UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ARIZONA PUBLIC SERVICE COMPANY, et al. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3)	) Docket Nos.	STN 50-528 STN 50-529 STN 50-530

MOTION TO RECONSIDER BOARD'S RULING OF APRIL 27, 1982 AS TO THE INADMISSIBILITY OF THE EFFECTS OF THE CLAIMS OF THE PIMA-MARICOPA INDIAN COMMUNITY ON APPLICANTS' SOURCE OF WATER AND THE LEGALITY OF APPLICANTS' CONTRACT FOR EFFLUENT

Intervenor Patricia Lee Hourihan respectfully moves this Licensing Board to reconsider its ruling that claims of the Pima-Maricopa Indian Community to Applicants' intended source of water for Palo Verde may not be considered in this proceeding. NEPA, as confirmed by a recent decision of the United States Court of Appeals for the District of Columbia, forbids this Board from foreclosing in its NEPA analysis consideration of significant uncertainties about an assured supply of water for Palo Verde.

I. Background

On January 19, 1982, the Pima-Maricopa Indian Community filed suit against the Department of the Interior and the Secretary of the Interior asking that the Secretary be ordered to carry out his duties under the federal reclamation laws to ensure that the Indian Community's prior and superior claims to reclamation project waters be satisfied. The NRC staff brought the suit and its

D503
50/1

subsequent transfer to Arizona federal district court to the Board's notice. Intervenor moved to postpone the licensing hearing on the ground that further investigation was required of the Indians' claims and their possible effect on an assured supply of water for Palo Verde. Intervenor argued that if the court were to grant the Indian Community's requested relief, the Secretary would be forced to exercise his power over all reclamation waters, including return flow and effluent, to satisfy these claims. Therefore, the Applicants' contract for effluent to serve as cooling water was seriously threatened by the Indians' lawsuit and the superior claim to this effluent.

The Board, in its order of April 13, 1982, denied Intervenor's motion to postpone the hearing and indicated that it was predisposed not to consider evidence about the possible illegality of Applicants' contract for effluent. The issue of the City of Phoenix's legal right to sell effluent for use outside the Salt River Project ("SRP") boundaries and the Indians' claim to that water was, the Board wrote, currently the "subject of litigation" and at the moment a "speculative and conjectural" issue.

Philip Shea, attorney for the Indian Community, testified in his limited appearance before this Board on April 27, 1982, that he believed if his clients prevailed in their lawsuit, the Secretary of the Interior would be forced to exercise his control over the effluent for which Joint Applicants have contracted and use it to satisfy the prior and superior claims of the Indians for water. He also cited a litigation report of February 25, 1980, of

the Solicitor of the Department of Interior which questioned the legality of transporting effluent out of SRP boundaries for use at Palo Verde, in light of the Secretary's "overriding trust responsibilities to determine whether that water can be used directly or by means of exchanges to meet the unfulfilled water rights of Indian tribes in the Salt and Verde River watersheds." Tr. at 172.

II. NEPA Requires This Board To Consider The Claims Of The Pima-Maricopa Indian Community To The Very Supply Of Water Applicants Have Contracted To Use At Palo Verde.

On April 27, 1982, the United States Court of Appeals for the District of Columbia, held that the NRC's Table S-3*/ violates the National Environmental Policy Act ("NEPA") because it fails to allow for consideration of uncertainties underlying the assumption that no radiological effluents will be released into the biosphere once wastes are sealed in a permanent repository. NRDC v. NRC, Nos. 77-1148, 79-2110 and 79-2131 (D.C. Cir. April 27, 1982), slip op. at 34. In an extensive analysis of the NEPA balancing process, the Court found that the NRC's S-3 Table contained no entry for the long-term effects of solid high-level and transuranic wastes. The Court further found in this omission that the Commission had foreclosed the licensing boards' consideration of the risk that permanent waste management facilities would not be developed or the risk that they would not perform as intended. Slip Op. at 27.

*/Table S-3 Rules -- the original, interim and final versions -- provide a set of numerical values intended to reflect the environmental effects of the uranium fule cycle.

Section 102(C) of NEPA, 42 USC §4332(C), requires, however, that among the environmental costs an agency must consider is the human uncertainty about the character of random and non-random phenomenona. In dealing with "uncertain" environmental effects, an agency must trace each "reasonably foreseeable contingency," Id. at 37, n. 101, and reveal what it does not know about the uncertain risks. Id. at 38.

It has long been the law that NEPA imposes an affirmative obligation on agencies to seek information about the environmental consequences of proposed action since "informed prediction is possible only after an agency has conducted a thorough inquiry into all aspects of a project."Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated, in part, sub nom. Western Oil & Gas Assoc. v. Alaska, 439 U.S. 922 (1978).

"Reasonable forecasting and speculation" is clearly a part of an agency's NEPA responsibilities. Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973), since "the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known." Consideration of "uncertain" effects is the only way an agency may effectively consider alternatives to its actions "to the fullest extent possible under its other statutory obligations." Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F. 2d 1109, 1128 (D.C. Cir. 1971

In this case the Board, to fully comply with its responsibilities under NEPA, must examine all uncertainties concerning Applicants' contract for effluent, including the most significant one

that the contract may be invalidated. Emerging from the testimony of John Schaper, attorney for the Buckeye Irrigation District and the limited appearance testimony of Mr. Shea and Mr. Bill Stephens, is the undisputed fact that ownership rights and beneficial use rights over effluent is an unsettled legal question in the Salt River Valley. The Solicitor of the Interior has admitted his grave doubt that Applicants' contract can withstand judical scrutiny in light of the Secretary's responsibilities to ensure the legal use of reclamation waters. And the Pima-Maricopa Indian Community has stated a strong case that the court should order the Secretary of the Interior to comply with the statutory responsibilities his Solicitor has clearly outlined. Therefore, uncertainty about the validity of Applicants' contract for effluent and rights to the effluent for which Applicants have contracted must be included in any NEPA determination about the likelihood of an assured supply of water for Palo Verde.

Even the Applicants' own witnesses have testified to the importance of water rights, water contacts, and lawsuits to their assured supply of water for Palo Verde or any other water user in the Salt River Valley.

Therefore, in light of the clear and inescapable ruling of the District of Columbia Circuit that licensing boards, in their NEPA analysis, must consider uncertainties, including risks due to human uncertainty over the calculation of random and nonrandom pheonomena, slip op. at 36, this Board cannot now foreclose testimony and consideration of the Indians' claims for SRP reclamation water, including effluent, and the possible illegality of the Applicants' contract for that effluent.

Intervenor has included a proffer in her letter of May 14, 1982, of Mr. Shea's testimony on the issue of the Indian Community lawsuit, the Secretary of the Interior's responsibilities under the reclamation laws, and the likely adverse effect of the Indian Community's lawsuit on an assured supply of water for Palo Verde.

Respectfully submitted,

Lynne Bernabei

Harmon & Weiss
1725 I Street N.W.
Suite 506
Washington, D.C. 20006
(202)833-9070

DATED: May 14, 1982