In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	)	Docket No. 50-322

AMICUS SUBMISSION BY THE
UNITED STATES DEPARTMENT OF ENERGY

In response to an invitation contained in an Order dated October 16, 1990, the Department of Energy (DOE) is pleased to provide comments as amicus curiae for the above-captioned proceeding now before the Nuclear Regulatory Commission ("NRC" or "Commission"). The comments expand on the position taken by Secretary Watkins in a letter to the Commission dated September 18, 1990, that an environmental impact statement (EIS) for the decommissioning of the Shoreham Nuclear Power Station ("Shoreham") is required to assess the direct and indirect impacts of decommissioning and the impacts of reasonable alternatives to decommissioning, including near term operation of the plant, prior to taking any action on the issuance of a "possession-only" license.

Memorandum and Order CLI-90-08, issued on October 17, 1990, ruled on petitions by two intervenors in the proceeding related to various actions by the Commission staff ("Staff") and the Long Island Lighting Company ("LILCO") concerning Shoreham. Among the

remedies sought, the interverors requested that the Commission direct the staff to prepare an EIS for the decommissioning of Shoreham, and specifically consider resumed operation as an alternative to decommissioning. Memorandum and Order CLI-90-08 ruled that this remedy should not be granted, and concluded that the National Environmental Policy Act (NEPA) did not require the Commission to consider "resumed operation" as an alternative to decommissioning. While not directly involved in the events leading to issuance by the Commission of Memorandum and Order CLI-90-08, DOE is compelled to address the legal conclusions contained therein regarding the scope of the Commission's environmental review for the decommissioning of Shoreham, because those conclusions relate directly to Secretary Watkins' September 18 letter.

For the reasons stated below, the Commission has defined too narrowly the extent of its responsibilities under NEPA to assess the impacts of decommissioning Shoreham. Because of the unique circumstances involving the Shoreham plant, these impacts will be significant, and therefore the preparation of an EIS is necessary before a decision leading to decommissioning can be made.

I. The Decommissioning Of Shoreham Is A Unique Situation Which Presents Important Environmental Considerations Requiring Special Attention When Complying With NEPA.

A decision whether to permit decommissioning of Shoreham, which is a new nuclear power plant, raises significant questions concerning energy supply and environmental impact which are not

present when a decision is made to authorize decommissioning of a plant at the end of its useful life. Construction and operation of replacement electrical capacity will cause significant environmental impacts which would not occur if the Shoreham plant were put into operation, rather than decommissioned. The issues raised by these special circumstances are not adequately addressed by the Commission s usual approach to NEPA compliance in decommissioning cases.

A. **The Indirect Environmental Impacts Which Will Occur If Shoreham Does Not Op rate Must Be Addressed.**

The Supreme Court has identified as one of the aims of NEPA to place "upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." (Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)). The breadth of this examination must be sufficient to encompass significant issues of broader concern when the results of the proposed action bear upon those issues, even though the immediate question may be more narrow. "The purpose of NEPA is to focus national policymaking on the interdependence between human beings and the environment." Dunn v. United States, 842 F.2d 1420, 1426 (3rd Cir. 1988).

The Council on Environmental Quality (CEQ) Regulations implementing NEPA have codified this principle of expansive, rather than restrictive, assessment of impacts by requiring that

the "indirect effects" of an action must be assessed in an EIS (40 CFR §1502.16(b)). The CEQ regulations define indirect effects as

> [those] which are caused by the action and are later in time or farther removed in distance, but still are reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. (40 CFR §1508.8(b))

The Supreme Court has held that "CEQ's interpretation of NEPA is entitled to substantial deference." (Andrus v. Sierra Club, 442 U.S. 347, 358 (1979)).[1] Other decisions have supported the requirement that all reasonably foreseeable impacts must be assessed, including those that are only indirectly attributable to the proposed action. (Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980); City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975)). It is also clear that reasonably foreseeable significant indirect impacts alone are sufficient to require the preparation of an EIS. (Joseph v. Adams, 467 F.Supp. 141 (E.D. Mich. 1978)).

