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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of	)	
Consumers Power Company	)	Docket No. 50-155-OLA
(Big Rock Point Nuclear Power Plant)	)	(Spent Fuel Pool Modification)

INTERVENORS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THE ENVIRONMENTAL IMPACT APPRAISAL

Proposed Finding of Fact

1. The Environmental Impact Appraisal (EIA) was originally filed by Staff in this proceeding on or about May 15, 1981. That EIA contained a discussion of alternatives to expansion including a discussion of no action, which would result in the closing of the plant.

2. A revised EIA was filed by Staff on or about May 10, 1982 and that version was introduced into evidence by Staff as Staff Exhibit 3. (TR 2290). The revised version deletes all discussion of alternatives. Niether the revised version or any other evidence offers an explanation for the deletion or the failure to consider alternatives.

3. The Staff has not demonstrated that there is no unresolved conflict concerning alternative uses of available resources.

Proposed Conclusions of Law

1. The EIA does not comply with Section 102(2)(E) of the National Environmental Protection Act, 42 U.S.C. §4332(2)(E).*

2. The Staff is directed to study, develop and describe alternatives to recommended course of action of expanding the spent fuel pool and to fill its results in this proceeding.

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* The current Section 102(2)(E) was originally Section 102(2)(D) and was renumbered 102(2)(E) in 1975, without change in text. Cases decided before 1976 refer to the Section in question as 102(2)(D). See Historical Note following 42 U.S.C.A. §4332.

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DISCUSSION

THE EIA DOES NOT COMPLY WITH NEPA §102(2)(E) BECAUSE OF ITS FAILURE TO STUDY, DEVELOP AND DESCRIBE APPROPRIATE ALTERNATIVES.

At the outset, Intervenors note that there is no dispute as to proposed Findings 1, 2 and 3 and request that they be included in the Board's Findings, regardless of whether the Board agrees with Intervenors on the legal significance of those undisputed facts.

The National Environmental Protection Act requires that "to the fullest extent possible...all agencies of the Federal Government shall-...(E) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternatives uses of available resources."

A somewhat similar requirement appears in Section 102(2)(C)(iii) which requires that an Environmental Impact Statement (EIS) contain a detailed statement on "alternatives to the proposed action." 42 U.S.C. §4332(2)(C)(iii). This latter Section applies only where there is a major federal action substantially affecting the environment. But no such substantial effect is a prerequisite for compliance with subsection E.

The cases hold that subsection (E) is both independent of, and broader than the requirement of subsection (C)(iii). The Second Circuit held in Hanley v Kleindeinst, 471 F2d 823(1972), that Section 102(E) /then (D)/ is not limited to action significantly affecting the environment. "Indeed, if they were so limited §102(D), which requires the agency to develop appropriate alternatives to the recommended course of action, would be duplicative since

102(C), which does apply to actions 'significantly affecting' the environment, specifies that the detailed impact statement must deal with 'alternatives to the proposed action'." Id.at 834-35

Again, in Trimty Episcopal School Corp. v Rommey, 523 F.2d 88 (2d Cir. 1975), the court held:

> Federal agencies must consider alternatives under §102(2)(D) of NEPA without regard to the filing of an EIS and this obligation is phrased to encompass a broad type of consideration-"study, develop, and describe." In Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 at 697 (2d Cir. 1972), this Court emphasized the importance of consideration of alternatives under §102(2)(D). The statute states in broad language that alternatives must be considered with respect to "any proposal which involves unresolved conflicts concerning alternative uses of available resources." Although this language might conceivably encompass an almost limitless range, we need not define its outer limits, since we are satisfied that where (as here) the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agent is required to study, develop and describe each alternative for appropriate consideration. Id. at 93.

Accord: Environmental Defense Fund v Corps. of Engineers, 492 F.2d 1123 (4th Cir. 1974).

In Sierra Club v. Alexander, 484 F. Supp. 455 (N.D. N.Y.), aff'd without opinion, 633 F.2d 206 (2d Cir. 1980), the court upheld the agency's determination that as EIS need not be filed but found that the agency had not complied with subsection (E) because it did not make an independent analysis of alternatives. See 484 F. Supp. at 468-69.

