DOCKETED
USNRC
83 APR -4 A10:25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
VIRGINIA ELECTRIC AND POWER COMPANY	Docket Nos. 50-338/339 OLA-1 and OLA-2
(North Anna Power Station, Units 1 and 2)	
(Proposed Amendments to Operating License to Allow Receipt and Storage of 500 Spent Fuel Assemblies from Surry Power Station, Units 1 and 2, and Expansion of Spent Fuel Pool Storage Capacity)	

COUNTY OF LOUISA, VIRGINIA, AND THE BOARD
OF SUPERVISORS OF THE COUNTY OF LOUISA, VIRGINIA
MEMORANDUM IN RESPONSE TO BOARD ORDER

DS03

8304060093 830401
PDR ADOCK 05000338
G PDR

TABLE OF CONTENTS

TABLE OF AUTHORITIES.. ii

I. THIS BOARD MUST CONSIDER THE HEALTH, SAFETY, AND ENVIRONMENTAL IMPACTS OF TRANSSHIPMENT OF SPENT FUEL FROM SURRY TO NORTH ANNA.............. 3

A. This Board Has The Power and the Obligation to Consider Transshipment In the Context of This Proceeding.............. 3

B. NEPA Requires Consideration of the Environmental Impacts of Transshipment......... 5

1. To Ignore Transshipment Would Result in Impermissible Segmentation of Vepco's Plan, In Violation of NEPA and Section 51.7(b) of the Commission's Regulations.................. 5

2. Consideration of Transshipment To A Reprocessing Center in Surry's Operating License Proceedings Does Not Foreclose Board Consideration of the Surry to North Anna Shipments......... 9

C. Section 189 of the Atomic Energy Act Requires This Board to Consider Transshipment.................................. 13

II. SECTION 102(2)(E) OF NEPA REQUIRES THE BOARD TO CONSIDER ALTERNATIVES TO THE PROPOSED ACTION REGARDLESS OF THE NEED FOR AN EIS.................... 15

A. The Case Law Demonstrates that Consideration of Alternatives Is An Independent Requirement..................... 16

B. Section 51.7 of the NRC Regulations Can Not Excuse the Commission From Its Obligation To Consider Alternatives........ 20

CONCLUSION... 23

TABLE OF AUTHORITIES

Cases	Page
Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975)....................	8
Andrus v. Sierra Club, 442 U.S. 347 (1978)..............................	21
Calvert Cliffs' Coordinating Committee v. U.S. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971)..................	17
Citizens Against 2, 4-D v. Watt, 527 F. Supp. 465 (W.D. Oklahoma 1981)...........	20
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)..............................	19n.8
City of New Haven v. Chandler, 446 F. Supp. 925 (D. Conn. 1978).................	19
City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976)......................	6, 7, 12
Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir.), <u>cert. denied</u>, 445 U.S. 915 (1979)................................	8
Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419 (1980)......................	3, 4
Consumers Power Co. (Big Rock Point Nuclear Power Plant), ALAB-636, 13 NRC 312 (1981)..............	3, 4n.1, 20, 22
Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974)....................	17, 18
Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), <u>cert. denied</u>, 412 U.S. 908 (1973)..............................	19n.8
Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973)......................	8
Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639 (D. Neb. 1979)..................	23
Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975)......................	17

Page

Patterson v. Exon,
415 F. Supp. 1276 (D. Neb. 1976)................. 8

Public Service Co. of New Hampshire v. United States Nuclear Regulatory Commission, 582 F.2d 77 (1st Cir.), _cert. denied_, 439 U.S. 1046 (1978)... 20

Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973)................................ 9

Sierra Club v. Bergland,
451 F. Supp. (N.D. Miss. 1978).................. 8

State of California v. Bergland,
483 F. Supp. 465 (E.D. Cal. 1980)................ 17, 19n.9

Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732 (3d Cir. 1982)................................. 17

Trinity Episcopal School Corp. v. Romney,
523 F.2d 88 (2d Cir. 1975)...................... 17, 18

Vermont Yankee Nuclear Power Corp. v. NRDC,
435 U.S. 519 (1978), 98 S.Ct. 1197,
55 L.Ed.2d 460................................... 19n.9

Virginia Electric and Power Co. (North Anna),
ALAB-584, 11 NRC 451 (1980)...................... 20

Statutes

Administrative Procedure Act
5 U.S.C. S 706................................... 9, 13, 19

Atomic Energy Act
42 U.S.C. §§ 2239 and 4332....................... Passim

Nuclear Waste Policy Act of 1982
§ 134(a)... 14

Page

NRC Regulations

10 C.F.R. § 50.. Passim

10 C.F.R. § 51.. Passim

40 C.F.R. § 1500.. 16

40 C.F.R. § 1508.. Passim

Miscellaneous

Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants, WASH-1238, December 1982; Supplement I, NUREG-75-038, April 1975.............................. 12n.6

Eure, Reports Show A-Waste Shipments Not Needed, Charlottesville Progress, March 28, 1983......... 19n.9

Final Environmental Statement, Surry Power Station Unit 1 (May 1972).............................. 9n.4

Final Environmental Statement, Surry Power Station Unit 2 (June 1982)............................. 9n.4

40 Fed. Reg. 1005 (January 6, 1975).................. 11

45 Fed. Reg. 37399 (June 3, 1980).................... 13

4/1/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
VIRGINIA ELECTRIC AND POWER COMPANY	)	Docket Nos. 50-338/339 OLA-1 and OLA-2
	)	
(North Anna Power Station, Units 1 and 2)	)	

