APPLICANTS' MEMORANDUM IN OPPOSITION TO RECIRCULATION OF AN FES SUPPLEMENT IN BOSTON EDISON COMPANY ET AL. (PILGRIM NUCLEAR GENERATING STATION, UNIT 2)
Docket No. 50-471

The Question: When in the course of proceedings on a construction permit application a Licensing Board has "satisfied itself that the staff's [FES] alternate site analysis [is] not adequate . . . [and] has in effect called upon the staff to supplement its efforts in this particular regard"1/, must the staff first prepare and circulate an FES alternate-site-analysis supplement prior to further development of the record.

Response: No. As we demonstrate in the discussion that follows, short of a complete alteration in what was initially proposed, recirculation need not be considered. Nothing in NEPA requires a different result.

1/ Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC ___ CCH ¶ 30,301 (May 25, 1978).

DISCUSSION

In Midland[2] the Appeal Board drew a distinction between impact statements prepared in conjunction with the Commission's activities which were not subject to evaluation through an adjudicatory hearing, and impact statements prepared for licensing proceedings where the opportunity for such a hearing is available. As the Board recounted in Maine Yankee[3], it held in Midland that in the case of an impact statement prepared for Commission activities, it was governed by Committee for Nuclear Responsibility v. Seaborg, 463, F.2d 783,787 (D. C. Cir. 1971). However, in the case where an impact statement was prepared for licensing proceedings, it concluded, there is not the same requirement.[4]

This dichotomy is sanctioned not only by reason of the fact that intervenors and other parties have an opportunity to make their submissions on points in issue in every licensing proceeding[5] but by the force of Commission regulation as well.[6]

2/ Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331, 334, reversed, sub nom Aeschliman v. NRC 547 F.2d 622 (D. C. Cir. 1976), reversed, sub nom Vermont Yankee Nuclear Power Corp. v. NRDC, ___ U. S. ___, 55 L. Ed. 60 (1978).

3/ Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station) ALAB-161, 6 AEC 1003, 1013; reconsideration denied, ALAB-166, 6 AEC 1148 (1973); remanded other grounds CLI-74-2, 7 AEC 2, reaffirmed, ALAB-175, 7 AEC 62 (1974); affirmed sub nom. Citizens for Safe Power v. NRC, 524 F.2d 1291 (D. C. Cir. 1975).

4/ Id. 6 AEC 1013.

5/ Ibid. Cf. Kleppe v. Sierra Club, 427 U. S. 392, 419 n. 1 (dissenting opinion).

6/ 10 CFR 51.52(b)(3).

The Commission's different NEPA requirements in those actions which it initiates and in licensing procedures are in no way at odds with NEPA. Indeed, in responding to a challenge in Seabrook[7] that 10 CFR 51.52(b)(3), in providing that the FES is deemed modified by subsequent decisions of its adjudicatory tribunals violates NEPA, the Commission observed in its January 6, 1978 decision that,

> "Two courts of appeal have approved of that rule. The Court of Appeals for the District of Columbia Circuit has approved our practice as not departing 'from either the letter or the spirit of [NEPA].' Citizens For Safe Power v. NRC, 524 F.2d 1291, 1294 n. 5 (D. C. Cir. 1975). See, also Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2nd Cir. 1974) where Judge Friendly recognized that omissions from an FES can be cured by subsequent consideration of the issue in an agency hearing." (Emphasis added).

The application of 10 CFR 51.52(b)(3) to "cure omissions" in an FES has not been infrequent. While we do not purport to have made an exhaustive search of the cases, the following examples serve to make the point. We can begin with Maine Yankee, supra, wherein FES modification by the Appeal Board without recirculation was affirmed in Citizens For Safe Power, supra. Next we find that the Appeal Board in LaSalle[8] remanded that proceeding to the Licensing Board for a new NEPA balancing and for such additional findings and conclusions as were warranted by the existing record as supplemented by evidence to be adduced during the proceedings on remand.[9]

7/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) CLI-78-1, 7 NRC 1, 29 n.43; affirmed sub nom New England Coalition on Nuclear Pollution v. NRC ___ F. 2d ___ (1st Cir. Aug. 22, 1978).

8/ Commonwealth Edison Company (LaSalle County Nuclear Station, Units 1 and 2) ALAB-153, 6 NRC 821, Oct. 19, 1973.

9/ Id. at 825.