NEPA does not require assessment of impacts which are remote or speculative (Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977)). However, in the case of Shoreham it

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[1] CEQ has formally stated that the Commission is required to prepare an EIS before taking actions which would lead to the decommis-sioning of Shoreham (letter dated October 9, 1990, from Michael R. Deland, Chairman of CEQ, to Kenneth M. Carr, Chairman of NRC).

is clear that the indirect environmental impacts stemming from actions necessary to replace the electric generation capacity of Shoreham are very real and predictable. Furthermore, to a large degree the parties involved have recognized that these impacts will occur. An agreement between the Long Island Lighting Company (LILCO) and New York State anticipates that demand, and LILCO and the New York Power Authority (NYPA) have entered into a Memorandum of Understanding (MOU), whereby NYPA has agreed "... to use its best efforts to license, finance, construct and put into commercial operation" various types of power generation and transmission facilities.[2] These projects include 480 MW of new gas turbine capacity, up to 900 MW of new thermal capacity and the potential for new transmission facilities to link LILCO's service area to either NYPA's system, Consolidated Edison's system, or both. While those major undertakings are contingent on state legislative authority, it is clear that the parties to the MOU view them as substitutes for Shoreham. They further anticipate that construction and operation of these facilities will have significant environmental impacts.[3] Alternatively, if

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[2] Memorandum of Understanding Concerning Proposed Agreements On Power Supply For Long Island, p. 1. This MOU was incorporated by reference into the LILCO-New York State agreement, entitled "SETTLEMENT AGREEMENT - LILCO ISSUES," dated February 20, 1989, at Article 11, p. 8.

[3] The MOU states that the gas turbines and thermal units will require state air quality permits and could require federal and/or state permits and approvals concerning fuel use, water quality, water discharge, activities in navigable waters, land use and wetlands. Local ordinances also may apply. (MOU at pp. 6 and 9-10). The MOU also specifies that, at least for the gas turbines, "State Environmental Quality Review Act review

these facilities are not constructed and operated, different significant indirect effects, in the form of additional air emissions (sulfur dioxide, carbon dioxide, oxides of nitrogen) and solid waste (from coal-fired plants), will result from operating the fossil fuel-fired plants which will be required to provide the electric generation capacity to replace Shoreham. Regardless of the source of replacement capacity for Shoreham, there will be significant environmental ramifications.

B. The Commission's Normal Approach To NEPA Compliance In Decommissioning Cases Is Inadequate To Address The Indirect Impacts Associated With Shoreham.

The Commission's regulations acknowledge that authorizing the decommissioning of a power plant is subject to NEPA. Those regulations specify that for such an action, the Commission staff normally "... will prepare a supplemental environmental impact statement for the post operational stage or an environmental assessment, as appropriate, which will update the prior environmental review." (10 CFR §51.95(b)) (emphasis supplied). The regulations themselves make clear that the approach prescribed is appropriate only for plants which are at the end of their useful life; it is inadequate to address the special circumstances surrounding Shoreham. Neither an environmental assessment nor a supplemental EIS of the type contemplated by the

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requirements would apply within the context of the approval process." (Id. at p. 6). The State Environmental Quality Review Act (N.Y. Environmental Conservation Law §8-0101 et seq. (McKinney 1984)) is New York's counterpart to the federal NEPA.

Commission's regulations will satisfy the requirements of NEPA with respect to the decommissioning of Shoreham. Instead, the Commission must prepare either a new EIS or a significantly different type of supplemental EIS before approving the decommissioning of the Shorehar plant.