(Proposed Amendments to Operating License to Allow Receipt and Storage of 500 Spent Fuel Assemblies from Surry Power Station, Units 1 and 2, and Expansion of Spent Fuel Pool Storage Capacity)

COUNTY OF LOUISA, VIRGINIA, AND THE BOARD OF SUPERVISORS OF THE COUNTY OF LOUISA, VIRGINIA MEMORANDUM IN RESPONSE TO BOARD ORDER

This is a proceeding to consider license amendments proposed by the Virginia Electric and Power Company ("Vepco" or "the applicant") to permit expansion of the spent fuel storage capacity at North Anna Power Station and to permit receipt and storage at North Anna of 500 spent fuel assemblies from Vepco's Surry Power Station. The County of Louisa, Virginia and the Board of Supervisors of the County of Louisa, Virginia ("Louisa County" or "the County") were admitted to the proceeding at the special prehearing conference held February 16, 1983. Another group, Concerned Citizens of Louisa County, is also seeking leave to intervene but the Atomic Safety and Licensing Board ("the Board" or "ASLB") has thus far deferred action on its petition.

Many of the intervenors' contentions discussed at the prehearing conference deal with the transshipment element of Vepco's proposed plan. Since the parties were in disagreement as to whether the Board may even consider transshipment in the context of the instant license amendment proceedings, the Board ordered briefing on the question whether the Board may consider the health, safety and environmental impacts of transshipment of spent fuel from Surry to North Anna.

Other contentions submitted suggested alternatives to the proposed action. Both the Staff and the Applicant took the position that the Board need not consider alternatives unless it is determined that the proposed action is a major federal action significantly affecting the human environment, thus triggering the National Environmental Policy Act ("NEPA") requirement that an environmental impact statement ("EIS") be prepared. Intervenors' position is that NEPA requires the Board to consider alternatives whether or not an EIS is required. The Board therefore ordered the parties to brief the question whether alternatives to the proposed action must be considered under Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), even if it is ultimately determined that an EIS is not required.

This memorandum is submitted by intervenor Louisa County in accordance with the Board's order.

I. THIS BOARD MUST CONSIDER THE HEALTH, SAFETY, AND ENVIRONMENTAL IMPACTS OF TRANSSHIPMENT OF SPENT FUEL FROM SURRY TO NORTH ANNA.

A. This Board Has The Power and The Obligation to Consider Transshipment In the Context of This Proceeding.

As a general rule, a Licensing Board may hear any issue "fairly raised" by the applications it has been convened to consider. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980). Since transshipment is the sine qua non of Vepco's proposal to receive and store Surry fuel at North Anna, it is an issue "fairly raised" by Vepco's license applications and falls directly within the Board's jurisdiction.

Despite this principle of jurisdiction, however, the Staff argues that because the notice of hearing mentions only "receipt" and "storage" of Surry fuel, this Board's jurisdiction is strictly limited to "receipt" and "storage" and does not extend to activities, such as transshipment, that are necessary to accomplish receipt and storage. This argument was squarely rejected in Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 324n.22 (1981), a spent fuel pool expansion case. There, as here, the applicant contended that the notice of hearing foreclosed consideration of anything other than the spent fuel pool itself and that therefore the Licensing Board could not consider the continued plant operation that would necessarily result from pool expansion. Holding that continued plant operation was an issue "fairly raised" by the applicant's proposal to expand its spent fuel pool, the Appeal Board ruled

that continued plant operation fell within the Licensing Board's jurisdiction. Similarly, in Zion, also a spent fuel pool expansion case, the Appeal Board held that changes in the plant's emergency plan necessitated by the proposed pool expansion were issues "fairly raised" by the licensee's application and therefore fell within the Board's jurisdiction. Commonwealth Edison Co. (Zion Station), 12 NRC at 426.

These cases stand for the principle that a Licensing Board's authority extends to any activity that is a necessary concomitant of the proposed action. Whether the Board must exercise that authority and actually consider the health, safty and environmental impacts of the concomitant activity depends on whether that activity will effect a change in the environmental or health and safety status quo.[1/] Indeed, since a Licensing Board may not grant a license amendment without first satisfying itself that a proposed action will not endanger the public health and safety and that the environmental review mandated by NEPA has been carried out, 10 C.F.R. §§ 50.40 and 50.57, the Licensing Board would be without authority to issue a license amendment if it failed to consider changes in the environmental and health and safety values previously relied upon.

1/ Thus, in Big Rock Point, the Board held that because the record did not indicate that the spent fuel pool expansion would necessitate any changes in the reactor operation, NEPA did not require consideration of the continued plant operation because the environmental impacts would continue to be the same as they had been since the plant was first licensed to operate for a full 40-year term. 13 NRC at 326.

Here, transshipment is a necessary prerequisite to any receipt and storage of Surry spent fuel at North Anna. Thus, it is an issue fairly raised by Vepco's license applications, and the Board therefore has jurisdiction to consider the transshipment aspects of Vepco's plans. Moreover, as discussed more fully below,[2/] the health, safety and environmental impacts of spent fuel transshipment from Surry to North Anna have never been fully considered. Since Vepco has never before shipped spent fuel to North Anna and the environmental impacts of such transshipment have not been addressed, transshipment will likely effect a change in the health, safety and environmental status quo. Therefore, this Board must consider these impacts, else under Sections 50.40 and 50.57 of the Commission's regulations it will lack the authority to grant the requested license amendments.