Subsection (E) is also broader in scope than subsection (C)(iii). The latter requires only a detailed statement of alternatives, whereas subsection (E) requires the agency to "study, develop and describe" appropriate alternatives. The Fourth Circuit held in Environmental Defense Fund v. Corps. of Engineers, 492 F. 2d 1123, 1135:

> Clearly, Section 102(2)(D) /now E/ is supplemental to and more extensive in its commands than the requirement of 102(2)(C)(iii). It was intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major federal project should be undertaken without intense consdieration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means. In Natural Resources Defense Council, Inc. v. Morton, supra, the District of Columbia Circuit recognized that this section did not intend to limit an agency to consideration of only those alternatives that it could adopt or put into effect. We agree. The imperative directive is a thorough consideration of all appropriate methods of accomplishing the aim of the action, including those without the area of the agency's expertise and regulatory control as well as those within it.

The District of Columbia Circuit Court agrees. In Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971), the court stated.

> This requirement /of 102(2)(E)/, like the 'detailed statement' requirement /of 102(2)(C)/ seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.

The failure of Staff to include a discussion of alternatives here violates this fundamental principle. The decision maker, here this Licensing Board does not have available to it the description of alternatives which the Staff is required to study and develop under Section 102(2)(E). And there are very realistic and feasible alternatives, the most prominent of which is the "no action" alternative. Under this alternative, once the current spent fuel pool is full, licensee might ship spent fuel which has been stored at Big Rock Point for several years to available space at Licensee's Palisades Plant or in its soon to be completed Midland plant, both located in Michigan.

Old spent fuel is much less radioactive than spent fuel newly removed from the reactor core, see EIA Section 4.2, and hence safer to ship. Eventually, off site disposal sites may become available. The licensee also has the options of closing the Big Rock Point Plan when the spent fuel pool is full. As discussed below, p 8-9, this option is quite practical since there is no need for the electricity procedured at this tiny, antiquated plant, already twenty years old.

There is no dispute that the "no action" alternative is one which must be considered in complying with NEPA. In all of the following cases, the courts have held that the agency erred in not developing the "no action" alternative.

Swain v. Brinegar, 517 F.2d 766, 780(7th Cir. 1975).

Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 761 (E.D. Ark. 1971), affirmed 470 F.2d 289 (8th Cir. 1972), cert. den. 412 U.S. 931.

Monroe County Conservation Council v. Volpe, 472 F.2d 693, 698-99 (2d Cir. 1972).

Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

Keith v. Volpe, 352 F. Supp. 1324, 1336 (C.D. Cal. 1972), affirmed en banc 506 F.2d 696 (9th Cir. 1974), cert. den. 420 U.S. 908.

National Helium Corp. v. Morton, 361 F. Supp.78 (D. Kan. 1973)

Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 740 (D. Conn. 1972).

Rankin V. Coleman, 394 F. Supp. 647 decree modified on other grounds, 401 F. Supp. 664 (E.D.N.C. 1975)

Natural Resources Defense Council v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), decree modified on other grounds 454 F. Supp. 148 (1978).

Save the Nebraska River Assoc. v. Andrus, 483 F. Supp. 844 (D. Neb. 1979)

In other case, courts have noted in approving an EIS that consideration was given to the "No Action" alternative. For example, see:

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

Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974).

Minnesota Public Interest Research Group v. Adams, 482 F. Supp. 170 (D. Minn. 1979).

Kettle Range Conservation Group, Berglund, 480 F. Supp. 1199 (E.D. Wash. 1979).

Akers v. Nesor, 443 F. Supp. 1355, 1359 (W.D. Tenn. 1978).*

Almost all of these cases arise in the context of a review of an EIS, but the principal is the same because the EIS must encompass the requirements of Section 102(2)(E). See Environmental Defense Fund v. Corps. of Engineers, 470 F.2d 289, 296 (8th Cir. 1972), cert. den. 412 U.S. 931. There is virtually no judicial discussion of the term "unresolved conflicts concerning alternative uses of available resources", apparently because it is routine to consider alternatives, most of which involve "unresolved conflicts" over use of resources. Intervenors have found only two cases which applied the term. Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123 (4th Cir. 1974), involved the construction of the Tennessee Tombigbee waterway system. The EIS was attacked as insufficient in the discussion of alternatives and the Corps of Engineers asserted two Defenses, the second of which was that "subsection D /now E/ requires the development of alternatives only where a project involves unresolved detrimental environmental impacts". Id. at 1135 (emphasis added). The court stated:

> At the outset, we reject the second defense. Where, as here, the agency preparing the statment has been unable to assign weighted values to ecological considerations, it is hardly in a position to insist that it need not consider any alternatives since it "finds" the environmental benefits of the project it proposes out-weigh its detriments. In any event, the congressional mandate to develop alternatives would be thwarted by ending the search for other possibilities at the first proposal which establishes an ecological plus, even if such a positive value could be demonstrated with some certainty. Id.

