Long Island Power Authority

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Richard M. Kessel
Chairman

'90 MAY 16 P3:59

May 16, 1990

Chairman Kenneth M. Carr
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

50-322

Re: Enclosed NEPA Memorandum

Dear Mr. Chairman:

As you are aware, the Long Island Power Authority (LIPA) has entered into binding agreements with the Long Island Lighting Company (LILCO) regarding the Shoreham Nuclear Power Station (Shoreham). Under the agreements, LILCO will not operate Shoreham and, after approval from the Nuclear Regulatory Commission (NRC), will transfer the plant to LIPA. LIPA will decommission Shoreham after receipt of NRC approval.

LIPA has a substantial interest in decisions by the NRC formulating policy regarding plants such as Shoreham that will be decommissioned prior to the end of their operating license terms. LIPA is aware that one matter that has been raised in this regard concerns the application of the National Environmental Policy Act (NEPA) to licensing activities related to such plants. It has been suggested that NEPA requires the NRC, in licensing activities involving plants which have been shut down, (a) to consider as an alternative operation of the plants as nuclear plants, (b) to assess the environmental impacts of constructing and operating fossil-fuel plants in lieu of the nuclear plants, and (c) to defer all licensing activities related to the plants pending NEPA review of proposed decommissioning plans.

LIPA believes that there is no support in either the Atomic Energy Act or NEPA for any of these positions. To assist the Commission in its decisionmaking on these matters, attached is a memorandum of law prepared by LIPA, in conjunction with its Washington, D.C. counsel from O'Melveny & Myers and Bishop, Cook, Purcell & Reynolds.

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By copy of this letter, LIPA is also providing a copy of this memorandum to NRC Staff counsel and the other individuals identified below.

Sincerely,

Richard M. Kassel

Enclosure

cc: Commissioner James R. Curtiss
Commissioner Forrest J. Remick
Commissioner Thomas M. Roberts
Commissioner Kenneth C. Rogers
Joseph F. Scinto, Esq.
James P. McGranery, Jr., Esq.
Donald P. Irwin, Esq.

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M E M O R A N D U M

May 16, 1990

NEPA ISSUES RELATED TO SHOREHAM CLOSURE AND DECOMMISSIONING

I. INTRODUCTION

The Long Island Lighting Company (LILCO) presently holds a Facility Operating License issued by the Nuclear Regulatory Commission (NRC) for the Shoreham Nuclear Power Station (Shoreham). However, pursuant to agreements described below, LILCO will not operate the Shoreham plant and, after NRC approval, will transfer the plant to the Long Island Power Authority (LIPA). Like LILCO, LIPA will not operate Shoreham as a nuclear power plant.[1] Rather, after receipt of NRC approval, LIPA will decommission Shoreham in accordance with an approved decommissioning plan. In the period prior to the transfer of Shoreham to LIPA, LILCO has defueled the plant and has applied for a Defueled Operating License.[2]

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[1] In discussing the operation or non-operation of Shoreham, this memorandum refers solely to operation or non-operation as a nuclear power plant. Consistent with its statutory obligations, LIPA is currently examining the possible conversion of Shoreham to a natural-gas fired power plant or other non-nuclear use.

[2] LILCO also has sought various other license amendments in the wake of its decision and agreement not to operate Shoreham. Discussion herein regarding the application for a Defueled Operating License would be equally applicable to LILCO's other pending license amendment applications.

NRC actions are subject to the procedural requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. It has been suggested that NEPA requires the NRC, in licensing activities involving Shoreham, to consider the alternative of Shoreham operation, to consider the environmental impacts of constructing and operating new power plants to replace Shoreham, and to defer all licensing activities pending NEPA review of a proposed decommissioning plan. LIPA submits this memorandum to demonstrate that there is no support in the Atomic Energy Act, 42 U.S.C. § 2011 et seq., or NEPA for any of these positions.

II. SUMMARY OF ISSUES AND ANSWERS

A. Is the decision not to operate Shoreham subject to NEPA review by the NRC?

No. NEPA applies only to "federal actions." The decision not to operate Shoreham was not a federal action. Rather, that decision was made by the plant owner (LILCO) and New York State government authorities, and no federal approval was required. Accordingly, there is no NEPA authority to review the decision not to operate Shoreham. Instead, the NRC's NEPA authority is limited to reviewing the environmental issues intrinsic to the specific applications for license amendments which follow the non-federal decision not to operate the plant ("follow-on applications") -- e.g., applica-

tions for a Defueled Operating License, for license transfer, or for approval of a decommissioning plan.