It appeared in that proceeding that in the staff FES, the net loss in agricultural production attributable to the LaSalle station could be offset by increased production or by returning to production acreage in the county currently in a Federal Feed Grain Program. However, prior to the initial decision in that case, the federal program had been discontinued.10/ Further, the recreational benefits attributed to the station's cooling lake in the FES were left in doubt with the reduction in the size of the proposed lake as a result of a settlement with intervenors in that proceeding.11/

In Comanche Peak12/ the Appeal Board found that the staff FES failed to give adequate consideration to the consequences of the loss of the station reservoir site for agricultural use. The Board tentatively concluded that a remand was necessary for the fulfillment of the Commission's NEPA responsibilities and invited memoranda from the parties as to why it should not give effect to its tentative conclusion.13/ The Applicant responded to the Board's invitation but the staff did not.14/ The Applicant urged the Board to make the necessary NEPA findings on the record before it which had been sponsored by the Applicant. This the Board declined to do stating that,

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10/ Id. at 823.

11/ Id. at 824.

12/ Texas Utilities Generating Company et al. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-225, 1 NRC 4 (January 23, 1975).

13/ Id. at 5-6.

14/ Texas Utilities Generating Company et al. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51 (February 26, 1975).

> "[T]he FES stands as the product of the study made by that segment of the agency which has the specific function of ferreting out the baseline facts upon which the final environmental judgments required by NEPA must be made. That being so it necessarily is a prime ingredient in the ultimate fashioning of the agency's NEPA determinations by the adjudicatory tribunals."15/

Instead the Board requested the staff to submit to it in affidavit form its own evaluation of the nature and quality of the land involved.16/ On receipt of the staff's affidavit, the Board concluded that a remand was no longer required. It declared that,

> "The FES is, however, to be deemed modified to include the contents of the [staff] affidavit."17/

Limerick Generating Station18/ presents a case where consideration of an environmental issue, the "river follower" alternative (which the Appeal Board found

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15/ Id. at 55-56.

16/ Id.

17/ Texas Utilities Generating Company et al. (Comanche Peak Steam Generating Station, Units 1 and 2), ALAB-266, 1 NRC 377, 378-79. (April 23, 1975.)

18/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163 (March 17, 1975)

necessary for a full NEPA review) was not specifically discussed in the FES but was presented and rejected during the course of the hearings before the Licensing Board.19/

The Appeal Board saw "no reason why the 'river follower' alternative as presented by 'a federal agency for NEPA purposes' could not have been first considered at the [Licensing Board] hearing thus avoiding a delay which would have been occasioned by a recasting of the FES and a recirculation of it."20/ The Appeal Board in so modifying the Initial Decision (FES) noted that its research had uncovered no judicial decision applying to NEPA which cuts against the conclusion it reached. This the Board found "scarcely surprising in view of the rule of reason which governs in the administration of that statute, Natural Resources Defense Council Inc. v. Morton, 458 F.2d 827, 834 (D. C. Cir. 1972)".

> "To us at least there would be nothing reasonable about an iron-clad requirement that the FES be redone, in advance of an adjudicatory hearing on environmental issues, whenever a late development raises the possibility that the project may be somewhat less beneficial than previously thought"21/

Although not cited by the intervenors in support of their contention for a supplemental FES recirculation, the Board distinguished its holding from the decisions in NRDC v. Morton, 337 F. Supp. 170 (D.D.C. 1972) and I-291 Why? Association v. Burns 372 F. Supp. (D. Conn. 1974) noting that:

19/ Id. at 171.

20/ Id. at 196.

21/ Id. at 196-97.

"In the former, the court held that an addendum prepared to cure a deficiency in the original environmental impact statement had to be recirculated for "comment and review". In I-291 Why?, a highway project was enjoined in circumstances where the results of belated studies made of certain environmental consequences of the project (e.g., increased noise and impact on air quality) were neither included in the environmental impact statement nor considered by any one other than the official (an engineer in the employ of the Federal Highway Administration) who had the authority to approve federal funding of the project.