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* See also Justice Douglas dissenting from the denial of certiorari in Scenic Hudson Preservation Conference v. Federal Power Commission, 407 U.S. 926 (1972).

In other words, the court rejected an argument that no discussion of alternatives is required if the agency finds no detriment to the environment in the proposed action. As another court stated, subsection E "instructs the agency preparing the EIS to present the reviewers with options other than the one favored by the agency." Rankin v. Coleman, 394 F. Supp. 647, 659, decree modified on other grounds, 401 F. Supp. 664 (D.N.C. 1975).

The other case mentioning the "unresolved conflicts" phrase is National Helium Corp. v. Morton 361 F. Supp. 78 (D. Kan. 1973). The case involved termination by the government of contracts with private companies to manufacture helium. The court found the discussion of alternatives inadequate. In so doing it stated that "/t/ here is no question that the termination of these contracts involves "unresolved conflicts concerning alternative uses of available rsources'." Id. at 104.

The only way to definitively determine whether there are unresolved issues is for the Staff to carry out its statutory duty and study the alternatives and report. The primary and non-delegable responsibility for complying with the requirements of NEPA rests with the federal agency, here the NRC as represented by its Staff. Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). In Calvert Cliffs Coordinating Comm. v. Atomic Energy Commission 449 F.2d 1109 (D.C. Cir. 1971), the Court of Appeals explained why the responsibility must rest on the agency:

> It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challange a staff recommendation which ignores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation. Id. at 1118-19.

Statements by counsel in a memorandum cannot substitute for a properly prepared analysis. Natural Resouces Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). Moreover subsection (E) expressly places on the agency the responsibility to study, develop and describe the alternatives. Failure to either comply with subsection (E) or to explain why compliance has not been made is the equivalent of not filing an EIS and also not filing an EIA to explain why the EIS is not needed.

In Sierra Club v. Alexander, 484 F. Supp. 455 (N.D. N.Y.), aff'd without opinion, 633 F.2d 206 (2d Cir. 1980), the court upheld the failure to file an EIS but required a statement of alternatives.

Finally, the May 15, 1981 EIA did contain a discussion of alternatives, albeit an inadeqaequate discussion. This inclusion, and the subsequent deletion without explanation, itself evidences the necessity for a discussion of alternatives.

When the staff does submit a statement under subsection (E) in response to an order of this Board, the adequacy can be tested by cross examination. At the moment, Intervenors would point out an obvious and basic defect in the discussion of alternatives in the 1981 version of the EIA. In discussing the cost of the "no action" alternative, the original EIA attributed to it the cost of closing the plant. But that cost will be borne regardless of whether the spent fuel pool is expanded or not. Eventually the plan must close. In fact, given inflation, to close the plant today means the closing cost will be considerably less than in the future.

An adequate study complying with subsection E would reveal that there is no need for the energy produced by the tiny Big Rock Point Plan, that licensee already has excess capacity and that the excess will increase when the Midland Plant goes on line. Licensee has conceded in statements on the record that Big Rock Point produces only a small fraction of all of Licensee's electricity. Intervenors have estimated the fraction at one percent; licensee has steadfastly refused to specify the amount. A proper

statement on alternatives would discuss such questions, and the claim of Licensee that Big Rock Point produces electricity at a cost below that of its other facilities. It would also consider the alternatives of shipping spent fuel to the Middland and Palisades plants.

All of this demonstrates why a statement complying with NEPA §102(2)(E) is necessary to provide decision-makers with the needed information on alternatives it needs to make a reasoned and informed decision.

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CERTIFICATE OF SERVICE

I certify that the above Proposed Findings of Fact and Conclusions of Law were served on the attached list on the 21 day of August 1982, by deposit in United States Mail, first class postage, prepaid.

Herbert Semmel

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