B. Is operation of Shoreham a cognizable "alternative" for purposes of any NEPA review to be conducted in connection with the follow-on applications?

No, for two independent reasons. First, NEPA empowers the NRC to consider alternatives only to actions proposed for its approval. As discussed above, the decision not to operate Shoreham was made by non-federal decisionmakers. Alternatives to that decision are outside the scope of NEPA review of follow-on applications. The NRC's NEPA authority to consider alternatives in the context of such applications is confined to reasonable alternative means to accomplish the objective of the application in question. Operation of Shoreham is not a reasonable alternative means to achieve the objectives of follow-on applications for a Defueled Operating License, for license transfer, or for approval of a decommissioning plan. Second, the decision not to operate Shoreham reflects the considered policy of the State of New York and is embodied in binding agreements among LILCO, the State, and LIPA. Both the courts and the NRC have consistently refused to consider supposed alternatives that could come to fruition only after substantial legislative or administrative changes.

C. Are the effects of possible replacement generating facilities, built in lieu of Shoreham, within the scope of any NEPA review to be conducted in connection with the follow-on applications?

No, for two independent reasons. First, NEPA empowers the NRC to consider the environmental impacts only of actions proposed for its approval. Here, any need for replacement plants would be caused by the non-federal decision not to operate Shoreham, not by any NRC decision that will be made as to follow-on applications for a Defueled Operating License, for license transfer, or for approval of a decommissioning plan. Second, NEPA does not require assessment of hypothetical or speculative impacts. The direct and indirect effects of any replacement facilities can only be considered in a meaningful way (and will in fact be considered) in the context of future proposals for projects that would cause those impacts.

D. Under NEPA precedents regarding "segmentation," must all NRC action as to the follow-on applications await NEPA review of a decommissioning plan?

No. The "rule against segmentation" is intended to ensure that interrelated "federal actions," the overall effect of which is environmentally significant, not be fractionalized into less significant actions to avoid NEPA review. As discussed above, environmental alternatives and impacts related to the non-federal decision not to operate Shoreham

are outside the scope of NEPA review of follow-on applications. Thus, NEPA review of such applications will not be improperly segmented if those applications are reviewed separately and sequentially. Taken in isolation or collectively, the follow-on licensing activities that have been or will be brought to the NRC for approval -- the "federal action" relevant under NEPA -- are not environmentally significant. Each of the follow-on applications that will ripen prior to NEPA review of decommissioning -- the Defueled Operating License application and a license transfer application -- involves segregable issues and has independent utility. Moreover, any NRC approvals on such matters will not foreclose in any way the NRC's later NEPA review of LIPA's decommissioning plan. It is thus entirely consistent with NEPA precedents for the NRC to review such matters on an independent basis.

III. BACKGROUND

A. The Decision Not to Operate Shoreham

The Shoreham facility was a source of controversy and litigation in New York State for many years. Ultimately, the New York State Legislature in 1986 enacted the Long Island Power Authority Act.[3] The Legislature found that rising

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[3] New York Public Authorities Law § 1020 et seq. (McKinney Supp. 1990).

electricity costs on Long Island and the related controversy over Shoreham were having serious economic impacts on the State, Long Island, and its residents and that an end to the controversy was necessary. The Legislature thus created LIPA, a corporate municipal instrumentality and political subdivision of the State, and granted it authority to acquire all or a portion of LILCO's assets or securities. In the event of a LIPA acquisition of Shoreham, the LIPA Act prohibits LIPA from operating Shoreham as a nuclear power facility and mandates that LIPA close and decommission the plant. N.Y. Pub. Auth. Law §§ 1020-h(9), 1020-t.

After extensive negotiations in 1988 and 1989, the controversy over Shoreham was settled by an agreement between the State and LILCO dated February 28, 1989. The 1989 Settlement Agreement has now become fully effective and legally binding. It specifically provides that LILCO "will not operate Shoreham pursuant to any authorization to operate Shoreham that may or has been granted by the Nuclear Regulatory Commission" and, upon NRC approval, will transfer Shoreham to LIPA.[4] LILCO's obligation not to operate Shoreham was further confirmed in a subsequent Asset Transfer Agreement between LILCO and LIPA.[5] In Opinion No. 89-9, issued April

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[4] Settlement Agreement-LILCO Issues, February 28, 1989, at 2.

