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January 5, 1994

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: DENIAL OF NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND ENERGY'S
REQUEST FOR ACTION

Dear Mr. Secretary:

Please accept the following in response to the letter dated December 23, 1993 from Director Robert M. Bernero denying NJDEPE's request for action pursuant to 10 C.F.R. § 2.206. It is hereby requested, for the reasons set forth below, that the Commission review and reverse the Director's Decision in accordance with its general supervisory authority over staff decisions and specific authority pursuant to 10 C.F.R. § 2.206(c).*

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* NJDEPE understands that Section 2.206(c)(2) provides that no petition to review a Director's Decision will be entertained by the Commission. However, after reading the Director's Decision and some of the grossly erroneous conclusions therein, NJDEPE felt compelled to provide the Commission with NJDEPE's primary concerns in order to aid the

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First and foremost, we respectfully submit that the Director's Decision provided an inadequate and incorrect rationale for not taking any action on NJDEPE's CZMA claims. The Decision concludes that since "the NRC does not regulate route selection, no NRC action fell within the CZMA." (p. 25). This reasoning ignores the licenses and certificates actually issued by the NRC which specifically authorized the ongoing shipments. Furthermore, the reasoning cannot be reconciled with the clear requirements of the CZMA that any applicant for a required federal approval, license, or permit "to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state" include in the federal application a certification that the proposed activity complies with the enforceable policies of the State's approved CZM program. 16 U.S.C. § 1456(c)(3)(A). NRC clearly issued approvals to LIPA, PECO, and Pacific Nuclear to conduct activities which affect the water uses and natural resources of New Jersey's coastal zone.

The Director does not dispute that these approvals are "listed" approvals for which consistency certifications should have been submitted to NJDEPE. Nor does the Director dispute that the approvals are required in order to conduct the

Commission's determination of whether or not to review the Director's Decision. This letter should not be construed as a waiver of any of NJDEPE's concerns as set forth in its October 8th submittal.

activities. Nor does the Director dispute that the approved activities are in or outside of New Jersey's coastal zone and affect the water uses and natural resources of the zone. The Decision attempts to simply avoid the requirements of CZMA by concluding that "NRC did not issue any license or permit for LIPA's selection of a coastal route." This argument is completely fallacious for without PECO's license amendments, LIPA's general license, or the Certification of Compliance, the ongoing shipments would not be authorized to proceed through New Jersey's coastal zone. It is irrelevant under CZMA whether or not NRC regulates the route selection itself because the Act simply requires consistency for required federal licenses where the authorized activity affects the state's coastal uses and resources. As discussed below, the NRC approvals issued in this case triggered CZMA.

The NRC issued PECO's license amendments in order to allow PECO to receive LIPA's fuel. The receipt of LIPA's fuel is clearly a licensed activity which although outside of New Jersey's coastal zone clearly affects the coastal water uses because PECO is receiving the fuel by barge shipments. It was clear to NRC, as established in the June 23, 1993, Safety Evaluation, that PECO's receipt of the fuel would affect New Jersey's coastal water uses since the fuel was to be barged to a PECO site "along the Delaware River." Thus, CZMA requires a showing of consistency even in this case where the activity of

actually receiving the fuel is outside of New Jersey's coastal zone.

Similarly, LIPA's general license to transport the fuel was conditionally conferred "provided the licensee obtains approval of the package." (Director's Decision p. 19). NJDEPE acknowledges that when NRC originally adopted this general license it would not necessarily have known that transporting licensed material would affect New Jersey's coastal water uses. Nonetheless, general licenses are not per se exempted from CZMA consistency requirements even though knowledge of how a general license will be used to affect a state's coastal zone, and therefore the obligation to perform a consistency analysis, may not arise until a later date. In this case that obligation to comply with CZMA ripened when NRC issued the Certificate of Compliance No. 9001, Revision No. 28, on August 19, 1993, authorizing an activity in New Jersey's coastal zone which affects the zone's water uses and natural resources. The Certificate was specifically issued for the transport of LIPA's fuel by barge in response to an application dated July 29, 1993. Thus, NRC's issuance of the Certificate violated CZMA since it conferred or reconferred upon LIPA a general license to transport the fuel without a showing of consistency under CZMA. Plainly LIPA's decision to use its general license in this manner and for NRC to sanction that use triggered an obligation to scrutinize the use of the general license for

coastal zone consistency. Similarly, NRC's issuance of the Certificate violated CZMA since it authorized Pacific Nuclear to transport the fuel without a showing of consistency under CZMA. As with LIPA's general license, this activity clearly is in New Jersey's coastal zone and affects the zone's water uses and natural resources.