B. NEPA Requires Consideration of the Environmental Impacts of Transshipment.

1. To Ignore Transshipment Would Result In Impermissible Segmentation of Vepco's Plan, In Violation of NEPA and Section 51.7(b) of the Commission's Regulations.

Vepco asserts, without support, that the spent fuel pool at Surry is running out of space. In response to this asserted storage problem, Vepco proposes to expand the spent fuel pool at North Anna, ship Surry spent fuel to North Anna, and store Surry fuel at North Anna. This plan cannot be accomplished without shipping, yet the Staff urges this Board to ignore the fact that

---

2/ See Section I.B.2, infra.

transsshipment will even occur. As discussed in Section I.A, supra, this Board has jurisdiction to consider transshipment; moreover, since Vepco has never before shipped spent fuel from Surry to North Anna, it is likely that the proposed plan will effect changes in the environmental, health and safety status quo. In these circumtances, both the Atomic Energy Act and NEPA require the Board to exercise its authority and address the transshipment component of Vepco's plan.

Additionally, the NEPA principle that proposed actions must be viewed comprehensively requires consideration of transshipment. That principle, incorporated into the Commission's own regulations, Section 51.7(b), requires the Board to address the "probable impacts" of a proposed action; since transshipment is indisputably a "probable impact" of a Board order granting Vepco's license amendments, this Board must consider the environmental impacts of transshipment.

In City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976), the Second Circuit overturned a Postal Service determination that its plan to construct a new postal facility was not a major federal action requiring an EIS where the Postal Service had confined its environmental scrutiny to construction of the new facility and ignored the environmental consequences that would flow from abandonment of the old postal service site and the resulting transfer of approximately 1,400 employees. There, as here, the various aspects of the plans were "separable" from the standpoint of execution of the plan, but

"intimately related, interconnected so to speak, in terms of . . . usage." Id. at 972. In holding that abandonment of the old site and transfer of the employees was a "consequential, if not inseparable, feature of the construction project," id. at 973, which must perforce be assessed, the court explained:

> [T]he cases in this circuit and elsewhere have consistently held that NEPA mandates comprehensive consideration of the effects of all federal actions. 42 U.S.C. § 4332(2)(a). To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA. Scientists Institute for Public Information v. Atomic Energy Commission, 156 U.S.App.D.C. 395, 481 F.2d 1079, 1086-87 (1973); Conservation Society of South Vermont, Inc. v. Secretary of Transportation, 343 F.Supp. 761 (D.Vt. 1972), aff'd, 508 F.2d 927 (2nd Cir. 1973), judgment vacated and remanded on other grounds, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975), rev'd on other grounds upon remand, 531 F.2d 637 (2nd Cir. 1976).

Id. at 972.

The Second Circuit's analysis in City of Rochester is echoed in the binding CEQ regulations, which require an agency, in determining whether an EIS is necessary, to consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts.[3/] Significance exists

---

3/ "Cumulative impact," according to the CEQ regulations, "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). Moreover, case after case has held that a project must be assessed with "a view to the overall, cumulative impact of the action proposed, related federal action and projects in the area and further actions contemplated." Sierra Club v. Bergland, 451 F. Supp. 120, 129 (N.D. Miss. 1978). Accord, Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1002 and n.44 (D.C. Cir.), cert. denied, 445 U.S. 915 (1979) (agency decision to consider jointly environmental consequences of federal project and its adjacent parking facility is reasonable interpretation of NEPA); Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (characterizing any piecemeal development of a project as "insignificant" merits close scrutiny to prevent policies of NEPA from being nibbled away by multiple increments); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 20 (8th Cir. 1973) (where record indicates that agency is committed to further action beyond the specific proposed action, agency's environmental review must be enlarged to include the further action); Patterson v. Exon, 415 F. Supp. 1276, 1281-84 (D. Neb. 1976) (where proposed project is only first step of larger scheme, agency's decision to issue negative declaration based solely on the environmental impacts of that first step is unreasonable).

To ignore the transshipment, which, like the transfer of employees in City of Rochester, is a "consequential feature" of Vepco's license amendment proposals would be to once again take an "unnecessarily crabbed approach to NEPA," Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1086 (D.C. Cir. 1973). Indeed, any Board decision that failed to consider transshipment would be in violation of the Commission's own regulations requiring the Board to assess "probable impacts." 10 C.F.R. § 51.7(b) and 50.40(d), as well as the Administrative Procedure Act ("APA") requirement that NRC decisions be made "in accordance with the law," 5 U.S.C. § 706(2)(A).

2. Consideration of Transshipment To A Reprocessing Center in Surry's Operating License Proceedings Does Not Foreclose Board Consideration of the Surry to North Anna Shipments.

The Final Environmental Statements prepared for the Surry reactors at the operating license stage both have sections dealing with transport of irradiated fuel.[4/] These documents assume that irradiated fuel will be shipped from Surry to Barnwell, South Carolina (which, at the time Surry was licensed, was slated to function as a reprocessing center) and conclude, in general, that exposure of workers and the public to radiation,

---

4/ Final Environmental Statement, Surry Power Station Unit 1 at 128-39 (May 1972); Final Environmental Statement, Surry Power Station Unit 2 at 128-39 (June 1972).

either in the course of normal shipments or in some (but not all) accident situations, would not exceed acceptable limitations.

