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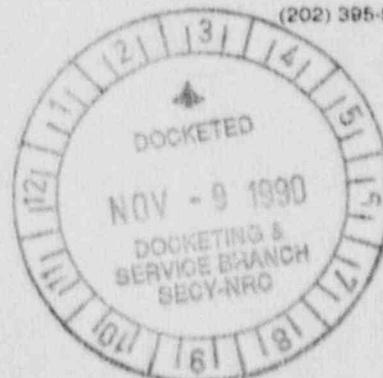


EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20500

Michael R. Deland
Chairman

(202) 395-5080

November 9, 1990



The Honorable Kenneth M. Carr, Chairman
The Honorable Kenneth C. Rogers, Commissioner
The Honorable James R. Curtiss, Commissioner
The Honorable Forrest J. Remick, Commissioner
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Sirs:

Re: In the Matter of Long Island Lighting Company, Shoreham Nuclear Power Station, Unit 1, Docket No. 50-322

By letter dated October 9, 1990, I urged the Nuclear Regulatory Commission (NRC) to prepare a comprehensive environmental impact statement (EIS) for all of the actions the agency may be called upon to take regarding the Shoreham Nuclear Power Station. On October 16, 1990, the Commission issued an order inviting me and the Secretary of Energy to "file on the record any comments they wish the Commission to consider." I am accepting that invitation, and my comments are presented below.

I. Preparation of a Comprehensive EIS is Mandated by the National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to prepare a "detailed statement" for all "major Federal actions significantly affecting the quality of the human environment...." 42 USC § 4332(2)(C). The Council on Environmental Quality (CEQ), which oversees federal agency

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compliance with NEPA, has promulgated regulations to implement the procedural provisions of the statute.'

Among other things, these regulations require federal agencies to consider connected actions together in the same NEPA document. See 40 CFR § 1508.25(a)(1). A "connected" action is one which is an interdependent part of a larger action and depends on the larger action for its justification. Id.

This issue was addressed in Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985), where the court held that the cumulative impacts of several land development proposals from several applicants must be considered by the Army Corps of Engineers in order to determine whether the impacts of the proposals were "significant." The court specifically recognized that there were "circumstances under which proposals that are functionally or economically related must be evaluated in the same environmental analysis." Id. at 1241 n. 10. As the court stated,

"If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together." Id.

In Andrus v. Sierra Club, 442 U.S. 347 (1979), the United States Supreme Court described the adoption of the CEQ regulations as a "detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." Id. at 358. The Court also stated that "CEQ's interpretation of NEPA is entitled to substantial deference." Id. See also Robertson v. Methow Valley Citizens Council, ___ U.S. ___, 109 S.Ct. 1835, 1848 (1989) ("CEQ regulations are entitled to substantial deference.")

Similarly, the court in Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), looked at whether the Forest Service properly considered the impacts of a logging road in one NEPA document and the impacts of timber sales which the logging road made possible in another. The court questioned whether the road and the timber sales were "sufficiently related" to require the preparation of one EIS in which the impacts of both actions would be addressed. Given that "the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales," the court concluded that the two proposals were "inextricably intertwined." Id. at 758-59.

Currently pending before NRC is the application of Long Island Lighting Company (LILCO) to amend its operating license for the Shoreham Nuclear Power Station to a "possession-only" license. The possession-only license is the first step in a clearly-stated plan to transfer the license to the Long Island Power Authority (LIPA) and to decommission the Shoreham facility.

These three elements of the plan (license amendment, license transfer, and decommissioning) will all require NRC approval and are "functionally or economically related" and "inextricably intertwined." Under the plan for Shoreham, decommissioning of the facility will not be sought unless the license amendment and transfer are approved, and a license amendment and transfer would not be sought unless decommissioning were the ultimate goal. In other words, the purpose of the license amendment which is

currently pending before NRC is to facilitate a future request for decommissioning.

The possession-only license amendment is "connected" to LILCO's expected request for a license transfer to LIPA and to LIPA's anticipated request to decommission the Shoreham plant, as that term is defined by the CEQ regulations and the relevant case law. The interrelationship of these proposals is clear and necessitates the preparation of a comprehensive EIS which addresses the environmental impacts of all three actions.²

II. The Comprehensive EIS Must Address the Environmental Consequences of the Proposed Actions and of All Reasonable Alternatives, Including the No Action Alternative

Section 102(2)(C) of NEPA specifically requires agencies to assess "(i) [t]he environmental impact of the proposed action, (ii) [a]ny adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) [a]lternatives to the proposed action...." 42 USC § 4332(2)(C). Further, the CEQ regulations direct agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives...." 40 CFR §

² Only by considering these related proposals together in the same document can the cumulative impacts and available alternatives be fully addressed. While the impacts of a license amendment and license transfer might not be significant standing alone, the cumulative impacts of those actions, combined with decommissioning, are certainly significant. Moreover, delaying consideration of the impacts of decommissioning until an application for such action is actually before the Commission forecloses other alternatives which might have been available at an earlier time, e.g. transfer of the license to a different entity for near term operation.