[5] The Amended and Restated Asset Transfer Agreement dated April 14, 1989 also commits LILCO to work cooperatively with LIPA in connection with the transfer of Shoreham to LIPA (continued...)

13, 1989, the Public Service Commission of New York State approved the 1989 Settlement Agreement and the Asset Transfer Agreement. Re Long Island Lighting Co., 101 P.U.R. 4th 81 (1989).

B. Anticipated Licensing Actions

LILCO has permanently ceased to operate Shoreham, pursuant to binding agreements entered into with the State and LIPA. LILCO and LIPA are now obliged to work together on follow-on matters, looking ultimately to radiological decontamination and termination of Shoreham's NRC license. Without committing to all specific steps that may be taken, it can be assumed that LILCO and LIPA will seek several separate NRC approvals subsequent to the decision not to operate the plant. LILCO, for example, has already sought amendment of Shoreham's license to a defueled operating status, such that LILCO is authorized to "possess, use, but not operate" Shoreham.[6] LILCO and LIPA anticipate submitting an application for authorization to transfer such Defueled Operating License, upon or after issuance, to LIPA. In accordance with the NRC's decommissioning rule (10 C.F.R. § 50.82), LIPA will also

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[5](...continued)
and in connection with the plant's decommissioning. In addition, LILCO is obliged to pay for all Shoreham-related costs incurred by LIPA in connection with the license transfer, maintenance, and decommissioning of Shoreham.

[6] SNRC-1664, Letter from W.E. Steiger, Jr., LILCO, to NRC (Document Control Desk), dated January 5, 1990.

submit for NRC approval a decommissioning plan, along with an application to terminate the Shoreham license.[7] Part IV below discusses the application of NEPA to these licensing actions.

IV. DISCUSSION

Section 102 of NEPA, 42 U.S.C. § 4332, establishes the basic requirement that federal agencies prepare an environmental impact statement (EIS) for "major federal actions," including licensing decisions, that "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Several issues have been raised concerning the application of NEPA to follow-on licensing activity involving Shoreham: (1) whether the NRC's environmental review may or must consider the supposed "alternative" of operating Shoreham notwithstanding the 1989 Settlement Agreement and the Asset Transfer Agreement; (2) whether such review may or must evaluate the environmental impacts of alternative generating facilities that might eventually be built in lieu of Shoreham; and (3) whether the NRC may or must withhold any follow-on licensing approvals until the agency has completed environmental review of a decommissioning plan. These specific issues will be addressed separately in Sections B, C, and D below. Before turning to those separate questions, however, Section

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[7] LIPA already has prepared and submitted through LILCO a Decommissioning Report concerning Shoreham. See SNRC-1713, Letter from W.E. Steiger, Jr., LILCO to NRC (Document Control Desk), dated April 16, 1990.

A first considers certain fundamental NEPA principles that bear on all three of the above-referenced issues.

A. The Decision Not to Operate Shoreham Involved No "Federal Action" And Hence Can Occasion No NEPA Activity.

The NEPA authority and duties of federal agencies attach only to "federal actions" proposed to or by the agency. 42 U.S.C. § 4332(2)(C). Where "federal action" is lacking, there is no NEPA authority. See, e.g., Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245-46 (7th Cir. 1976). This fundamental principle is of great importance here because there has not been and will not be any "federal action" associated with the decision not to operate Shoreham. Hence, the NRC has no NEPA authority to study alternatives or impacts related to that decision. Instead, the agency is empowered to consider only alternatives to, and impacts of, specific follow-on applications brought to the NRC for approval.

The decision not to operate Shoreham was not a federal decision. It was made by the plant owner and New York State government authorities. Moreover, the parties to that non-federal decision were not required to obtain federal approval of the decision not to operate Shoreham. In this connection, it is clear that, under the Atomic Energy Act, the NRC is without authority to review or reverse a no-operation decision. In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190,

218-19 (1983), for example, the Supreme Court stated that the NRC "does not and could not compel a utility to develop a nuclear plant." Plainly, if the NRC cannot compel construction, the agency likewise cannot compel operation.[8] The NRC has acknowledged its inability to override a licensee's no-operation decision, stating that "[t]he decision as to whether a [plant will be] shutdown . . . is, of course, the licensee's." 50 Fed. Reg. 5600, 5605 (1985); see also 49 Fed. Reg. 9352, 9356 (1984).