The Environmental Statements do not consider the environmental consequences of interim shipments to another reactor site; they do not consider shipments from Surry to North Anna; nor do they consider the specific routes here proposed by Vepco. They do not discuss the environmental consequences of sabotage or diversion of a spent fuel shipment; nor do they consider the human and material costs to localities of developing an emergency response capability sufficient to cope with accidents and/or sabotage involving spent fuel shipments. They do not consider the effect on land use patterns along the shipping routes and elsewhere in Louisa County; they do not consider the effect on the quality of life in Louisa County if it comes to be viewed as a nuclear dump site--for example, the effect on its recreation industry and its ability to attract other non-nuclear industries. Nor do they consider how the planned shipments will affect Louisa County's roads and traffic patterns.

Yet the Staff contends that these Environmental Statements, limited as they are to radiation exposures that would result from shipments from Surry to Barnwell, somehow prevent this Board from considering any environmental consequences, even nonradiological impacts, associated with Vepco's plan to ship Surry fuel to North Anna. Simply to state the argument is to reveal its absurdity.

Nor can Table S-4, appearing in the Commission's regulations at § 51.20(g), excuse this Board from its obligation to consider

the environmental impacts of Vepco's transshipment plan. In the firt place, Section 51.20(g) makes it clear that Table S-4 was intended to be used only at the operating license stage,[5/] not for subsequent license amendments. Second, Table S-4 was developed to express the environmental consequences of shipment to a reprocessing plant; what Vepco is seeking here is a license amendment permitting it to deviate from Table S-4's assumptions and to ship to another reactor. Table S-4 in no way purports to cover such contingencies. Third, even as applied to operating license applications, Table S-4 was not intended by the Commission to supplant all other analyses of environmental factors in individual license proceedings. The Federal Register notice accompanying the Commission's adoption of Table S-4 states unequivocally, for example, that "[t]he environmental effects of sabotage and diversion . . . are beyond the scope of the rule and are subject to appropriate separate consideration in individual licensing proceedings." 40 Fed. Reg. 1005, 1007 (January 6, 1975). Similarly, the Commission's obligation to achieve the "as low as reasonably achievable" ("ALARA") standards set forth in Part 20 of the Commission's regulations, "must be considered in individual reactor licensing cases." Id. at 1008. Although the Table is denominated "Environmental Impact of Transportation of Fuel," the impacts addressed in the Table and the studies

---

5/ Table S-4 is to be used to express "the contribution of the environmental effects of such transportation [of irradiated fuel to a reprocessing plant] to the environmental costs of licensing the nuclear power reactor." 10 C.F.R. § 51.20(g)(1).

underlying it[6/] are exclusively radiological. Although it may well be that Table S-4 forecloses additional consideration in operating license proceedings of the radiological values expressed in the Table, it cannot be seriously argued that application of the Table, by itself, would discharge the Board's responsibility to consider "probable impacts." 10 C.F.R. § 51.7(b).

The planned Surry-to-North Anna shipments introduce new elements into the environmental cost-benefit balance struck at the Surry operating license stage, elements that are also beyond the scope of Table S-4. These new elements must be considered by this Board. To grant the proposed amendments without addressing these environmental impacts not heretofore assessed would violate the NEPA mandate to consider proposed projects comprehensively, City of Rochester v. United States Postal Service, 541 F.2d at 972, 40 C.F.R. § 1508.27(b)(7) and 1508.7, the Commission's own requirement to consider "probable impacts," 10 C.F.R. § 51.7(b), the Board's responsibility to ensure compliance with NEPA, 10 C.F.R. § 50.40, and the APA requirement that agency decisions be made in accordance with the law, 5 U.S.C. § 706(2)(A).

6/ Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants, WASH-1238, December 1972; Supplement I, NUREG-75-038, April 1975.

C. Section 189 of the Atomic Energy Act Requires This Board to Consider Transshipment.

Section 189 of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239, guarantees a hearing to "any person whose interest may be affected by the proceeding." To allow the County to participate in the proceedings but then to narrowly circumscribe the proceedings so as to exclude consideration of transshipment would be to deny Louisa County's right to be heard on a matter by which it is indisputably affected.

Moreover, no other forum is available to air the County's transshipment concerns. First, Louisa had no reason to participate in Surry's original licensing proceedings, and even had it done so, none of the concerns at issue now were addressed in those 1972 proceedings. Second, the proposed routes were approved by the Commission just 15 days after Vepco submitted its route approval request. Neither the County nor any other affected party was provided an opportunity to be heard. And there is no evidence of record suggesting that either Vepco or the Commission ever considered any alternatives to the proposed transshipment scheme, despite the fact that the very purpose of requiring licensees to submit route information and security plans is to enable the Commission "to assure [itself] that [the licensee] has considered alternatives to the making of the shipment." 45 Fed. Reg. 37399, 37403 (June 3, 1980).

Third, if this Board declines to consider the health and safety aspects of Vepco's transshipment plan, the likely result is that these matters will <u>never</u> be adequately addressed by the

NRC. Vepco and the Staff seem to think health and safety of transshipment are covered elsewhere in the Commission's regulations, but they cannot agree on precisely where that is. In view of the NRC's mission to protect the health and safety of the public and the substantial health and safety implications of transshipment, it flies in the face of logic to suggest that a licensee is free to ship without first obtaining NRC approval. Moreover, Section 134(a) of the Nuclear Waste Policy Act of 1982 indicates Congress' view that a utility's transshipment scheme must be licensed by the NRC. That section, entitled "Licensing of Facility Expansions and Transshipments," sets forth the procedures required to be followed in Commission hearings "on an application for a license, or for an amendment to an existing license . . . [to allow] transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system." Certainly Congress would not have ordained specific hearing procedures for a specific licensing action if that action were not, in fact, one subject to NRC licensing requirements.