1. The Commission's NEPA Strategy On The Decommissioning Of Nuclear Facilities: The Role Of The Generic EIS

Until recently, the Commission's NEPA regulations required that an EIS be prepared before the Commission could authorize the decommissioning of a nuclear power reactor (10 CFR §51.20(b)(5)) (1988). However, on June 27, 1988 (53 F.R. 24018), the Commission amended its regulations to eliminate that requirement and instead added decommissioning to the category of post-operating-license-stage actions which require either a supplemental EIS or an environmental assessment (EA).[4]

It was the clear intent of those amendments to reduce the NEPA requirement for decommissioning from an EIS to an EA in virtually all foreseeable cases, notwithstanding the provision in the amended 10 C.F.R. §51.95(b) for either a supplemental EIS or an EA, "as appropriate." Contemporaneous with, and supporting those amendments, the Commission prepared a Generic EIS (GEIS) on Decommissioning of Nuclear Facilities (NUREG-0586). The draft and final GEISs were issued in January, 1981, and August, 1988,

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[4] The amendments were originally proposed on February 11, 1985 (50 FR 5600).

respectively. The GEIS assessed as alternatives the three basic decommissioning methods available (immediate decontamination, deferred decontamination, and entombment), and analyzed the application of each basic method to a complete range of facility types. The final GEIS stated "[t]his EIS represents a compendium of what would otherwise have been many separate EIS's on the nuclear facilities considered in this report." The preamble to the Febr[illegible]y 11, 1985 proposed rule stated that:

> "... on the basis of information in the draft GEIS and its supporting technical data base indicating that the environmental impacts associated with decommissioning are unlikely to be significant, the Commission is of the opinion that there is no need, absent special circumstances, to prepare an environmental impact statement in connection with the issuance of a license amendment or order authorizing the decommissioning of a facility other than a waste disposal facility. In most cases, preparation of an environmental assessment which supplements the previously prepared environmental impact statement should be sufficient. The Commission notes, however, that there may be situations in which the special nature of the decommissioning action necessitates the preparation of an environmental impact statement " (50 FR 5600, 5610).

Further, the Commission left no doubt as to what "special circumstances" or "situations" might warrant preparation of an EIS:

> If unique methods are proposed by a licensee which are significantly different from those studied by the Commission, the Commission retains discretion to require an environmental impact statement. Id. (emphasis added).

Thus, the Commission contemplated preparing only an EA for decommissionings which proposed to use one of the basic methods assessed in the GEIS.

The Commission's NEPA strategy for addressing decommissionings does not anticipate a situation like Shoreham. The strategy is based on the implicit assumption that the only special circumstances which would warrant an EIS for decommissioning involve proposals to use unusual methods of decommissioning. Furthermore, as discussed below, the strategy is explicitly limited to cases, unlike Shoreham, in which the facility is at the end of its useful life.

2. **An EA Supplementing The GEIS Is Not Adequate In The Case Of Shoreham.**

Under the CEQ regulations, the principal purpose for preparing an EA is to determine whether an EIS for a proposed action is required (40 CFR §1508.9(a)(1)).[5] The Commission's regulations do not offer criteria for determining in general when an EA is appropriate, but rather state that an EA will be prepared for all licensing actions not specifically identified elsewhere as either requiring an EIS or covered by a categorical exclusion (i.e., actions presumed to be clearly insignificant (10 CFR §51.21)). However, as discussed supra, the Commission has concluded that in usual reactor decommissioning cases the

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[5] Agencies also are authorized to prepare an EA "... on any action at any time to assist agency planning and decisionmaking." (40 CFR §1501.3(b)).

environmental impacts are not significant, and that an EA will be adequate.

The Shoreham plant differs fundamentally from the typical, routine decommissioning candidate. The Shoreham plant is a new facility barely at the beginning of its useful life. In contrast, the GEIS "... addresse[d] only the issues involved in the activities carried out at the end of a nuclear facility's useful life which permit the facility to be removed safely from service and the property to be released for unrestricted use." (NUREG-0586, p. viii) (emphasis supplied). Any environmental impacts associated with decommissioning Shoreham that differ from those involved with decommissioning a facility at the end of its useful life would be beyond the scope of the type of EA contemplated by the NRC regulations, since that kind of EA is intended only to "supplement" the GEIS by confirming that the proposed method of decommissioning was analyzed in the GEIS. More importantly, if any new issues offer the potential for significantly affecting the human environment, an EIS would be required and an EA, no matter how broad in scope, would be inadequate.

