UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT and SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 90-1241

RESPONDENTS' REPLY TO RESPONSE
TO RESPONDENTS' MOTION TO DISMISS

On May 9, 1990, we filed a Motion to Dismiss the petition for review in the litigation captioned above insofar as the petition seeks review of agency actions which are not final agency actions.[1] On May 11, the petitioners filed their response

[1]The Motion to Dismiss was pages 15-17 of our Response to the petitioners' May 7, 1990 Emergency Motion for a stay of certain Commission actions pending the Court's review of those actions.

A grant of our Motion to Dismiss would not dispose of this litigation entirely. The Petitioners also seek review of (1) an Order which prohibits the Long Island Lighting Company (LILCO) from placing nuclear fuel into the Shoreham reactor without prior approval from the NRC, and (2) an exemption which permits LILCO to reduce the amount of onsite property insurance it is required to carry. See Petition for Review at 1-2. Both of these actions are final and subject to judicial review.

to our motion.[2] Below, we reply to their arguments that the actions in question are final, and we argue that even if the agency has taken final action denying the Petitioners' requests to the agency for enforcement action, the denial is not judicially reviewable. However, we also state below that if certain of the actions in question become final for purposes of judicial review in the near future, we will not oppose a motion by the Petitioners to amend their petition for review to include those actions.

1. NRC Staff Papers To The Commissioners And Proposed Amendments To Licenses Are Not Final Agency Action And Therefore Are Not Judicially Reviewable.

Under the "Hobbs Act", only final agency actions made reviewable by section 189b of the Atomic Energy Act, 42 U.S.C. 2239b, are judicially reviewable. See 28 U.S.C. 2342(4). The Petitioners seek review of, among other things, two proposed amendments to the license which LILCO holds to operate Shoreham, and one NRC staff paper submitted to the Commission, SECY-90-84, "Shoreham Nuclear Power Station - Status and Developments", March 12, 1990. See Petition for Review at 1.[3] In our Motion to

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[2]Their Response was combined with their Reply to our Response to their Emergency Motion for a stay.

[3]One of the amendments would permit LILCO to cease its offsite emergency preparedness activities. See 55 Fed. Reg. 12076, 12077, col. 1 (March 30, 1990) (Attachment E to the Petition for Review). The other would permit LILCO to reduce its security force. See 55 Fed. Reg. 10540, col. 2 (March 21, 1990) (Attachment D to the Petition for Review). Both proposed

(Footnote Continued)

Dismiss, we argued that the proposed amendments were simply that -- proposed -- and that no SECY paper is ever final agency action, for the simple reason that it at most proposes final agency action. We concluded that these documents were therefore not judicially reviewable. See Respondents' Motion to Dismiss at 15-17. In their Response, the Petitioners argue that a Commission vote has made SECY-90-84 final and that the proposed amendments are final because no "further non-ministerial action is required before the ... amendments become final." Petitioners' Response at 6-7. The Petitioners are wrong on both counts.

First, the Petitioners ignore the fact that, as we said in our Motion, the Commission voted not on the SECY paper but on two recommendations made at the end of that SECY paper. Motion at 16. By that vote, the SECY paper did not become final, and neither did one of the recommended actions, which was simply to publish a proposed amendment. Only the Confirmatory Order the staff attached to the paper became final by the Commission's vote. The Petitioners now seek review of that Confirmatory Order, Petition at 1, but review of the Order does not entail review of the SECY paper, which only identifies the Order and

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(Footnote Continued)
amendments are predicated largely on the fact that there is no fuel in the reactor.

The Petitioners are also seeking judicial review of a second "SECY" paper, by way of a May 11, 1990 Motion to amend their original petition in this litigation. We will be responding to that motion in a separate pleading.

says that it is attached. See SECY-90-84 (Attachment A to Petition for Review) at 4. Compare this Court's similar treatment of another SECY paper in Public Citizen v. NRC, D.C. Cir. No. 89-1017, slip opinion at 12 n.4 (April 17, 1990).

Second, it is simply false that no further non-ministerial action is required before the proposed amendments at issue here become final. Indeed, as we shall show, the Petitioners have themselves taken action which assures that the proposed amendments cannot yet become final.

As the Federal Register notices announcing these proposed amendments make abundantly clear, the agency is proposing to make them effective pending any hearing on the basis of a proposed finding that they involve "no significant hazards considerations". 55 Fed. Reg. 10528, col. 1 (March 21, 1990) (Attachment D to Petition for Review). The notices invite comment on the proposed finding and commit the agency to a final determination on that issue if a hearing is requested. Id. at 10529, col. 1. Such a determination clearly is not merely ministerial.