Since the decision not to operate Shoreham was not a federal action, that decision triggers no NEPA authority or obligations. See Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272-73 (8th Cir.), cert. denied, 449 U.S. 836 (1980). NEPA does not make federal agencies into environmental ombudsmen. It is a procedural statute that applies if, but only if, a substantive statute defines a "federal action," including licensing activities, having environmental impacts. See Natural Resources Defense Council, Inc. (NRDC) v. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987). Moreover, NEPA "as a procedural device, does not work a broadening of the agency's substantive powers." Id. Consistent with these principles, the courts have held that NEPA's applicability to downstream

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[8] The only exception would arise if Congress had declared a state of war or national emergency and the NRC found that the common defense and security required issuance of an order requiring a licensee to operate a nuclear plant. 42 U.S.C. § 2138; see also id. §§ 2236, 2238 (in defined circumstances and upon paying compensation, the NRC itself may operate plant for which the license has been revoked).

"federal actions" (here the follow-on licensing activities at Shoreham) does not allow federal agency NEPA review of upstream non-federal decisions (here the decision not to operate Shoreham).

Particularly relevant here are the decisions in NRDC v. EPA and Edwards v. First Bank of Dundee. In NRDC v. EPA, the EPA, citing its NEPA authority over applications for discharge permits under the Clean Water Act, sought to ban construction of industrial plants needing discharge permits for operation, pending an environmental review of alternatives to, and impacts of, construction of such plants. In that case, the upstream non-federal activity was construction of an industrial plant; the downstream "federal action" was the EPA's jurisdiction over discharge permits needed to operate the plant. The D.C. Circuit held squarely that NEPA's application to the downstream "federal action" concerning discharge permits did not authorize the EPA to conduct a NEPA review of alternatives to, or impacts of, the upstream non-federal decisions concerning whether and where the plant should be built. 822 F.2d at 129 & n.25, 131 n.27.[9]

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[9] The court emphasized that NEPA review of applications for discharge permits was limited to securing environmental information on alternatives to, and effects of, the specific "proposal" which was subject to "federal action" -- that a discharge permit should issue. 822 F.2d at 129 & n.25. The court specifically held that the environmental effects of the non-federal construction decision were not effects of the discharge-permit application. Id. at 131 n.27.

Similar reasoning was followed in Edwards v. First Bank of Dundee, where it was claimed that NEPA applied to demolition of a building. There the upstream non-federal decision involved demolition of a building by a bank, and the downstream "federal action" involved statutorily required FDIC approval for the bank to relocate its headquarters in a new building to be constructed on the demolition site. Again, the court ruled that NEPA's application to the downstream "federal action" concerning relocation did not allow NEPA study of the upstream non-federal decision to demolish the existing structure. 534 F.2d at 1245-46.

The same principle applies here. Under the Atomic Energy Act, the decision not to operate Shoreham is left in non-federal hands. The applicability of NEPA to downstream NRC licensing activities does not allow the NRC to study the alternatives to, or impacts of, the upstream non-federal decision not to operate Shoreham. Rather, the NRC's authority and duties under NEPA are confined to alternatives to, and impacts of, the specific applications brought before the agency. For Shoreham, these include the applications for a Defueled Operating License, for license transfer, and for approval of a decommissioning plan. These matters are considered in further detail in Sections B and C below.

B. The Hypothetical Possibility of Operating Shoreham Is Not a Cognizable Alternative Under NEPA.

Under NEPA, an EIS must include an evaluation of "alternatives to the proposed action." 42 U.S.C. § 4332(2)-(C)(iii). The issue here is whether the NRC may or must consider operation of Shoreham as an "alternative" to issuing a Defueled Operating License, granting license transfer, or approving a decommissioning plan. Under applicable precedent, it is clear that operation of Shoreham is not a cognizable "alternative" in connection with such licensing activities.

The first reason for this conclusion arises directly from the non-federal nature of the decision not to operate Shoreham. As already discussed, the requirements for environmental study under NEPA do not extend to non-federal decisions, much less to possible alternatives to such decisions. NRDC v. EPA, 822 F.2d at 129; Edwards v. First Bank of Dundee, 534 F.2d at 1245-46. Stated otherwise, an agency's authority under NEPA is "limited to . . . securing the information pertinent" to the specific "proposals" over which it has jurisdiction. NRDC v. EPA, 822 F.2d at 129 & n.25. There will be no LILCO or LIPA "proposal" to operate Shoreham. To the contrary, LILCO and LIPA are each bound not to operate Shoreham. And operation of Shoreham is not an alternative means of effectuating applications for a Defueled Operating License, for license transfer, or for approval of a decommissioning plan. See Process Gas Consumers Group v.