* * *

[N]ot having been circulated, the NRDC and I-291 Why? evaluations were available for appraisal only by the agency officials making the ultimate decision on the project. Not so here. Under the procedures of this agency, the analysis was put forward at a public, adjudicatory hearing and was fully tested. And Commission regulations not only contemplate that the ultimate NEPA judgments be made on the basis of the entire record before the adjudicatory tribunals but, as well, that the findings and conclusions of those tribunals be deemed to amend the FES (insofar as different therefrom). 10 CFR (1974 ed.) Part 50, Appendix D, Section A.11; 10 CFR 51.52(b)(3), 39 F.R. 26285 (July 18, 1974)".22/

22/ Id. at 197.

In Barnwell[23] because of an assertedly deficient FES and the incomplete nature of the Commission's generic environmental study of the use of mixed oxide fuel (GESMO), the intervenors moved the Appeal Board to stay the Licensing Board hearing.

One deficiency in the FES, according to the intervenors, was that the statements contained in the FES differed from the staff testimony at the hearing. Addressing this contention, the Appeal Board declared:

> "The Commission's regulations, however, recognize that evidence presented at a hearing may cause a licensing board to arrive at conclusions different from those in the FES. In that event, the FES is simply deemed amended pro tanto. 10 C.F.R. §51.52(b)(3). To be sure, this provision ordinarily comes into play when other parties' evidence requires the board to reject or modify a staff position adopted in the FES. But we have been told no reason why the staff itself must be forever frozen in its FES position. Nor would there be any wisdom in such a rule. To the contrary, we think the staff is obliged in the performance of its duties to bring to the attention of the Board significant new or updated information. The staff's (and the Commission's) obligation is to objective truth, not to the printed word."[24]

> "Of course, in a given instance, the staff's evidence may depart so markedly from the positions espoused or information reflected in the FES as to require formal

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23/ Allied-General Nuclear Services et al. (Barnwell Nuclear Fuel Plant Separation Facilities), ALAB-296, 2 NRC 671. (October 30, 1975).

24/ Id. at 680.

> redrafting and recirculation for comment of the environmental statement (or at least those portions which are affected by the changes) before the licensing board gives any further consideration to the subjects involved. [Citing Limerick, supra, 1 NRC at 196-97] In this connection, however, we are not persuaded that the changes embodied in the staff testimony are so significant as to require that to be done here."25/

Lastly, we focus on St. Lucie26/ which the Pilgrim Appeal Board has characterized as "an analogous situation" and observed that what was "said in St. Lucie applies with equal vigor here".27/ While it was determined that the staff alternate site analysis had to be augmented so as to include at least one actual site (5 NRC 1044-45) there was never entertained nor do we find even the hint of a suggestion that the St. Lucie FES had to be recast and recirculated prior to the remanded hearings in that proceeding.

A general principle can thus be distilled from the foregoing cases. Unless the hearing record discloses a complete or major alteration of what was initially proposed (Limerick, supra)or that the staff evidence departs so markedly from its position as espoused in the FES (Barnwell, supra), there is no need to start all over again, but reliance on 10 CFR § 51.52(b) procedures can and should be had to cure omissions or deficiencies in an FES.

25/ Ibid.

26/ Florida Power & Light Co. (St. Lucie Unit 2) LBP-75-5, 1 NRC 101, LBP-75-5, 1 NRC 463 (1975) reversed, ALAB-335, 3 NRC 830 (1976), on remand, LBP-77-27, 5 NRC 1038, 1041-47, affirmed, ALAB-435, 6 NRC 541 (1977).

27/ Pilgrim, supra, ALAB-479, CCH ¶ 30,301.07.

Further, on our review of the cases involving FES modification by the Commission's Licensing and Appeal Boards, we can readily join the Limerick Appeal Board in stating that our research likewise has uncovered no judicial decision applying NEPA which cuts against an FES modification pursuant to 10 CFR § 51.52(b)(3). Rather, the judicial decisions which have considered such modification have, to the contrary, affirmed the practice under the rule.

Earlier in this discussion, we noted the Commission's observation in Seabrook, supra, 7 NRC at 29 n.43 to the effect that two courts of appeal have approved of that rule and its implementation vis-a-vis the Commission NEPA responsibilities.[28/] A third[29/] can now along with the Supreme Court by virtue of its decision in the analogous case of Aberdeen & Rockfish R. R. Co. v. SCRAP, 422, U. S. 289, 320.