The Petitioners have requested hearings on both amendments. Thus by the terms of the notices, before the proposed amendments can become effective, the Commission must make final determinations that they involve no significant hazards considerations. Thus, by the simple act of asking for hearings, the Petitioners have seen to it that, contrary to the position they take in their Response, further non-ministerial actions -- namely, "no significant hazards considerations"

determinations -- are required before the amendments can become effective. Given these facts, none of what the Petitioners call their "extensive authority on the doctrine of finality", see Response at 6, can make the proposed amendments final.

However, as is clear from the notices proposing these amendments, if the agency makes final determinations that the amendments involve no significant hazards considerations, they may become effective in the near future, probably well in advance of the briefing in this litigation. Should the proposed amendments become effective in the near future, the Respondents will not oppose a motion by the Petitioners to amend their petition for review to include these amendments.

2. Even If The Agency Has Taken Final Action Denying Petitioners' Requests For Enforcement Against LILCO, Such Action Is Presumptively Unreviewable, And Petitioners Have Not Overcome That Presumption.

The Petitioners also seek review of what they regard as final agency action denying their requests to the agency for enforcement action. They argue that several actions the NRC has taken amount to a de facto final denial of their requests for enforcement action under 10 C.F.R. 2.206. See Petition at 2. Some actions the agency has taken may indeed have resolved de facto some of the issues raised by the Petitioners in their 2.206 requests. Nonetheless, the agency has not issued a final response to the Petitioners on those issues, and, as we argued in our Motion to Dismiss, not all the issues the Petitioners raised in their 2.206 requests have been resolved even de facto. See Respondents' May 9, 1990 Motion to Dismiss at 17 n.14. Moreover,

even assuming arguendo that the agency has finally denied the Petitioners' requests, the denial still is not judicially reviewable.

Three courts of appeals, including, most recently, this Court, have held that, under the Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985), final agency denials of requests for enforcement action under 10 C.F.R. 2.206 are presumptively unreviewable. See Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C. Cir. 1989); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989); and Massachusetts Public Interest Research Group v. NRC, 852 F.2d 9 (1st Cir. 1988) (MASSPIRG). These cases establish that NRC denials of requests for enforcement action under 10 C.F.R. 2.206 are presumptively the kind of enforcement decisions which, when exercised by prosecutors, have long been regarded as discretionary. Under these cases, the presumption of unreviewability can be overcome only by a showing that there is law which the court can apply to judge whether the agency has properly declined to take the requested enforcement action. See Safe Energy Coalition, 866 F.2d at 1477-78.

The Petitioners have made no such showing here. They claim first that law to apply is to be found in NRC regulations on enforcement, in particular in the regulations which set forth the procedures for imposing requirements by Order, taking action on licenses, or imposing civil penalties (10 C.F.R. Part 2, Subpart B), and in the Commission's Policy Statement on Enforcement Actions (10 C.F.R. Part 2, Appendix C). See

Petitioners' Response at 8-9, citing Petitioners' May 7, 1990 Memorandum in Support of Emergency Motion, at 5-8. However, the court in MASSPIRG rejected the claim that Subpart B overcame the presumption of unreviewability, see 852 F.2d at 16-17, and both the MASSPIRG court and this Court in Safe Energy ruled similarly concerning agency policy statements, in particular the NRC Policy Statement on Enforcement Actions. See MASSPIRG, 852 F.2d at 17-18, and Safe Energy, 866 F.2d at 1479-80.

The Petitioners claim second that 10 C.F.R. 51.101(a)(1) of the Commission's NEPA regulations provides law to apply to denials of requests for enforcement action. Petitioners' Memorandum in Support of Emergency Motion at 7. This section says, in pertinent part, that until the Commission has issued the record of decision on a proposed action which requires the preparation of an environmental impact statement (EIS), the Commission will take no action concerning the proposal which would limit the choice among reasonable alternatives to be considered in an environmental review. See 10 C.F.R. 51.101(a)(1). The Petitioners' claim regarding section 51.101(a)(1) fails for three reasons.

First, no EIS is required for the denial of a section 2.206 request for enforcement action. Compare 40 C.F.R. 1508.18(a) (judicial or administrative civil or criminal enforcement actions are not "major federal actions" requiring preparation of EIS).