Department of Agriculture, 694 F.2d 728, 769 (1981), modified on rehearing en banc, 694 F.2d 778 (D.C. Cir. 1982), cert. denied, 461 U.S. 905 (1983) ("The range of alternatives need not extend beyond th[o]se reasonably related to the purposes of the project"). Accordingly, the hypothetical possibility of Shoreham operation is not within the scope of the NRC's environmental review of follow-on applications.[10]

At most, in this context, the NRC's environmental review may need to include the alternative of "no action," as opposed to issuance of requested approvals. See, e.g., Rankin v. Coleman, 394 F. Supp. 647, 658-59 (E.D. N.C. 1975). But operation of Shoreham is not the "no action" alternative to issuing a Defueled Operating License, granting license transfer, or approving a decommissioning plan. Instead, the "no action" alternative would be to continue Shoreham indefinitely in its present shutdown condition, under the present license and under LILC ownership, with no plan for decommissioning. The NRC, however, has already rejected the notion

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[10] This point may be illustrated with reference to the NRC's review of a Shoreham decommissioning plan. Requested approval of a decommissioning plan is not tantamount to requested approval of non-operation. The proposal before the NRC will be for approval of a plan to decontaminate a nuclear plant at which operations have ceased permanently. The alternatives pertinent to the NRC's NEPA decisions when that proposal is made will include the choice between DECON, SAFSTOR, and ENTOMB. These are the same alternatives that must be considered with respect to the decommissioning of any other nuclear power plant, regardless of when in a facility's life that decommissioning will occur.

that closed plants should continue without decommissioning, and no responsible party would so propose. See § 2.4.1 of Generic Environmental Impact Statement (GEIS).[11]

A second line of analysis leads independently to the conclusion that the NRC may not consider Shoreham operation as an "alternative" to a request for a Defueled Operating License, for license transfer, or for approval of a decommissioning plan. Under NEPA precedent, the "alternatives" to be considered to proposed federal action are not unbounded. In evaluating whether alternatives have been considered adequately, the courts are guided by a "rule of reason" articulated in NRDC v. Morton, 458 F.2d 827, 834, 837-38 (D.C. Cir. 1972):

> . . . NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" . . . [that are] only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies -- making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). This rule of reason as applied to consideration of alternatives was specifically acknowledged by the NRC in its issuance of 10 C.F.R. Part 51 to implement NEPA. See 49 Fed. Reg. 9352, 9355-56 (1984).

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[11] NUREG-0586, "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (August 1988).

Under this rule of reason, agencies do not consider "'alternatives which could only be implemented after significant changes in government policy or legislation.'" City of New York v. Department of Transportation, 715 F.2d 732, 743 (2d Cir. 1983), appeal dismissed, 465 U.S. 1055 (1984). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 486 (1978) (rule of reason eliminates consideration of alternative site involving legal obstacles to construction). By force of the 1989 Settlement Agreement and the Asset Transfer Agreement, LILCO is legally bound not to operate Shoreham. Thus, operation of the plant is not even a "remote and speculative possibilit[y]." Morton, 458 F.2d at 838. The clear policy of New York State against operating Shoreham rules out consideration of that potential alternative. See City of New York, 715 F.2d at 743. The Supreme Court has stated that "[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." Vermont Yankee, 435 U.S. at 551 (emphasis added).[12]

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[12] Supporting the conclusion that the NRC is not entitled to consider Shoreham operation as an "alternative" is the NRC Staff's own prior practice with respect to the Humboldt Bay facility. The licensee in that case opted to discontinue operation of the plant and to decommission it prior to the end of its useful life. In the Draft Environmental Statement (DES) issued in April 1986 (note that this was well before the issuance of the GEIS), the Staff gave no attention to the "alternative" of restarting the plant. The Staff accepted that "[f]acility restart is not a viable alternative because the licensee has concluded that the restart of Humboldt Bay Unit 3 is economically unattractive." DES at 4-1. The Staff did not evaluate the environmental costs and benefits of a (continued...)

c. The Environmental Impacts of Replacement Generating Facilities Are Not Subject to NRC NEPA Review.

