the Board considers the "Need For Power" one of the most crucial issues in this hearing. In balancing alternatives, as required by NEPA, the chief benefit of a power plant is the electricity it produces. If that electricity is not needed, then the benefit side of the balance will have little weight.

To rely on a power forecast based on 1971 or 1973 figures, when the current figures are available and significantly different than anticipated eight years ago, would fall far short of meeting NEPA's mandate. See especially: Libby Rod and Gun Club, Inc. v. Poteat, op. cit. at 1188 in which the court required the Corps of Engineers to update a four year old FES in order to consider new and different information on power needs.

The RES must also include a discussion of energy conservation measures as they affect the choice between alternatives. The 1973 FES totally ignored the possible impact of conservation measures. This is a significant omission. See generally, Energy Future: Report of

the Energy Project At the Harvard Business School

(Stobaugh and Yergin editors, 1979); Energy in Transition 1985-2010: Final Report of the Committee on Nuclear and Alternative Energy Systems, National Research Council (Washington, D.C.: National Academy of Sciences, 1979); Hans Landsberg, et al., Energy: The Next Twenty Years; Report by a Study Group Sponsored by the Ford Foundation and Administered by Resources for the Future (Cambridge, Mass: Ballinger Publishing Co., 1979).

Energy conservation has been referred to by the President as the "cornerstone" of our national energy policy. President's Address to the nation, The Energy Problem, April 18, 1977, 13 Weekly Comp. of Pres. Doc. 560, 562, 563 (April 25, 1977). Numerous federal statutes enacted since 1973 reflect Congress' intent that energy conservation must be a national priority. See e.g., National Energy Conservation Policy Act, 42 U.S.C. 6344a, 6346, 6371, 6372 note, 8201, 8251, 8253, 8273; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, 2611, 15 U.S.C. 3201; Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301; National Energy Extension Service Act, 42 U.S.C. 7001; Solar Energy Research, Development and Demonstration Act of 1974, 42 U.S.C. 5551; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. 5581; Energy Conservation and Production Act, 42 U.S.C. 6801, 6831; Energy Policy and Conservation Act, 42 U.S.C. 6201, 6321; Department of Energy Organization Act, 42 U.S.C. 7112; Energy Tax Act of 1978,

92 Stat. 3174, Pub. Law 95-618 (November 9, 1978); Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, Pub. Law 96-223 (April 2, 1980).

CEQ's NEPA regulations reflect this emphasis on the importance of energy conservation. They require that an EIS must include discussion of the "[e]nergy requirements and conservation potential of various alternatives and mitigation measures." 40 C.F.R. 1502.16(e).

NIPSCO itself has recognized the need to consider conservation impacts. "General load growth for this area has been adjusted from six percent per year to reflect further conservation, load management programs by large industrial and commercial customers and to reflect prospective reduction from the rate of growth actually experienced in the past 10 years." NIPSCO News at p. 3 (November 5, 1979) (emphasis added). In fact, NIPSCO's 30 minute system peak has grown at an annual rate of only 3.8% between 1973 and 1979. See NIPSCO F.P.C. Form 1, 1973; and NIPSCO F.E.R.C. Form 1, 1979. The complete lack of consideration of conservation issues in BGSN-1's FES obviously must be remedied.

3. Effect of construction delay on the original economic disadvantage of the alternate Schahfer site.

Inasmuch as the chief economic disadvantage of the alternate site (Schahfer) was found to be the "delay associated with moving there, estimated to be from two to four years" RAI-74-4, 624 cited in Porter County Chapter of the Izaak Walton League v. AEC, 533 F. 2d 1011 (7th Cir. 1976), and inasmuch as the actual

delay at the Bailly Site has already exceeded five years and finally, in light of the fact that NIPSCO is now asking for extension of at least 8-1/4 years (significantly longer than the original construction permit allowed) and the fact that construction problems at the Bailly site are not yet resolved, a RES must reconsider the cost/benefit analysis (in conjunction with other considerations above) to determine if the "slight" advantage found in 1973 still exists.

4. Increased Cost

The estimated capital cost of BGSN-1 has increased from \$180,000,000 (FES at XI-3) to \$1,100,000,000, as of November 1979 (NIPSCO News, at 2 Nov. 5, 1979). This new information must be factored into the cost/benefit analysis and balancing of alternatives.

5. Information relevant to effects to date upon the Indiana Dunes National Lakeshore and Cowles Bog due to dewatering, pumping and construction at the proposed site of BGSN-1.

Due to the sensitive ecology of the lakeshore the broad aims of NEPA require that actual effects to date of dewatering the Bailly site be considered and made available for public comment. Significant effects must be factored into an RES.

6. Changes in construction methods.

To the best of undersigned's knowledge, it appears that the substitution of shorter piles in the foundation of BGSN-1 and the concerns about subsurface softening due to the earlier

use of water jet drills are significant new changes requiring an RES.

7. New Pollution Control Technology.

One of the factors that weighed against the building of a coal fired plant at the Bailly site was its SO<sub>2</sub> pollution load. FES at XI-4. The FES stated that no equipment then existed to lower SO<sub>2</sub> output. The undersigned contend that since SO<sub>2</sub> control equipment is now available and the Clean Air Act of 1970 was amended in 1977, the feasibility of a coal fired plant must be reviewed.

8. Unanticipated Geological Characteristics of the Bailly site

To the best of the undersigned's belief, the applicant has discovered as a result of excavations at the site that the geological characteristics of the site are different from that which was projected as a result of test boreings at the time of the initial application. These differences in characteristics appear to substantially affect the environmental impacts of the site and its suitability for the purpose of the applicant.

D.

CONCLUSION

The National Environmental Policy Act of 1969 requires federal agencies, including the Nuclear Regulatory Commission, to prepare and circulate for public comment environmental impact statements prior to taking a major federal action

significantly affecting the human environment. The grant of an 8-1/4 year extension of the construction permit for BGSN-1 as requested by NIPSCO would constitute a major federal action significantly affecting the human environment.

Less than 1% of the work originally authorized had been completed by the applicant under the original permit at the time the extension was sought. Yet during that same period a substantial reduction in the growth of demand for electrical power has occurred, serious questions regarding the safety of commercial nuclear reactors and the wisdom of locating them in or near major population centers have arisen, significant alterations in the cost of construction and operation of nuclear power plants as well as coal fired plants have been experienced, improvements in pollution control technology of coal fired plants have been made, new information of the geological character of the Bailly site suggesting the need for a substantial change in design of the plant have become available, and important new information regarding the effects of the construction on the Indiana Dunes National Lakeshore and Cowles Bog has been developed. In view of the relatively modest investment of resources in the Bailly site and the substantial changes in circumstance, it is obvious that the requested extension of the Construction Permit cannot be based on the FES issued by the AEC in 1973. A revised or supplemental environmental impact statement is clearly necessary before a decision to grant the extension can be made.

Sincerely,

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