1502.14(a). The term "all reasonable alternatives includes those which are not within the jurisdiction of the agency and the "no action" alternative. Id. at § 1502.14(c) and (d).

The CEQ regulations also require an agency to discuss "the environmental impacts of the alternatives including the proposed action...." 40 CFR § 1502.16. The discussion of environmental impacts must include direct and indirect effects, energy requirements and conservation potential of the various alternatives, and natural or depletable resource requirements and conservation potential of the various alternatives. Id.

Setting aside for the moment the question of which alternatives NRC must address in its comprehensive EIS, the agency must, at a minimum, address the environmental consequences of the proposed action: the decommissioning of the Shoreham facility.³ Regardless of whether those consequences are unavoidable, the impacts are obvious and include increased

³ The generic or programmatic EIS which NRC has prepared for decommissioning of nuclear power plants specifically addressed the dismantling of plants at the end of their useful lives. The environmental impacts of decommissioning a 30- or 40-year old plant are decidedly different from the impacts of decommissioning a fully operable plant at the beginning of its useful life. Similarly, the reasonable alternatives to decommissioning a plant at the end of its useful life do not include operation of the facility, an alternative which would be available to Shoreham.

reliance on other, perhaps less environmentally desirable, sources of energy.⁴

With respect to alternatives, NRC must address the environmental consequences of not decommissioning the facility-- the "no action" alternative. In addition, NRC must examine the environmental consequences of other reasonable alternatives to decommissioning, e.g. "mothballing" the plant for possible future operation. While, as the Commission pointed out in its October 17, 1990 Order (CLI-90-08), LILCO gives every appearance of abiding by the settlement agreement (id., slip op. at 5), it is not unreasonable to project that LILCO and the State of New York might, in the future, mutually agree to disregard that settlement agreement.⁵

It is true that modification of the settlement agreement between LILCO and the State of New York is not within the control of NRC and that it would require legislative reversal of an existing state statute. Alternatives outside the jurisdiction of the agency may still be "reasonable" under the CEQ regulations, however, and "[t]he mere fact that an alternative requires

⁴ The 1972 EIS prepared for the construction permit for Shoreham briefly addressed the environmental consequences of alternative energy sources. That information would need to be supplemented, but can be referenced or used once NRC has satisfied itself that it is still accurate. See 40 CFR §§ 1502.9(c), 1502.20.

⁵ The State of New York and Suffolk County, in which Shoreham is located, supported the construction and operation of Shoreham for many years. Events in the early 1980's caused a change of heart, and events of the early 1990's could have the same effect.

legislative implementation does not automatically establish it as beyond the domain of what is required for discussion...."

Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972).⁶

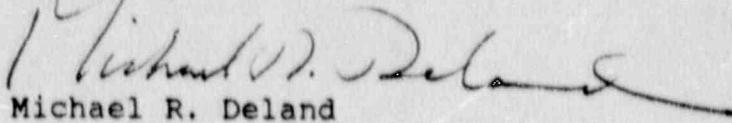
The comprehensive EIS which must be prepared for a license amendment, license transfer, and decommissioning must consider the environmental impacts, including the cumulative environmental impacts, of those actions. Among those impacts is the need to provide replacement generating capacity. NRC must also consider reasonable alternatives to these actions, including the no action alternative (i.e., not approving decommissioning) and alternatives outside the jurisdiction of the agency (i.e., repudiation of the settlement agreement and operation of the Shoreham facility).⁷

⁶ The court went on to say that "the need for an overhaul of basic legislation" bears on the determination of what is a reasonable alternative and that NEPA would not require an extended discussion of legislative alternatives which were "remote from reality...." 458 F.2d at 837. Support for the operation of the Shoreham Nuclear Power Station, far from being "remote from reality," was in fact reality in the 1970's.

⁷ The Commission has suggested that it need not look at alternatives to decommissioning because the agency has no authority to mandate operation of the facility. See CLI-90-08, slip op. at 9 n.4. This suggestion, however, ignores NRC's obligation to address the environmental consequences of its actions and to address the "no action alternative" and alternatives outside the jurisdiction of the agency.

I appreciate the opportunity to present these views to you. As I stated in my earlier letter, I strongly recommend that you give this matter serious attention and acknowledge the need to meet both the letter and the spirit of the National Environmental Policy Act.

Sincerely,


Michael R. Deland

cc: Service List (see attached)

I hereby certify that copies of the letter of Michael R. Deland, Chairman of the Council on Environmental Quality, to the NRC Commissioners, dated November 9, 1990, regarding preparation of an environmental impact statement for the Shoreham Nuclear Power Station, have been served upon the following persons by U.S. mail, first class.

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The Honorable James D. Watkins
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Dated at Washington, D.C. this 9th day of November, 1990.



Gloria Robinson