Closely related to the question of alternatives is the question whether the NRC's NEPA review of follow-on applications may or must address the environmental impacts of new generating facilities that might be built in lieu of Shoreham. The answer is clearly "no."

Again, the first reason for this conclusion flows directly from the non-federal nature of the decision not to operate Shoreham. It is that fundamental non-federal decision, not any follow-on NRC licensing actions, that would lead to any need for replacement power sources. Resolution of follow-on applications by the NRC simply will not contribute, one way or the other, to any greater or lesser impacts of hypothetical replacement power. In these circumstances, the NRC's NEPA authority and duties do not extend to the study of possible impacts of replacement power.

NEPA authority is limited to addressing questions concerning the environmental impact of the specific "proposals" brought before a federal agency (here, for example, the impacts of various alternatives for decontaminating the facility). See NRDC v. EPA, 822 F.2d at 129 & n.25; State of Alaska v. Andrus, 429 F. Supp. 958 (D. Alaska 1977), aff'd,

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[12](...continued)
restart alternative. There is no valid reason to treat the Shoreham case differently.

591 F.2d 537 (9th Cir. 1979); Save the Bay, Inc. v. Corps of Engineers, 610 F.2d 322, 326-27 (5th Cir.), cert. denied, 449 U.S. 900 (1980). The environmental effects of upstream non-federal decisions are neither direct nor indirect effects to be considered in a federal NEPA review. See NRDC v. EPA, 822 F.2d at 131 n.27 ("the environmental effects of the [non-federal] construction siting decision cannot be deemed to be either direct or indirect effects of EPA's [subsequent] issuance of a discharge permit").

There is a second and independent reason why replacement power impacts are not within the scope of any NEPA review to be conducted as to follow-on applications. Under the regulations promulgated by the Council on Environmental Quality (CEQ) to implement NEPA, indirect effects to be considered in an environmental review include only those effects which are "reasonably foreseeable." 40 C.F.R. § 1508.8(b) (1988) (emphasis added); see also State v. Andrus, 483 F. Supp. 255, 260 (D.N.D. 1980); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978) (under NEPA, "the environmental assessment of a particular proposed Federal action . . . may be confined to that action together with, inter alia, its unavoidable consequences") (emphasis in original). Such cases indicate that environmental impacts that cannot yet be described with any specificity are outside the scope of NEPA. See Sierra Club v. Marsh, 769 F.2d 868, 878 (1st Cir. 1985). The rationale for this rule of reason is that an environmental

analysis is not necessary or meaningful until a project is concretely defined.

Apart from the fact that no "federal action" will cause a need for replacement power, the possible need for and effects of replacement power on Long Island are not presently ascertainable. It cannot now be known when and in what quantities such power might be needed. Moreover, the impacts of replacement facilities will depend upon the size, type, and manner of operation of any proposed facilities, as well as the location of those facilities. In the absence of any specific proposals for replacement facilities, so many contingencies now exist that any discussion of these possible impacts would be more akin to speculation than to analysis.

Moreover, before any alternative energy production facility is constructed, a detailed environmental review will be prepared under the New York State Environmental Quality Review Act[13] and other applicable laws. This review will consider the need for the facility, the reasonable alternatives, and any adverse environmental impacts. The review will be circulated for appropriate State/local review. Therefore, the construction of an alternative energy source does not have to be analyzed now to preserve decisionmaker flexibility. In sum, the impacts of the construction of alternative power sources to replace the Shoreham nuclear plant are outside the

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[13] N.Y. Envtl. Conserv. § 8-0101 et seq. (McKinney 1984).

scope of NEPA review of follow-on matters brought before the NRC for approval.

D. NEPA Does Not Require All Licensing Actions to Await Environmental Review of a Decommissioning Plan.

The foregoing sections demonstrate that NRC NEPA review of follow-on applications cannot include consideration of alternatives to, or impacts of, the non-federal decision not to operate Shoreham. Instead, the NRC's NEPA review is to focus on the environmental information pertinent to specific applications before the agency. Assuming that NEPA review will be limited to its proper scope, it remains to be considered whether NEPA requires all follow-on licensing activities to be deferred pending environmental review of a proposed decommissioning plan. If such a course were followed, there could be considerable delay -- at great cost -- in acting upon the Defueled Operating License application, the license transfer application, or any other approval sought before completion of the NEPA review of a decommissioning plan. However, NEPA precedents and NRC practice make clear that any such delays would be entirely unwarranted.