Fourth, in view of this Board's obligation to make a finding that any activity it licenses will not be inimical to the public health and safety, 10 C.F.R. § 50.57, this Board should address the health and safety aspects of transshipment unless it can be clearly established that these concerns are addressed elsewhere in the Commission's regulatory framework.

In short, since there exists no other means to address the health and safety aspects of Vepco's plan to ship Surry fuel to

North Anna, since Congress views intrasystem shipments as subject to NRC licensing, since Louisa County is affected by Vepco's plan and therefore has a right to be heard under Section 189a of the AEA, 42 U.S.C. § 2239, this Board must consider transshipment within the context of this proceeding.

II. SECTION 102(2)(E) OF NEPA REQUIRES THE BOARD TO CONSIDER ALTERNATIVES TO THE PROPOSED ACTION REGARDLESS OF THE NEED FOR AN EIS.

The alternatives issue arises in these proceedings primarily because the Commission's NEPA regulations, 10 C.F.R. § 51, do not specify that the Staff's environmental impact appraisal--the document that serves as a basis for a Commission determination not to prepare an EIS for a proposed action--must include analysis of potential alternatives.[7] As demonstrated below, however, the NEPA case law is clear: an agency's duty to consider alternatives is independent of the EIS requirement. Moreover, the fact that an agency's NEPA regulations do not, in terms, require consideration of alternatives does not excuse the agency from its NEPA obligations, and it is extremely doubtful

---

7/ Section 51.7(b) of the Commission's regulations states:

> Environmental impact appraisals. An environmental impact appraisal will be prepared in support of all negative declarations. The appraisal will include:
>
> (1) A description of the proposed action;
>
> (2) A summary description of the probable impacts of the proposed action on the environment; and
>
> (3) The basis for the conclusion that no environmental impact statement need be prepared.

the Commission would have intended such a construction. Rather, the NRC regulations provide a framework for NRC compliance with NEPA, and must be construed in light of NEPA case law and the binding Council on Environmental Quality ("CEQ") regulations, 40 C.F.R. § 1500.

A. The Case Law Demonstrates that Consideration of Alternatives Is An Independent Requirement.

The statute itself makes it clear that an agency's obligation to consider alternatives to a proposed course of action is independent of any obligation to prepare an EIS. It is true, of course, that where an EIS is required, the EIS must include, *inter alia*, "a detailed statement . . . on . . . alternatives to the proposed action." Section 102(2)(C)(iii) of NEPA, 42 U.S.C. §§ 4332(2)(C)(iii). Wholly apart from the EIS requirement set forth in Section 102(2)(C), however, Congress also directed, in Section 102(2)(E) of NEPA, that:

> To the fullest extent possible, all agencies of the Federal Government shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

42 U.S.C. § 4332(2)(E).

The prevailing view of the courts that have addressed the issue now before this Board is that:

> [Section 102(2)(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 consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.

Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974). Natural Resources Defense Council v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975); State of California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980). Moreover, circuit court decisions addressing specifically the NRC's NEPA obligations have held that Section 102(2)(E) imposes an independent obligation on the Commission. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 739 n.14 (3d Cir. 1982); Calvert Cliffs' Coordinating Committee v. U.S. A.E.C., 449 F.2d 1109, 1114 (D.C. Cir. 1971).

In Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975), the Second Circuit held that the threshhold review conducted by HUD to determine whether a proposed project significantly affected the environment was inadequate because the agency had failed to consider alternatives. The Section 102(2)(E) obligation to consider alternatives, observed the court, is independent of any EIS requirement, arising whenever "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." Id. at 93.

Moreover, the agency's obligation to consider alternatives under Section 102(2)(E) is not discharged by a finding that the environmental benefits of a proposed project outweigh its

detriments. Rejecting such an argument in the Environmental Defense Fund case, the Fifth Circuit held that "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." 492 F.2d at 1135. Similarly, even in the unlikely event that the Board found that Vepco's proposal to ship and store Surry fuel at North Anna and to expand the North Anna pool posed an "ecological plus," the Board would still be required to "study, develop and describe appropriate alternatives." 42 U.S.C. § 4332(2)(E). Accord, Trinity Episcopal School Corp. v. Romney, 523 F.2d at 93 (obligation to consider alternatives arises whenever objective of proposed action can be accomplished in one or more ways that will have different environmental impacts).