The First Circuit's decision in NECNP, supra, in conjunction with the decision of the Supreme Court in SCRAP II, supra, merit close attention. The court in NECNP began with a recount of NEPA impact statement requirements along with the Commission's implementing regulations. It then observed that the issue raised by the intervenors arose because between the time the FES was prepared and the time the Licensing Board held its hearings EPA decided that the originally proposed intake structure location was not acceptable and required its relocation. The staff called upon the Applicant to revise its environmental report accordingly but chose not to redo the FES.[30/]

28/ Citizens for Safe Power v. NRC, 524 F.2d 1294 n. 5, supra, and Ecology Action v. AEC, 492 F.2d 1001-02, supra.

29/ New England Coalition on Nuclear Pollution v. NRC, ___ f.2d ___; CCH ¶ 20,092, (1st Cir. 1978), supra, affirming Public Service Company of New Hampshire (Seabrook Station Units 1 and 2) CLI-78-1; 7 NRC 1.

30/ New England Coalition on Nuclear Pollution v. NRC, CCH ¶ 20,092 at 16,556.

The Licensing Board went ahead with the hearings and evaluated the EPA location on the basis of the record before it. It then issued an initial decision. In doing so, the Board relied on 10 CFR § 51.52(b)(3).31/

The Court in addressing the issue before it declared:

> "We must decide whether this procedure, on the facts of this case, satisfied the requirement of NEPA. We have no trouble finding that it did. The Supreme Court has held that the provision of NEPA [§ 102(2)(C)]quoted above does not affect the time when the statement must be prepared; rather, it says what must be done with the statement when it is prepared. Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289, 320 (1975). As the Court pointed out, 'the time at which the agency must prepare the 'statement' is the time at which it makes a recommendation or report on a proposal for federal action.' Id. (emphasis omitted); 42 U.S.C. § 4332(2)(c). In that case the ICC was required to prepare a statement, at the earliest, after an oral hearing when the agency issued a decision. Similarly, in our case, the earliest recommendation or report of the NRC, as distinguished from one by its staff[32/] was the Licensing Board's initial decision. At that point, of course, the FES was in its final form, modified by the decision, and discussed the new intake location. (Footnotes omitted)

31/ Id. at 16,557.

32/ The footnote to the Court's decision reads as follows:

> "12Functionally, the staff is a party at the hearing. It takes its position as an adversary, and the Commission does not adopt any position officially until after the hearing." (CCH ¶ 20,092 at 16,557.)

Continuing the Court noted:

> "The District of Columbia Circuit has reached a similar conclusion, upholding application of 10 C.F.R. § 51.52(b)(3) to modify a final environmental impact statement in compliance with NEPA. Citizens For Safe Power, Inc. v. NRC, 524 F.2d 1291, 1294 & n.5 (D.C. Cir. 1975)"33/

The decisions are of particular significance in that they square 10 CFR § 51.52(b)(3) with the letter of § 102(2)(c) of NEPA (42 USCS § 4332(2)(c)) as well as with its spirit and intent. What is more, the Supreme Court in SCRAP II, supra, 422 U. S. at 321, n.20 declared:

> "To the extent to which Calvert Cliffs' Coordinating Committee v. AEC, 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971); Greene County Planning Bd. v. FPC, 445 F. 2d 412 (CA2), Cert denied, 409 U. S. 849 (1972); and Harlem Valley Transportation Assn. v. Stafford, 500 F. 2d 328 (CA2 1974), read the requirement that the statement accompany the proposal through the existing agency review processes differently, they would appear to conflict with the statute."

While as pointed out in Kleppe v. Sierra Club, supra, 427 U. S. at 406 n.15:

> "This is not to say that § 102 (2)(C) imposes no duties upon an agency prior to its making a report or recommendation on a proposal for action. The section states that prior to preparing the impact statement the responsible official 'shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to

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33/ Id.

> any environmental impact involved.' Thus, the section contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal. But the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption."

In our proceeding, the comments and views of the appropriate agencies and those of the general public have been sought and received. Furthermore, under Commission procedures as discussed above, the staff's current alternative site analysis will be put forth at a public, adjudicatory hearing wherein it may be fully tested. (See, e.g., Limerick, supra).

CONCLUSION

Unless the staff's supplementary site analysis which it proposes to present at Licensing Board hearings is at odds with the proposed action as it now stands or reaches a different result than currently presented in the FES, the Commission's adjudicatory decisions clearly hold that recirculation is neither required nor the accepted practice. As we have demonstrated, nothing in NEPA calls for it.

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