Under NEPA, an agency may not divide up a large "federal action" into smaller parts, each individually with minimal environmental impacts, to avoid the need for environmental review of the entire federal action. This is called the "rule against segmentation." Impermissible segmentation

occurs when the agency defines a project too narrowly for purposes of appropriate environmental analyses. See City of West Chicago, Ill. v. NRC, 701 F.2d 632, 650 (7th Cir. 1983); see also Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).

But the "rule against segmentation for EIS purposes is not an imperative to be applied in every case." Sierra Club v. Callaway, 499 F.2d 982, 987 (5th Cir. 1974). To the contrary, the courts have recognized that it is entirely proper for an agency to proceed with one step in a series of related steps if the first step is segregable, has independent utility, and does not foreclose the opportunity to consider alternatives relevant to the steps to follow. See Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981). Consistent with these principles, the NRC and other federal agencies regularly consider the environmental impacts of related agency actions separately and sequentially. Specifically, where each independent approval will not result in "any irreversible or irretrievable commitments to the remaining segments," agencies do not prepare a complete EIS -- or a more abbreviated environmental assessment (EA) -- for all segments as a prerequisite to the first. U.S. Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982).[16] In the case of Shoreham, appropriate

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[16] Accord Duke Power Co. (Amendment to SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, (continued...)

environmental review of the decommissioning plan would not be prejudiced by earlier issuance of a Defueled Operating License or approval of license transfer.

The pending application for a Defueled Operating License and the anticipated license transfer application are segregable from an eventual application for approval of a decommissioning plan to decontaminate the plant. There also is indisputable independent utility to such applications (e.g., to reduce requirements to save money, to effect a transfer of control), apart from authorization to decommission pursuant to an approved plan. Moreover, issuance of a Defueled Operating License or grant of a license transfer application will leave the NRC unfettered in later evaluating the technical merits of a decommissioning plan.[15] It also bears noting that the NRC has already expressed the view that action on a possession-only license should not be delayed

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[14](...continued)
313 (1981) (NRC Staff correctly confined its environmental review to spent fuel shipments presently before the agency for approval; the Staff did not need to address immediately the environmental consequences of a broader "Cascade Plan" for shipments).

[15] The alternatives and consequences related to physical decontamination of Shoreham are not in danger of escaping review or becoming foreclosed by earlier action on a Defueled Operating License or a license transfer. The decommissioning plan will identify LIPA's choice from among the NRC-approved decommissioning alternatives and will provide LIPA's plans and procedures for carrying out the selected alternative. In addition, supplemental environmental data related to decommissioning will be filed at the time the decommissioning plan is filed. This is clearly contemplated by NRC regulations. See 10 C.F.R. § 51.53(b). See also p. 14 n.10 supra.

pending review of a decommissioning plan. The agency stated that an operating license will "[n]ormally" be amended to a possession-only status prior to finalization of the decommissioning plan, so as "to confirm the nonoperating status of the plant and to reduce some requirements which are important only for operation." 53 Fed. Reg. 24018, 24024 (1988).

Therefore, under the Atomic Energy Act and NEPA, the NRC should consider the environmental effects of each follow-on application separately, limiting its review to the impacts caused by that action. It remains only to discuss briefly whether an EIS or an EA will be required for follow-on applications that have been or will be brought to the NRC. For the reasons shown below, the pending and anticipated follow-on applications require no more than an EA to comply with NEPA.

LILCO's application for a Defueled Operating License involves no consequences not previously considered in the full EIS for the Shoreham operating license. Moreover, as already noted, the NRC has stated that a possession-only license merely "confirm[s] the nonoperating status of the plant and . . . reduce[s] some requirements which are important only for operation." 53 Fed. Reg. 24018, 24024 (1988). Applying the NRC's own regulations to the Defueled Operating License application, an EA would be prepared in accordance with 10

C.F.R. §§ 51.30-51.35, leading to a finding of no significant impact.[16]

It is also clear that an amendment authorizing transfer of Shoreham to LIPA, especially in a non-operating status and in view of LIPA's statutory duty not to operate Shoreham, does not involve environmental consequences. An ownership change is strictly an administrative change with no physical impacts at the Shoreham site. The NRC has typically issued amendments of this variety based upon an EA and a finding of no significant environmental impact. See, e.g., 54 Fed. Reg. 49368 (1989) (finding no impact from an amendment changing the licensed operator for Arkansas Nuclear One); 54 Fed. Reg. 35737 (1989) (finding no impact from a transfer of an ownership share of Comanche Peak).