Second, section 51.101(a)(1) is not triggered by anything which has happened concerning the Shoreham plant,[4] and even if this section were triggered, it would not be applicable to the denial of the Petitioners' request for enforcement action.

Third, the Petitioners mischaracterize NEPA and its relation to the Atomic Energy Act of 1954 (AEA), the NRC's organic statute. Section 234 of the AEA, 42 U.S.C. 2282, gives the Commission authority to enforce the standards of the AEA, but there is nothing in NEPA itself to enforce against licensees. NEPA places burdens on federal agencies, not on private parties. Moreover, those burdens are strictly procedural. It is well-established that NEPA imposes no substantive standards on federal agencies at all. See, e.g., Robertson v. Methow Valley Citizens Council, ___ U.S. ___, 109 Sup. Ct. 1835, 1846-1847 (1989), and Stryker's Bay Neighborhood Council V. Karlen, 444

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[4]There is as yet no proposed action which would trigger this regulation. It is undisputed that no one has filed a formal application to decommission the Shoreham nuclear power plant. The NRC is far from approving the decommissioning of Shoreham. For example, the application to decommission would be made by the Long Island Power Authority, not LILCO, and before the Authority can apply, the NRC must approve a transfer of ownership of Shoreham from LILCO to the Authority (no application for approval of a transfer has been filed as yet). Nor does there exist a de facto proposal to decommission Shoreham now before the NRC. As we have recounted in our Motion to Dismiss and Response to Emergency Motion for Stay, the NRC has adopted a "middle ground" approach to the impending decommissioning of the Shoreham plant. While avoiding imposing on LILCO the very considerable expense of keeping Shoreham fully ready for full power operation, this approach aims to assure that LILCO cannot take any action which would prejudice considerations of alternatives in a NEPA review of an application to decommission Shoreham. See Motion to Dismiss at 4-7.

U.S. 223 (1980). In short, NEPA cannot and does not require the NRC to grant a petition for enforcement action against a private licensee. Put in the context of reviewability, NEPA does not establish any standards that might make denials of section 2.206 petitions judicially reviewable. Compare Arnow, 868 F.2d at 235 (cited regulations merely set forth requirements for licensee but provide no guidelines for agency to follow in exercising its enforcement powers that reviewing court could look to in adjudicating NRC's decision not to take enforcement action).

The Petitioners do not seek the sort of procedural relief NEPA contemplates, but demand that the NRC require the licensee to maintain the plant and staff in a condition suitable for full power operation. Thus they seek precisely the sort of judicial oversight of NRC enforcement discretion that this Court's Safe Energy decision forbids.

Moreover, the Petitioners' approach to NEPA would emasculate the holding in Safe Energy and other cases that denials of section 2.206 petitions are presumptively unreviewable, because all a petitioner under 2.206 would have to do to overcome the presumption would be to couch the 2.206 petition in terms of NEPA.[5]

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[5]As the recent cases on reviewability of denials of section 2.206 petitions hold, such a denial might be reviewable where the agency had "consciously and expressly adoped a general policy [of non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities." See, e.g., Safe Energy, 866 F.2d at 1477, quoting Chaney, 470 U.S. at 833 n.4. The

(Footnote Continued)

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed insofar as it seeks judicial review of actions which have not yet become final agency actions.

Respectfully submitted,

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(Footnote Continued)
Petitioners predictably accuse of the NRC of "total abdication" of its responsibilities under both NEPA and the Atomic Energy Act, see Petitioners' May 7, 1990 Memorandum at 6, in particular for "refus[ing] to demand compliance with regulations where they do apply." Id. The Petitioners fail to make clear, however, what regulations the NRC is refusing to enforce against LILCO. The Petitioners claim, for example, that the Confirmatory Order they seek review of finds violations of license conditions and regulations, Petitioners' Memorandum at 8, but they cite to no such findings, and the Order contains none.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Respondents' Reply to Response to Respondents' Motion to Dismiss" were served on the following parties by first class mail this 16th day of May 1990:

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DECOMMISSIONING PRESENTATION

for J. Partlow

prepared by G. KALMAN, ext 2136

B/4

DECOMMISSIONING
SUMMARY OF PROPOSED DISCUSSIONS

Decommissioning of power reactors has received an inordinate amount of attention during the past year. The attention was generated primarily by the announcement by the Long Island Lighting Company of its intent to terminate operations at the Shoreham Nuclear Power Station and to transfer the plant to a state agency for decommissioning. Reaction from nuclear power proponents, particularly the Department of Energy, has caused the Nuclear Regulatory Commission (NRC) to closely examine decommissioning regulations in anticipation of legal challenges to the decommissioning process.