Nor may the Board rely on the sketchy discussion of alternatives contained in Vepco's license amendment application documents. "[T]he federal agency must itself determine" what alternatives are reasonably available and therefore may not "accept[ ] . . . without question the self-serving statements or assumptions" of interested persons who desire to go forth with

the proposed action. Id. at 94.[8/] Therefore, this Board may not rely on Vepco's unsupported assertions that shipment to North Anna is the only feasible alternative available to deal with Surry's spent fuel storage problems. City of New Haven v. Chandler, 446 F. Supp. 925, 934 (D. Conn. 1978). This is especially true in light of the mounting evidence that Surry will not lose full core reserve (FCR) until well into 1986 and that dry cask storage, for which Vepco is already seeking NRC licenses, can be operational at Surry in 1986 or even earlier.[9/]

8/ The Trinity decision also makes it clear that an agency's failure to consider alternatives may also result in violation of the Administrative Procedure Act, 5 U.S.C. § 706. The court noted that "in the context of legislation that requires federal agencies to affirmatively develop a reviewable environmental record, even where the agency determines that an EIS is not required, a perfunctory and conclusory statement that there are no alternatives does not meet the agency's statutory obligation." Any agency decision based on such an unsupported conclusion would certainly be vulnerable to judicial reversal on the ground that it was "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Hanly v. Kleindienst, 471 F.2d 823, 829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

9/ "The agency need not 'ferret out every possible alternative, regardless of how uncommon or unknown.' Vermont Yankee Nuclear Power Corp. v. NRDC (1978) 435 U.S. 519, 551, 98 S.Ct. 1197, 1216, 55 L.Ed.2d 460. But if the agency need not consider every conceivable alternative, neither may it ignore obvious ones." State of California v. Bergland, 483 F. Supp. at 488.

For Vepco, at least two other alternatives--dry cask storage and no action--are obvious. See Contentions of Intervenor County of Louisa, Virginia and the Board of Supervisors of the County of Louisa, Attachment C, Current Cost Estimates, Independent Fuel Storage Installation, Surry Power Station - Units 1 and 2 (Vepco Memorandum, Oct. 6, 1982); Eure, Reports Show A-Waste Shipments Not Needed, Charlottesville Daily Progress, March 28, 1983, at 1. For the convenience of the Board, this article is appended to the Brief at Attachment A.

The Section 102(2)(E) requirement to consider alternatives is consistent with Congress' aims in enacting NEPA because without considering alternatives an agency would be unable to discharge its overriding NEPA responsibility "to minimize all unnecessary adverse environmental impact." Public Service Co. of New Hampshire v. United States Nuclear Regulatory Commission, 582 F.2d 77, 81 (1st Cir.), cert denied 439 U.S. 1046 (1978). More particularly, as the court observed in Citizens Against 2, 4-D v. Watt, 527 F. Supp. 465 (W.D. Oklahoma 1981), in order to make the threshhold determination whether a proposed action is "significant" and therefore requires an EIS, "there must be an analysis of the need for the federal proposal; the environmental consequences which can be reasonably expected to be generated; and the availability of alternatives to achieve the objectives of the federal proposal." Id. at 468. Thus, consideration of alternatives lies at the very heart of the NEPA process and may not be short-circuited by the Nuclear Regulatory Commission.

B. Section 51.7 of the NRC Regulations Can Not Excuse the Commission From Its Obligation To Consider Alternatives.

On the few occasions when the issue here has been presented to a Commission Appeal Board, the Appeal Board has held that Section 102(2)(E) is not limited to actions requiring an EIS. See, e.g., Consumers Power Co. (Big Rock Nuclear Plant), ALAB-636, 13 NRC 312, 332n.41; Virginia Electric and Power Co. (North Anna), ALAB-584, 11 NRC 451, 457 and n.12 (1980). Despite this Commission authority, however, the Staff claims that Section

51.7(b)'s failure to mention alternatives precludes Board consideration of alternatives in this proceeding. This untenable position is refuted by the statute, the CEQ regulations, and judicial and Commission case law.

The National Environmental Policy Act empowers the Council on Environmental Quality ("CEQ") to establish regulations to be followed by all federal agencies in carrying out their NEPA responsibilities. These regulations, which are binding on all federal agencies, Andrus v. Sierra Club, 442 U.S. 347, 358 (1978), make it clear that Section 102(2)(E)'s directive to consider alternatives is separate from any EIS requirement.[10]

10/ The CEQ regulations envision a two-step environmental review. First, the agency conducts an "environmental assessment," and, on the basis of that assessment, determines whether an EIS is required. If the determination is positive, the agency prepares an EIS. The threshhold environmental assessment, the closest CEQ parallel to the NRC's "environmental impact appraisal," is defined as follows:

> "Environmental Assessment":
>
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
>
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
>
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9.

In addition, Section 102(2)(B) of NEPA, 42 U.S.C. § 4332(2)(B), requires each agency of the federal government to "develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." Thus, the NRC, in discharging its NEPA obligations, is bound by the statute, the CEQ regulations, and its own NEPA regulations. 10 C.F.R. § 51.

The "purpose and scope" section of the Commission's NEPA regulations,[11/] makes it clear that the regulations are not intended to detail exhaustively the Commission's NEPA obligations; rather, they focus primarily on the EIS aspects of the Commission's obligations. Accordingly, in cases where the Commission's regulations do not address a NEPA issue, the Appeal Board looks to the CEQ regulations for guidance. In Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC at 324nn.21 and 22, a spent fuel pool expansion case, the issue was whether NEPA required consideration of the secondary indirect impacts of the continued plant operation that would result if the spent fuel pool were expanded. Since the Commission's NEPA regulations do not discuss "indirect" environmental impacts, the Staff argued that they need not be considered. Rejecting the

---

11/ "This part sets forth the Nuclear Regulatory Commission policy and procedures for the preparation and processing of environmental impact statements and related documents pursuant to section 102(2)(C)." 10 C.F.R. § 51.1(b).