With respect to the NRC's review of a decommissioning plan, the NRC has previously announced that NEPA requirements have been largely fulfilled by the GEIS already prepared

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[16] Indeed, the application may qualify for a categorical exclusion from NRC's NEPA review. See 10 C.F.R. § 51.22. For instance, in connection with the decommissioning of the Humboldt Bay facility, the licensee applied in 1984 to amend its operating license to possession-only status and to decommission the plant in accordance with a plan submitted with the application. The NRC issued the possession-only portion of the requested amendment in 1985. In its safety evaluation report on that amendment, the NRC Staff concluded that the amendment involved no significant increases or changes in the amounts or type of effluents, and no significant increase in occupational radiation exposures. The Staff then concluded that the possession-only amendment met the criteria of § 51.22(b) and (c)(9) for a categorical exclusion. See Safety Evaluation Supporting Amendment No. 19 to Facility Operating License No. DPR-7 (July 16, 1985).

by the NRC for decommissioning. See 53 Fed. Reg. 24018, 24039 (1988). In accordance with the procedure now outlined by the NRC for decommissioning approvals, an EA would be prepared for Shoreham that would supplement the GEIS to address site-specific circumstances. See id. at 24039. A full site-specific Shoreham EIS supplement would only be necessary if the NRC were to determine that the Shoreham case involves significant impacts not adequately addressed by the GEIS. This is inherently implausible because the GEIS considered the environmental consequences of decommissioning plants after prolonged operation at full power. Shoreham decommissioning, by contrast, comes after very limited operation of the plant and thus will involve very reduced radiological risk.[17]

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[17] In this regard, Shoreham is a unique case, distinguishable even from the currently pending decommissioning case involving the Rancho Seco Nuclear Plant. Like Shoreham, Rancho Seco is being decommissioned prior to the end of its license term, but Rancho Seco has operated at full power for a significant period of time, thereby building up a corresponding inventory of radiological materials. In contrast, Shoreham never operated above 5% of its rated power capability, and the burnup of fuel equalled the equivalent of only two full-power days. Accordingly, there is only a small amount of radiological contamination at Shoreham.

V. CONCLUSION

The Atomic Energy Act leaves to non-federal decisionmakers the question whether to cease operation of Shoreham. In connection with follow-on applications, NEPA does not permit, much less compel, consideration of alternatives to, or impacts of, the non-federal decision. The conclusions of this memorandum are more fully summarized in Part II above.

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON D.C. 20555

August 25, 1989

Action: Murley, NRR
Cys: Taylor
Thompson
Blaha
Russell, RI

OFFICE OF THE SECRETARY

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MEMORANDUM FOR: James M. Taylor
Acting Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - SECY-89-247 - SHOREHAM STATUS AND DEVELOPMENTS

This is to advise you that the Commission, with Chairman Carr and Commissioners Roberts and Rogers agreeing, has approved, subject to the following guidance and modifications, your proposed actions in regard to the Shoreham Nuclear Power Station.

[redacted]

Commissioner Curtiss approved in part and disapproved in part the staff's proposed actions. He noted that:

"Under the terms of the Shoreham operating license, LILCO is legally entitled to engage in those activities

permitted by the license, so long as those activities conform to the Commission's regulations and ensure adequate protection of the public health and safety when considering the particular mode or condition that the plant might be in at a given time. For this reason, and in view of the assurances that we have received from the licensee that it does not intend to operate this plant, it is not clear to me that we have a legal basis under the existing license to require LILCO to preserve "all systems required for full-power operation" from degradation, so as to ensure that "the plant is preserved as a physical entity capable of being returned to service without untoward resource expenditure" -- the second condition proposed by the staff in SECY-89-247.

At the same time, in view of the requirements in the Commission's decommissioning rule, the licensee should not be permitted to take any steps that would have a material and demonstrable impact on any aspect of the decommissioning of this plant, prior to the submittal and approval of a decommissioning plan in accordance with the requirements of this rule."

Additional comments are attached to the Commissioners' vote sheets, as previously provided to you.

cc: Chairman Carr
Commissioner Roberts
Commissioner Rogers
Commissioner Curtiss
OGC