Even though decommissioning regulations were upgraded in 1988, their implementation has not been tested and the recent scrutiny has uncovered an abundance of regulatory voids and ambiguities. In addition to Shoreham, other plants effected by these issues include Rancho Seco, Fort St. Vrain, and to some extent Three Mile Island Unit 2.

The decommissioning discussion will focus on two major topic areas:

(1) Decommissioning Regulations
(2) Current Decommissioning Issues.

Decommissioning Regulations

The decommissioning process for all power reactor licensees will begin this summer. By July 26, 1990, all licensees are required to submit a financial plan that describes how to raise the funds (approximately $ 100 million) for decommissioning. Five years in advance of the projected permanent plant closure, licensees are required to submit a preliminary decommissioning plan. Within two years following permanent closure, a decommissioning plan describing a specific decommissioning alternative is required. Because there is no offsite repository for spent fuel, decommissioning for most licensees is limited to the SAFSTOR option. SAFSTOR is the decommissioning process which permits licensees to defuel the reactor and delay site decontamination for 50 or more years or until an offsite fuel repository is available.

Regulations addressing license termination were revised in 1988 and promulgated in the June 27, 1988 Federal Register. In August 1988 a Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities, NUREG-0586, was issued. These publications provide considerable guidance for plant decommissioning. However, specific guidance has not been provided for questions such as reduction of operationally oriented regulatory requirements after a plant is defueled, modification of the 50.59 evaluation to recognize the defueled plant condition, and the extent to which the National

Environmental Protection Act (NEPA) is applicable to the decommissioning related environmental evaluation.

Other more general issues are also left unresolved. What is an acceptable residual radioactivity for releasing the site for unrestricted use? What material may be released to commercial land fills vs. shallow land burial? The closure of the three major power stations has focused the Agency's attention on these issues and answers to the questions are being developed.

Current Decommissioning Issues

The unexpected licensee decisions to prematurely decommission Shoreham, Rancho Seco, and Fort ST. Vrain have brought to center stage not only the existing regulatory voids and ambiguities but also initiated a controversial decommissioning process without much forethought. Regulation writers envisioned a gradual approach to decommissioning with a preliminary decommissioning plan five years before plant shutdown. The necessity to develop regulatory criteria to regulate events that, in many cases, are in progress, has made regulators uncomfortable. The considerable pressure exerted from external interest groups has made the process more difficult for both the licensees and regulators.

The Department of Energy and other organizations have challenged the proposed decommissioning of Shoreham and Rancho Seco on the grounds that the facilities are national energy resources and the premature decommissioning would decrease the amount of available electrical energy in the nation. More fossil fueled power stations would be called into service to produce electrical power that could have been produced by nuclear means. In the process, the nation's environment and resources would suffer. Opponents of the plant closures cite the National Environmental Protection Act (NEPA) to require an evaluation of the alternatives to plant closure before proceeding with the decommissionings. The U.S. Secretary of Energy, James Watkins, personally requested the Commission not to allow the equipment at Shoreham to degrade until the NEPA evaluation was completed.

The NRC legal staff is reviewing the NEPA to determine its applicability to decommissioning. Based on the extent of the existing controversy, it is anticipated that no matter how NRC deals with the NEPA issue, the decision will be challenged in the courts.

VIEW GRAPHS

for DECOMMISSIONING PRESENTATION

NRR

TITLE SUMMARY OF PERTINENT DECOMM. REG.
SPEAKER JAMES G. PARTLOW
DATE 5/2/90 PAGE NO. 0

SUMMARY OF PERTINENT DECOMMISSIONING REGULATIONS

BY

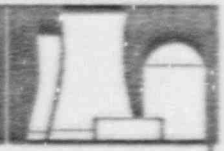
JAMES G. PARTLOW

ASSOCIATE DIRECTOR FOR PROJECTS

Regulatory Information Conference
Washington, D. C.
May 2, 1990

NRR

TITLE SUMMARY OF PERTINENT DECOM. REG.
SPEAKER JAMES G. PARTLOW
DATE 5/2/90 PAGE NO. 1



10 CFR 50.75, "REPORTING AND RECORD KEEPING FOR DECOMMISSIONING PLANNING"

- ESTABLISH ~$100M DECOM. FUND
- 5 YRS PRIOR TO END OF OPS, SUBMIT PRELIM. DECOM. PLAN.