3. A Separate EIS, Rather Than A Supplemental EIS, Is Appropriate.

Although the regulations applicable to post-operation activities offer only a choice between a supplemental EIS and an EA (10 CFR §51.95(b)), in the preamble to the 1988 amendments to

its NEPA regulations the Commission expressed a willingness to prepare an EIS for decommissioning in "special circumstances" (see discussion supra). Because of the special circumstances surrounding Shoreham the Commission, consistent with the general provisions of its NEPA regulations,[6] should prepare a separate EIS for decommissioning Shoreham.

Preparation of a supplemental EIS for Shoreham decommissioning, rather than a separate EIS, would be inappropriate in two respects. First, the EISs prepared for the construction permit and the operating license lack sufficient information to form an adequate basis for a supplemental EIS. Under the NRC regulations, the purpose of a supplemental EIS is to "... update the prior environmental review." (10 CFR §51.95(b)). This presupposes the existence of an analysis in the underlying documents that can be updated. Neither of the previous Shoreham EISs included any substantial analysis of the potential for significant adverse environmental effects occurring from the construction and/or operation of other facilities if Shoreham were not built and operated.[7] Simply stated, there is

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[6] An EIS is required for "[a]ny other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment." (10 CFR §51.20(b)(13)).

[7] The 1972 construction permit EIS included a brief discussion (4 pages) of alternatives for new capacity generation, focusing on other types of facilities which could be built at the Shoreham site (Section 10.2). Coal, natural gas, distillate fuel oil (in gas turbines) and hydroelectric generation were dismissed as being either uneconomic or unreliable. Thermal generation was not mentioned. Residual fuel oil was the only alternative for which any analysis was presented (one page of text and one

virtually nothing for a supplemental EIS to "update" with regard to these impacts, which are required to be analyzed under NEPA.[8] It would be misleading to characterize a supplemental analysis of decommissioning alternatives alone as an adequate NEPA review, given the obsolete and inadequate nature of the documents upon which the supplemental analysis would necessarily rely. A fresh start is called for.

Second, a separate EIS is appropriate to ensure an adequate opportunity for interested parties and the public to participate in the process of framing the issues and identifying potential impacts, which are unique to Shoreham's decommissioning. This process is commonly called "scoping." Although the Commission's regulations provide ample opportunity for participation in the scoping process by all interested parties when an EIS is being prepared in the first instance (10 CFR §51.28 and §51.29), preparation of a supplement to a final environmental impact statement need not involve a scoping process (10 CFR §51.92(c)).

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table). This analysis included only "source terms" (i.e., emission parameters), and did not provide any impact analysis of the effect of those source terms on the environment (e.g., air quality modeling). The 1977 operating license EIS contained no discussion of these issues. The State is currently proposing to build both gas turbines and thermal units to replace Shoreham (see note 2, supra.).

[8] Preparation of a supplement to the GEIS rather than supplementing the earlier Shoreham EISs, would also be inappropriate, because issues raised by decommissioning a new plant are specific to the circumstances of each individual plant, and the impacts are dependent on the variables surrounding the vehicle by which the power would be replaced. Such issues cannot be meaningfully addressed generically. (See Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 738-9 (3rd Cir. 1989)).

This exception, although discretionary, implies that it is less important to encourage full public participation in the preparation of a supplement, presumably because the issues are already defined and simply need to be addressed in light of updated data. Exactly the opposite is true in this case. The document to be prepared should benefit from the attention and visibility which a separate, fully-scoped EIS would attract, and should undergo the public scrutiny and participation implicit in that process. At a minimum, should the Commission decide instead to prepare a supplemental EIS, full scoping procedures should be followed, in order to define issues not raised or addressed in the original EISs.

II. The Indirect Environmental Effects Of Not Operating Shoreham Must Be Assessed And Compared With Those Of Operation, Even Though The Commission Is Not Empowered To Order That Operation.

Memorandum and Order CLI-90-08 makes it clear that the Commission believes that, notwithstanding the significant environmental questions described supra, its NEPA responsibilities extend no further than the narrow question of how the mechanics of a decommissioning are carried out (Memorandum and Order at p. 9). This restrictive view is at odds not only with the case law, but also with the underlying principle of full examination and disclosure of impacts upon which NEPA is based.