Staff's "lead argument that 10 C.F.R. 51 . . . somehow provides the solution to this problem," id., the Appeal Board looked to the CEQ regulations and NEPA case law for guidance on how to proceed.

Similarly, here the Commission's NEPA regulations do not specify in what circumstances alternatives must be considered. Section 51.7 merely omits to mention consideration of alternatives in its description of an "environmental impact appraisal"; it does not provide that they should not be considered.[12/] In Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639, 650 (D. Neb. 1979), the HUD regulations likewise did not require consideration of alternatives, but the court, relying on Section 102(2)(E), held that such an inquiry was nonetheless required. This Board, like the Big Rock Point Appeal Board and the Monarch court, must then reject the Staff's argument that Section 51 provides a solution to the problem, and instead look for guidance from the CEQ regulations, 40 C.F.R. § 1508.9, and NEPA case law in the courts as well as the Commission. These authorities demonstrate conclusively that alternatives must be considered whenever a desired result may be achieved in one of two or more different ways that will have different environmental impacts.

CONCLUSION

For the reasons set forth above, Louisa County requests the Board to exercise its jurisdiction to consider the transshipment

---

12/ See note 7, supra.

element of Vepco's plan and to order consideration of alternatives to that plan.

Respectfully submitted,

J. Marshall Coleman
Christopher H. Buckley, Jr.
Cynthia A. Lewis
Robert Brager
Virginia S. Albrecht

Beveridge & Diamond, P.C.
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 828-0200

Attorneys for Intervenors

April 1, 1983

Of Counsel:

Richard W. Arnold, Jr.
County Attorney
PO Box 276
Louisa, VA 23093
(703) 967-1650

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing County of Louisa, Virginia, and the Board of Supervisors of the County of Louisa, Virginia Memorandum in Response to Board Order upon each of the persons named below by depositing a copy in the United States mail, properly stamped and addressed to him at the address set out with his name:

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Chief, Docketing and Service Section

Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. George A. Ferguson
School of Engineering
Howard University
2300 5th Street, N.W.
Washington, D.C. 20059

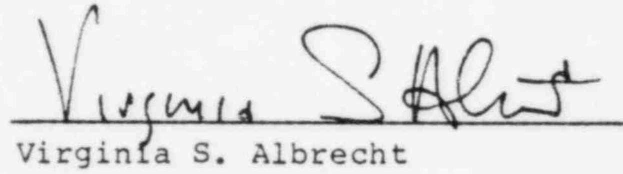
Daniel T. Swanson, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael W. Maupin
Hunton & Williams
P.O. Box 1535
Richmond, VA 23212

April 1, 1983



Virginia S. Albrecht

CHARLOTTESVILLE, VA. MONDAY, MARCH 28, 1983 TWO SECTIONS, 18 PAGES PRICE: 25

Reports Show A-Waste Shipments Not Needed

By ROB EURE
of The Progress Staff

Virginia Electric and Power Co. can expect to have storage casks available in 1984 to store spent fuel from its Surry nuclear reactor, thereby averting the need to ship fuel from Surry to North Anna in Louisa County, a Nuclear Regulatory Commission official says.

The newly developed dry cask storage also could mean that Vepco will not face a shutdown of its Surry plant if it can't ship the fuel to North Anna as utility officials have warned, said Norm Davison, who is in charge of Vepco's application for dry casks at the NRC.

Another NRC official confirmed that Vepco is replacing four fewer spent fuel assemblies than expected at Surry's Unit 1, a move which should extend by 18 months the capacity of the pool for storing fuel rods from the reactors' cores.

Vepco wants to begin transporting spent fuel rods from its Surry reactors for storage at North Anna next year because the Surry spent fuel pool is running out of space.

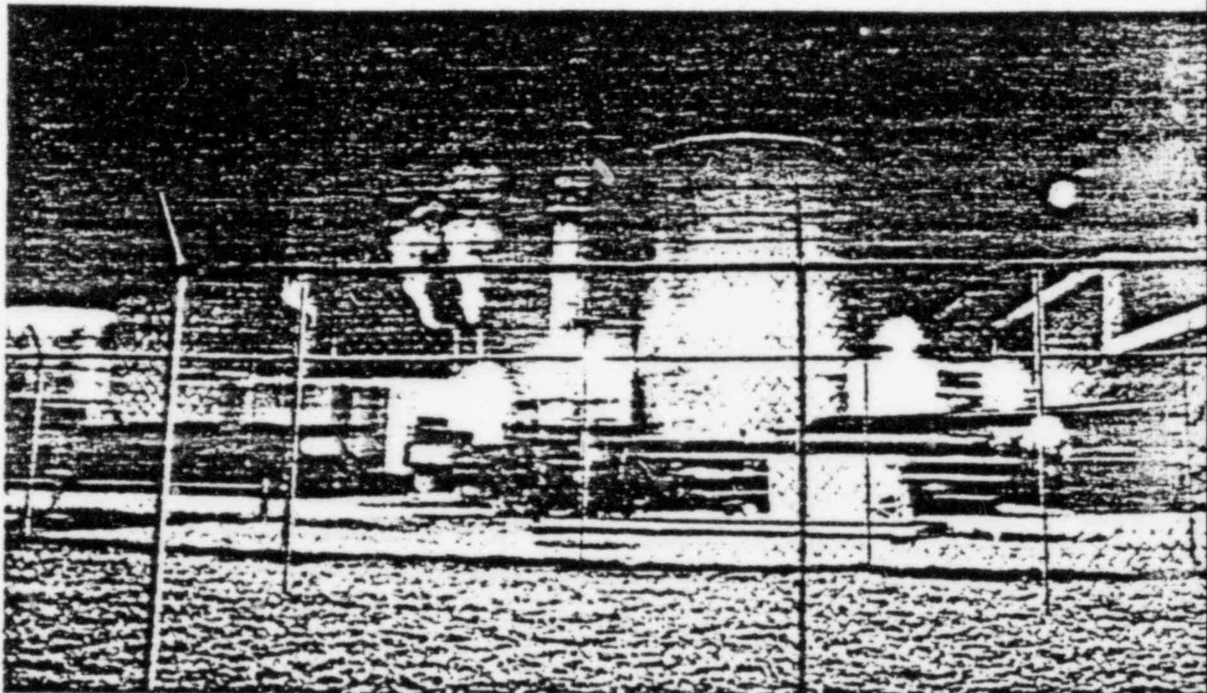
Utility officals have repeatedly said no other options would be available in time before the pool was full.