ADDRESS:

(1) DECOMMISSIONING ALTERNATIVES

(2) MAJOR TECH. ACTIONS

(3) HL & LL WASTE SITUATION

(4) RESIDUAL ACTIVITY CRITERIA

(5) SITE SPECIFIC FACTORS

10 CFR 50.82, "APPLICATION FOR TERMINATION OF LICENSE"

- APPLY TO DECOMMISSION WITHIN 2 YRS
- DECOMMISSIONING PLAN INCLUDES:
  - (1) CHOICE OF ALTERNATIVES
  - (2) PLAN TO PROTECT HEALTH & SAFETY
  - (3) FINAL RADIATION SURVEY CRITERIA
  - (4) UPDATED COST ESTIMATE
  - (5) TS, QA, & SECURITY PLANS

NRR

TITLE SUMMARY OF PERTINENT DECOM. REG.
SPEAKER JAMES G. PARTLOW
DATE 5/2/90 PAGE NO. 3

FEDERAL REGISTER DATED 6/27/88 - "DECOM. RULE SUPPLEMENTARY INFO."

- NORMALLY, AMENDED PART 50 LICENSE AUTHORIZING ~~POLICY~~ POL WILL BE ISSUED TO CONFIRM NONOP. STATUS AND TO REDUCE SOME REQUIREMENTS

"NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)"

- MAJOR FEDERAL ACTIONS MUST ADDRESS:

  (1) E.I. OF PROPOSED ACTION

  (2) ALTERNATIVES TO PROPOSED ACTION

  (3) IRRETRIEVABLE COMMITMENT OF RESOURCES

  (4) WORLDWIDE AND LONG-RANGE CHARACTER OF E.I.

10 CFR 51.53, "SUPPLEMENT TO ENVIRONMENTAL REPORT"

- ENVIRONMENTAL REPORT REQUIRED WITH:

  (1) DECOMMISSIONING APPLICATION

  (2) AMENDMENT TO STORE FUEL AFTER O.L. EXPIRATION

- ENVIRONMENTAL REPORT TO ADDRESS ONLY IMPACT OF SPENT FUEL STORAGE, UNLESS OTHERWISE REQUIRED BY THE COMMISSION.

E711

SUMMARY OF PERTINENT DECOMMISSIONING REGULATIONS

* 10 CFR 50.82, APPLICATION FOR TERMINATION OF LICENSE
  - APPLY TO DECOMMISSION WITHIN 2 YRS
  - DECOMMISSIONING PLAN INCLUDES:
    (1) CHOICE OF ALTERNATIVES
    (2) PLAN TO PROTECT HEALTH & SAFETY
    (3) FINAL RADIATION SURVEY CRITERIA
    (4) UPDATED COST ESTIMATE
    (5) TS, QA, & SECURITY PLANS

BRIDGE NO. 492-4421

MAY 31, 1990, 1:00 PM EDT

MEETING TO DISCUSS PROPOSED DECOMMISSIONING OF SHOREHAM, RANCHO SECO, AND FORT ST. VRAIN

AGENDA

* STATUS OF ACTION ITEMS

* REPORTS FROM REGIONS I, IV, AND V
  1. INSPECTION PROGRAM
     a. TYPE INSPECTIONS
     b. FREQUENCY OF INSPECTIONS
  2. ENFORCEMENT CRITERIA
     a. EXAMPLES OF ENFORCEMENT ACTIONS
  3. PLANT CONDITIONS/LICENSEE ATTITUDES

Shoreham decom plan - 2d qtr 91

License transfer in next 2 mos.

C/1

ACTION ITEMS

- DECOMMISSIONING POLICY PAPER (NEPA)...TO EDO WEEK OF 6/20
- STAFFING CRITERIA/ENFORCEMENT OPTIONS... IN CONCURRENCE
- 2.206 PETITIONS ON SHOREHAM... NEED NEPA DECISION
- FORT ST. VRAIN POL... RESOLVE FUEL ISSUE
- SHOREHAM ULTIMATE DISPOSITION DOCUMENT... ACCEPTABLE ?
- SALP REQUIREMENTS... NRR LETTER TO REGIONS
- PSC DISASSEMBLY STARTS 6/22... RESPOND TO 5/22 LETTER