A. NEPA Requires The Examination Of A Full Range Of Alternatives, Including Those Beyond The Agency's Jurisdiction.

A citation to the limitations of the Commission's authority in decommissioning proceedings is an insufficient basis for dismissing an otherwise reasonable alternative from consideration. Early decisions interpreting NEPA held that such a narrow interpretation was not consistent with the statute's principles of full disclosure and informed decision making. "The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision makers in the legislative as well as the executive branch." NRDC v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972).

The position espoused in Memorandum and Order CLI-90-08 was recently considered in Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719 (3rd Cir. 1989). There, the court held that the Commission's obligation to consider reasonable alternatives under NEPA goes beyond its authority under the Atomic Energy Act (AEA), and that "contrary to the NRC's contention, simply meeting the requirements of the AEA does not exempt the Commission from complying with NEPA's procedural requirements." Id. at 741. The CEQ regulations (40 CFR §1502.14(c)) are clear and unequivocal on this point. Additionally, CEQ has elaborated that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense,

rather than desirable from the standpoint of the applicant" (emphasis in original); and that "[a]lternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." (Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Questions 2a and 2b, 46 FR 18026, 18027, March 23, 1981). Clearly, the Commission must look beyond its authority in order to determine the range of reasonable alternatives under NEPA.

B. Operation Is The Appropriate Characterization Of The No Action Alternative When Assessing The Indirect Environmental Effects Of Decommissioning Shoreham.

As discussed supra, the Commission has narrowly characterized its action in this case as determining how, rather than whether, Shoreham should be decommissioned (Memorandum and Order CLI-90-08, p. 9). This position implies that the Commission believes that its inaction as an alternative is not reasonable when considering a request to decommission a nuclear power plant.

The requirement to analyze the "no action" alternative was established in the landmark case of Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission. 449 F.2d 1109 (D.C. Cir. 1971). (Alternatives must include "total abandonment" of the project.) The CEQ regulations have codified this requirement at 40 CFR §1502.14(d). CEQ has made it clear that analysis of

appropriate, even if an agency is under a judicial or legislative command to act. If the "no action" alternative would result in predictable action by others, those consequences also should be discussed (Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 3, 46 FR 18026, 18027, March 23, 1981). This requirement has consistently been upheld. (See, e.g., Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988), holding that "[T]he 'heart' of the EIS -- the consideration of reasonable alternatives to the proposed action -- requires federal agencies to consider seriously the 'no action' alternative before approving a project with significant environmental effects." Id. at 1451).

The GEIS makes it clear that, at least in the case of a facility at the end of its useful life, the Commission believes that the "no action" alternative can be summarily dismissed as unreasonable.

> The objective of decommissioning is to restore a radioactive facility to a condition such that there is no unreasonable risk from the decommissioned facility to the public health and safety. In order to ensure that at the end of its life the risk from a facility is within acceptable bounds, some action is required, even if it is as minimal as making a terminal radiation survey to verify the radioactivity levels and notifying the NRC of the results of the survey. Thus, independent of the type of facility and its level of contamination, No Action, implying that a licensee would simply abandon or leave a facility after ceasing operations, is not a viable decommissioning alternative. Therefore, because no action is not considered viable for any facility discussed in this EIS, this alternative is not considered further in this report.

GEIS at p. 2-6. In contrast, in the case of Shoreham, the concept of "no action" has meaning other than unregulated abandonment. Indeed, it is only when the no action alternative is characterized as that action which allows Shoreham to operate that a meaningful comparison of the impacts is achieved. While such a result may be beyond the authority of the Commission to mandate,[9] it is a foreseeable outcome of a decision not to decommission, an outcome which would significantly reduce the indirect impacts that will occur if Shoreham is decommissioned.