By improperly issuing federal approvals to receive and transport LIPA's fuel in violation of CZMA, specifically 15 C.F.R. § 930.53(e), NRC has failed to ensure that the approved activities will not violate New Jersey's coastal zone policies. As set forth in NJDEPE's October 8th request, NRC should stay PECO's license amendments, Pacific Nuclear's Certificate, and LIPA's general license pending compliance with CZMA's consistency process. (NJDEPE's Request, p. 5).

As to NJDEPE's NEPA claims, the Director similarly attempts to distort NJDEPE's position by using a strawman argument that NJDEPE wants NRC to make the initial decision of whether LIPA should transfer the fuel by rail or by barge. (p. 12). This clearly is not NJDEPE's position. NJDEPE recognizes that the routing decision is a private decision; however, when the NRC is deciding whether or not to issue licenses which allow private entities to conduct an activity, NEPA does not allow the NRC to simply ignore the impacts and alternatives to the proposed activity.

The flaw in the Director's Decision is best explained by the alternatives analysis that NRC itself performed in PECO's EA. There, the NRC concluded that the alternatives to the proposed activity, disposal at a Federal high-level waste repository or reprocessing overseas, would have either no impact or greater environmental impact. The alternatives that NRC examined in that EA were clearly private decisions. It was LIPA's decision, not NRC's, to ship its fuel to PECO rather than to a Federal or overseas facility. However, when LIPA and PECO sought various NRC approvals to implement this decision, the NRC was bound by NEPA to examine the alternatives to the proposed activity.

NJDEPE's claim is simply that when LIPA decided to ship the fuel by barge and PECO decided to receive it by barge, the NRC was similarly bound by NEPA to examine the alternative means of getting the fuel to PECO and determine which alternative would have a lesser environmental impact. Thus, the Director's Decision, that since the barge decision was made by a private party NEPA is not triggered, is without merit and entirely inconsistent with the broad scope of NEPA intended by Congress.

The other reason cited in the Decision for not examining alternatives is that:

Because this shipment falls within the "envelope" of environmental consequences that have already been analyzed generically or in the original impact

statements for the specific plants at issue here, NEPA does not require any further evaluation of alternatives. Thus, no NRC analysis of other potential routes or means for transporting the Shoreham fuel to Limerick is required.

This position is clearly violative of both NEPA and past NRC decisions. In Virginia Electric and Power Company, 22 NRC 481, 490 (1985), the Licensing Board held that the NRC cannot simply ignore the alternatives requirements in NEPA once it concludes that a full EIS is not required. In that case, the Concerned Citizens of Louisa County argued that while an EIS was not required, the EA should be "redone to include a discussion of or at least acknowledge the dry cask storage alternative." Id at 491.

Similarly here, NRC failed to comply with NEPA because the EA completely fails to acknowledge or analyze the alternatives to shipment by barge down the entire length of New Jersey's coastal zone, including the rail shipment alternative which was apparently considered and rejected without the public input required by NEPA. NJDEPE has consistently maintained that an alternatives analysis is altogether meaningless if it is performed without any discussion of the alternatives that were actually considered.

In accordance with 10 C.F.R. § 2.206(c), the Commission may, within 25 days, review a Director's decision under 10 C.F.R. § 2.206. While NJDEPE respects the time and effort that

NRC staff has expended with respect to this matter, NJDEPE strongly maintains that the Director's Decision sets a dangerous precedent by limiting the rights of affected states, such as New Jersey, to protect their coastal resources. Unfortunately, the Director's Decision essentially holds that since route selection is a private decision the affected coastal states are not entitled to any review of planned shipments. This abrogates the entire CZMA scheme which was designed to require the "active participation of coastal states." 16 U.S.C.A. § 1451(m). The NRC should not dismiss a congressional directive so lightly.

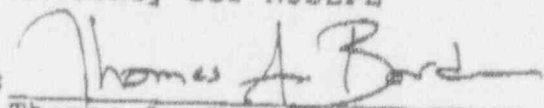
Accordingly, for the reasons set forth above and the reasons set forth in NJDEPE's October 8, 1993 petition, NJDEPE respectfully requests that the Commission review and reverse the Director's Decision and take the action requested by NJDEPE.

Thank you for your immediate attention to this matter.

Respectfully submitted,

FRED DeVESA
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Attorney for NJDEPE

By:


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c: attached service list

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
STATE OF NEW JERSEY)
Department of Law and Public)
Safety's Requests)

OFFICE OF THE SECRETARY
DOCKETING & SERVICE
JAN 5 1994

CERTIFICATION OF SERVICE

I, Thomas A. Borden, hereby certify that on this 5th day of January 1994, I served by facsimile on the following copies of New Jersey Department of Environmental Protection and Energy's Letter dated January 5, 1994.

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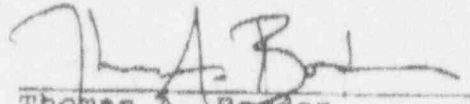
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