Donald Nabors, the NRC's Surry project manager, confirmed that Vepco reported earlier this month that it is replacing 60 fuel assemblies at Surry Unit 1 — instead of the 64 originally planned.

But Vepco spokesman Rodney Smith said today that "we're still planning to refuel 64 assemblies. But I'm also told that our outage schedule is sometimes modified slightly."

Nabors said he was told by Vepco official Wanda Kraft in a March 4 telephone conversation that "Vepco currently is replacing only 60 assemblies instead of the 64."

Please See WASTE, Page A8



Progress File Photo by Jon

VEPCO WANTS TO SHIP FUEL FROM SURRY TO NORTH ANNA, SHOWN ABO
NRC Official Says That New Dry Cask Storage Makes Fuel Shipments Unnecessary

ATTACHMENT A

★ Waste —

Continued From Page A1

The figures are significant because Vepco has said that after a refueling scheduled for Dec. 23, 1984, it would not have enough space left in the Surry pool to remove all its 157 fuel assemblies from the reactor.

While the full-core discharge capability is not required by NRC regulations, Vepco claims it gives the reactor crucial flexibility in the event of an emergency. Since 1972 when Surry became operational, a full core has been removed at Surry three times.

But the reduction in the number of fuel assemblies being replaced at Surry now means that, following the refueling in 1984, Vepco will have 159 open racks at its Surry pool, two more than is necessary for full core discharge. The estimate of the Surry pool capacity comes from a study of U.S. nuclear fuel storage problems prepared for the NRC by the Nuclear Assurance Corp. in 1982.

"In view of the recent developments, I can see no reason why Vepco needs to ship and no reason why Louisa needs to accept the fuel," said Virginia Albrecht, one of the lawyers defending a Louisa County ordinance banning the storage of Surry fuel at North Anna.

"I really don't know why they (Vepco) are litigating, (with the dry cask option available," she said.

Ms. Albrecht, a member of the Washington firm of Beveridge and Diamond, is defending the Louisa ordinance in the 4th U.S. Circuit Court of Appeals.

The firm is also intervening on behalf of Louisa County before the NRC licensing hearings to ship the fuel from Surry to North Anna.

Vepco has applied to the NRC for a license to be the first utility in the United States to use dry casks for storage, but company officials have estimated that the NRC would not approve the casks for use until 1986.

Davison, of the NRC's fuel licensing division, said that Vepco will get its license for the dry casks before the end of this year and should be able to use the casks within six to 12 months of NRC approval.

"Apparently he (Davison) has told us the same thing," Vepco spokesman Smith said, "and we're really pushing for dry cask storage." But "there very well could be some technological problems," Smith added.

"We expect to grant Vepco the license (for dry casks) by the end of the year," Davison said. "Dry casks use very straightforward technology. There is really no research to do on the things."

Davison said the dry casks are already in use in West Germany. He said the commenting period for Vepco's dry cask license has already passed and there have been no objections.

"The dry casks are a very popular form of storage," said Davison. "Everyone, even the anti-nuclear groups, seems to agree that they are a better form of storing spent fuel."

Davison said the NRC has given tentative support to two dry casks, one manufactured in Germany and the other by an American firm.

"If everyone does a decent job, I would think that Vepco could have the casks in use at Surry in 1½ to 2 years at the outside," said Davison.

Asked if he thinks Vepco faces the threat of a shutdown at Surry if it can't ship fuel to North Anna, Davison said "Oh, no, I don't think they will have to do that. There really is no problem in getting these casks in use."

The reduction in spent fuel stored at Surry would not be enough to change Vepco's claim that in 1987 the utility will not have enough space at the Surry pool. At that point, the reactors would have to shut down without dry cask storage or shipping the fuel to North Anna.

Davison said that storing spent fuel in dry casks may be more expensive than shipping the fuel from Surry to North Anna.

"It would cost more now because Vepco has the space already built at North Anna," said Davison. "But if Vepco had to build a new spent fuel pool at today's interest rates, the casks might be a little cheaper.

"The beauty of the casks," said Davison, "is that you buy just what you need. When the federal government finally does provide permanent storage or reprocessing facilities for the fuel, you wouldn't have any unused overhead with casks."

Davison also said the casks are also considered safer because they use no liquids.

"The problem with using a fluid is that the fluid is corrosive and limits the life of the storage facility," Davison said.