C. **The Operation Alternative Is Within The "Rule Of Reason".**

Memorandum and Order CLI-90-08 states that "even if 'resumed operation' were an alternative to decommissioning, we would not be required to consider it under the NEPA 'rule of reason.'" (Id. at p. 10). This conclusion is based on narrow readings of various cases, including NRDC v. Morton, supra, which support the principle that alternatives which require the "overhaul of basic legislation" (Id. at p. 837), or "significant changes in governmental policy or legislation" (NRDC v. Calloway, 524 F.2d 79, 92 (2nd Cir. 1975)) are outside the scope of reasonable alternatives which must be addressed under NEPA.

However, the Commission's reliance on these cases is misplaced, and results in an artificially restrictive view of its

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[9] But see Joint Petition for Reconsideration by Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc., Intervenors, pp. 16-21, and pp. 19-20, infra.

NEPA responsibilities in the situation of Shoreham. As discussed above, NRDC v. Morton stands for the principle that agencies must look beyond their immediate jurisdiction and assess outcomes which could reasonably be predicted to occur. The extreme situations posited in NRDC v. Morton in which the rule of reason would limit inquiry are those in which the underlying Federal legislation precludes the alternative in question, and would require major changes to allow it to occur. The operation of Shoreham requires no "overhaul of basic legislation;" to the contrary, a full power operating license has been issued for that facility and no other Federal action would be necessary. Likewise, no "significant change in governmental policy" would be required at the Federal level to allow Shoreham to operate. Promotion of a strong nuclear power industry in the mix of energy sources has been an element of U.S. energy policy since passage of the 1954 amendments to the AEA.

The Commission bases its position that operation is beyond the rule of reason largely on the opposition to Shoreham by non-Federal entities (New York State and LILCO) (Memorandum and Order CLI-90-08, p. 10). However, such opposition should not place operation outside the range of reasonable alternatives for three reasons. First, NEPA applies only to the actions of Federal agencies and the resulting outcomes. The fact that non-Federal parties (including a State) would need to change their positions in order for Shoreham to operate does not constitute a limitation on the Commission's ability to act, and clearly cannot eliminate

from consideration what would otherwise be a reasonable alternative, i.e., one that is practical and feasible from a technical and economic standpoint (see discussion supra).

Second, the positions of the State and LILCO are not irrevocable, and it must be presumed that they are subject to being influenced by an enlightened discussion of all the issues.[10] The ongoing events in the Middle East have stimulated the national dialogue about energy security. As the dialogue continues, it is reasonably foreseeable that recognition of the important role which Shoreham could play in reducing reliance on imported oil will modify present opinions. An integral element of this dialogue is consideration of the environmental impacts of operating versus not operating Shoreham. Indeed, it is unlikely that these important considerations will be adequately aired for public discussion unless an EIS is prepared in conjunction with the decision to decommission.

Third, notwithstanding the State's and LILCO's current intention not to operate the plant, there are currently in place Federal emergency authorities, other than NRC's decommissioning jurisdiction under the AEA, which could come into play and

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[10] In fact, there are seven operating nuclear power plants (including Shoreham) in New York State, two of which are operated by a State authority. In addition, both LILCO and the State supported the construction and operation of Shoreham for many years. Accordingly, modification of the settlement agreement (e.g., to permit operation by LILCO, to transfer the plant to another entity for operation, or to "mothball" the plant for possible future operation) must be characterized as both reasonable and foreseeable.

influence a decision to operate Shoreham. For example, through the DOE Organization Act, the Secretary of Energy acquired the authority originally vested in the Federal Power Commission to order the operation of an electrical generating facility whenever the Secretary determines that there is an energy emergency by reason of, among other things, a shortage of electrical energy or facilities for the generation or transmission of such energy, or of fuel for such generating facilities, or other causes (16 USC 824a(c)). The regulations implementing this statutory authority define the term "emergency" to include sudden increases in consumer demand, inability to obtain adequate amounts of fuel, extended periods of insufficient supply resulting from inadequate planning or failure to construct necessary facilities, or regulatory action prohibiting the use of certain electrical power facilities (10 CFR 205.371). Obviously, the use of this authority is one of the options available to the Secretary depending on the course of events both in the Middle East and in this country as those events affect the local, regional or national energy supply and security.

Indeed, the Commission itself has authority to compel plant operation should Congress determine that an emergency exists, by reason of the Middle East situation or otherwise (42 USC 2138, 2238). This is is precisely the type of alternative which the court in NRDC v. Morton had in mind as being beyond the immediate authority of the agency, but "within the purview of both Congress and the President, to whom the impact statement goes," (458 F.2d at 834-

35), and thus within the range of reasonable alternatives under NEPA.

Thus, contrary to the Commission's conclusion, not only is overhaul of Federal legislation unnecessary to allow Shoreham to operate, but there are indeed Federal authorities in place which, under appropriate circumstances, could mandate its operation.

III. An EIS Must Be Prepared For The Earliest Commission Decision Which Could Affect Decommissioning.

NEPA compliance must occur at "... the time [the agency] makes a recommendation or report on a proposal for federal action." (Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320 (1975) (emphasis in original). The precise point when a proposal exists can depend on the nature of the action to be taken. Clearly, approving an amendment to Shoreham's operating license to allow decommissioning of the plant would constitute such a proposal. However, approving the request by LILCO for a "possession-only" license amendment must also be considered an action requiring NEPA review. Furthermore, that review must consider the entire process leading to eventual decommissioning. It is clear that approval of a "possession-only" license is likely to result in actions being taken at the plant which could render moot a later meaningful consideration of alternatives to decommissioning.[11] Therefore the two actions must be considered

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[11] Memorandum and Order CLI-90-08 acknowledges that the LILCO requests for action now before it are "preparatory to some future NRC decision approving" decommissioning of Shoreham (Id. at p. 8). In the preamble to its final rule entitled "General

as one and analyzed at the time when the first action is proposed.

The CEQ regulations state this principle as follows:

> Proposals or parts of proposals which relate to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement. (40 CFR §1502.4(a)).

The regulations further define such "connected actions" which are "closely related" as ones which "[a]utomatically trigger other actions which may require environmental impact statements." (40 CFR §1508.25(a)(1)(i)). The test has evolved that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future pro ects, the consequences of the projects should be evaluated together." (Fritiofson v. Alexander, 772 F.2d 1225, 1241(n.10) (5th Cir. 1985). (See also, Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988). "[The no action] analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available.")

Requirements for Decommissioning Nuclear Facilities" (53 FR 24018, June 27, 1988), The Commission acknowledged that "[d]ecommissioning activities are initiated when a licensee decides to terminate licensed activities." (52 FR 24019). Thus, NRC should be proceeding under the principle that any action it has been requested to take subsequent to the February 20, 1989, Settlement Agreement must be evaluated in a manner that considers the issues surrounding ultimate decommissioning.

Once the license is downgraded, LILCO would be free to take actions which would effectively result in the destruction of the Shoreham facility as a potential nuclear generating station. Indeed, the Commission's staff has already conceded as much, in a September 10, 1990 letter from James G. Partlow, Associate Director for Projects, Office of Nuclear Reactor Regulation, to Thomas E. Tipton, Director of the Operations, Management and Support Services Division, Nuclear Management and Resources Council (copy attached). In that letter, Mr. Partlow explicitly stated that:

> When the non-operating status of the plant is confirmed by the issuance of a "possession-only" license amendment, then major permanent changes to the facility can be carried out under 10 CFR 50.59, provided they do not involve a change in the technical specifications or an unreviewed safety question. If there are activities that require NRC approval of the decommissioning plan or adversely affect the choice of any of the decommissioning options, those activities should not be carried out under 10 CFR 50.59. (Emphasis supplied)

Given this staff position, and the fact that there is relatively minor contamination of the Shoreham facility, there are very few plant systems that could not be effectively destroyed by LILCO under 10 CFR 50.59 without prior notice to and approval by the Commission, and before a decommissioning plan is ever filed and approved by the Commission.

By granting LILCO a "possession-only" license for Shoreham, NRC would be allowing LILCO to alter significantly the plant's ability to operate. Such action would be tantamount to

foreclosing the "no action" alternative before a decision to allow decommissioning were ever considered. In these circumstances, NEPA requires that NRC prepare an EIS for the combined actions of proposing to authorize a "possession-only" license and to approve decommissioning.

IV. Conclusion.

The Commission must prepare an EIS which considers the direct and indirect impacts of not operating Shoreham before taking any action which could lead to the plant's decommissioning, thereby precluding consideration of reasonable alternatives. Under the CEQ regulations and applicable case law, one such reasonable alternative is the operation of Shoreham for the production of electricity.

Respectfully submitted,

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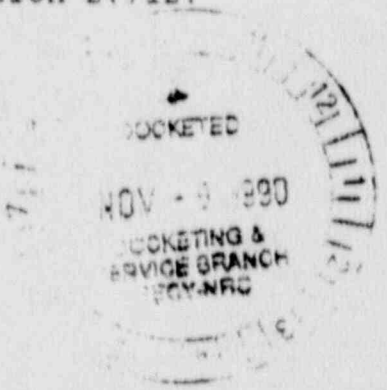
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amicus Submission by the United States Department of Energy, dated November 8, 1990, have been served upon the following persons by U.S. mail first class, except as otherwise noted and in accordance with the requirements of 10 CFR Section 2.712.



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Washington, D.C. 20500

Dated at Washington, D.C. this 8th day of November 1990

Lawrence A. Gollomp

ATTACHMENT

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 10, 1990

Mr. Thomas E. Tipton, Director
Operations, Management and
Support Services Division
Nuclear Management and Resources Council
1776 Eye Street, N.W., Suite 300
Washington, D.C. 20006-2469

Dear Mr. Tipton:

SUBJECT: NUCLEAR PLANT CLOSURE ACTIVITIES AND DECOMMISSIONING

I have received your letter of April 3, 1990, which provided a draft white paper "Nuclear Plant Closure Activities That May Be Pursued In Advance Of An Approved Decommissioning Plan." The white paper has been reviewed by the NRC staff. I feel that clarification of the way in which the 10 CFR 50.59 evaluation process is to be used is warranted.

Proceeding from an operating commercial nuclear power plant to a decommissioning facility can be viewed as a three phase process. The three phases are as follows:

1. Plant closure prior to the request and issuance of a license amendment to remove the authority to operate at power ("Possession Only License"),

2. Plant closure and preparation for decommissioning after issuance of a "Possession Only License," but prior to approval of a proposed decommissioning plan per 10 CFR 50.82., and

3. Decommissioning after approval of the decommissioning plan per 10 CFR 50.82.

Licensees may make changes in the facility and in the procedures as described in the safety analysis report without prior NRC approval provided the proposed change does not involve a change in the Technical Specifications or is not an unreviewed safety question. In this connection, until NRC authorizes a change in the status of the plant license, 10 CFR 50.59 analyses are to assess the affect of the change on a plant licensed to operate at the authorized power level. This does not preclude 10 CFR 50.59 changes applicable to the shutdown or defueled state, in a manner similar to the procedures applicable to changes that may be made under 10 CFR 50.59 for a plant that is shut down for an extended period for major inspection or repair work. When the non-operating status of the plant is confirmed by the issuance of a "possession-only" license amendment, then major permanent changes to the facility can be carried out under 10 CFR 50.59, provided they do not involve a change of technical specifications or an unreviewed safety question. If there are activities that require NRC approval of the decommissioning plan or adversely affect the

choice of any of the decommissioning options, those activities should not be carried out under 10 CFR 50.59.

It is, of course, essential that licensees maintain their facilities in a safe condition and that plant closure and decommissioning activities be carried out in compliance with NRC regulations. If you have any questions, please contact me at (301) 492-1284.

Sincerely,

James G. Partlow
Associate Director for Projects
Office of Nuclear Reactor Regulation

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Sincerely,

Original signed by
James G. Partlow

James G. Partlow
Associate Director for Projects
Office of Nuclear Reactor Regulation

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See previous concurrence

[DECOMMISSIONING]