UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

4/1/83

In the Matter of	Docket Nos.
VIRGINIA ELECTRIC AND POWER CO.	50-338 OLA-1 50-339 OLA-1 (Receipt of Surry Spent Fuel)
(North Anna Power Sta., Units 1 and 2)	50-338 OLA-2 50-339 OLA-2 (Spent Fuel Pool Modification)

BRIEF OF CONCERNED CITIZENS OF LOUISA COUNTY ON JURISDICTIONAL ISSUES

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At the prehearing conference held in these proceedings on February 17, 1983, the Atomic Safety and Licensing Board ("Board") requested the parties to submit briefs concerning the following issues:

(1) whether the Board may consider the health, safety, and environmental implications of transshipment of spent fuel from Surry to North Anna; and

(2) whether alternatives to the proposed action must be considered under §102(2)(E) of the National Environmental Policy Act ("NEPA") despite the absence of need for an EIS.

In this brief Concerned Citizens of Louisa County ("Citizens") demonstrates that both of these questions should be answered in the affirmative.

I. The Board is Obligated Under NEPA to Consider the Environmental Impacts of Transporting Surry Spent Fuel to North Anna

No one has suggested, nor could they suggest, that these

proceedings do not concern the trucking of spent fuel from Surry to North Anna. This is the means by which VEPCO proposes to move spent fuel from one plant to the other, and it is this aspect of the proposal which presents the greatest environmental threat. What has been suggested is that the "narrow scope" of these proceedings precludes the Board from considering anything but the "receipt" and storage of Surry spent fuel. In other words, the Board and the Nuclear Regulatory Commission ("NRC") Staff must ignore the bulk of the environmental consequences of VEPCO's proposal because of a lack of jurisdiction.

There is one respect in which Citizens agrees that the scope of these proceedings is limited. VEPCO now has authority under 10 CFR §70.42(b)(5) to ship spent fuel from Surry, and thus no one may raise the "public health and safety" or "common defense and security" issues which surround the proposed shipments.[1/] However, the environmental aspects of the proposal cannot be dismissed in this fashion. NEPA's requirements are far broader than those of the Atomic Energy Act, and they require the Board to at least **consider** the environmental impacts of transshipment, even if it lacks licensing authority over certain aspects of VEPCO's transshipment plans. Under NEPA, whenever an agency is considering a licensing action it must investigate all of the "reasonably forseeable" environmental impacts associated with it. Minnesota v. NRC, 602 F.2d 412 (D. C. Cir. 1979). Here, the

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1/ The reason is not that these issues were dealt with when Surry was licensed, but that the time for challenging 10 CFR §70.42(b)(5) has long since passed.

shipment of spent fuel from Surry to North Anna is part and parcel of a unified plan for relieving VEPCO's spent fuel storage difficulties at Surry. NEPA does not permit the Board to overlook the environmental risks attendant to these shipments, as if they were the Emperor's new clothes. There may be no need for findings on the "inimicality" of these impacts, but under NEPA they must, at a minimum, be taken into account before transshipment is permitted.

The sweep of NEPA's requirements in this regard is well established in the case law. When an agency licenses an activity that will directly produce adverse environmental effects, such effects must, of course, be addressed under NEPA. Furthermore, when the activity will lead the licensee to take further actions, regardless of whether such actions require further federal approval, the forseeable environmental effects of the subsequent actions must be analyzed at the time of the initial licensing decision. Thus, when the Environmental Protection Agency issued a water pollution discharge permit for a proposed coastal oil refinery, the agency was required to look beyond the effects of the refinery's discharges of pollutants, and to examine whether endangered species of eagles might be harmed as an indirect effect of oil spills following collisions involving supertankers calling at the refinery.[2/] Similarly, the impact state-

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2/ Roosevelt Campobello International Park Commission v. Environmental Protection Agency, 684 F.2d 1041 (1st Cir. 1982)(declaring EIS invalid).

ment for a harbor dredging and port construction project had to analyze not only the environmental effects of the dredging and construction activities, but also the risk of oil spills that flowed from the maritime activities that would inevitably follow the issuance of the disputed permits.3/

In these cases it could, and indeed may well have been argued that the permitting agency lacked jurisdiction over these indirect activities and environmental effects. Neverthess, the courts found that the Act's requirements applied fully to those aspects of the cases. Analogy to the present circumstances seems hardly necessary. We know - because it has been so stated on the record - that VEPCO will be shipping spent fuel to North Anna if it receives the license amendments it has sought. Transshipment is the key element of the overall plan. The transshipment aspects of the proposal cannot be segmented from the other aspects on the grounds that, under a technical reading of NRC rules, a license amendment is not needed for transshipment.4/

3/ Sierra Club v. Sigler, ___ F.2d ___, 13 ELR 20210 (5th Cir. 1983)(invalidating EIS).

4/ In Citizens for Responsible Area Growth v. Adams, the Federal Aviation Administration argued that although it was funding several projects aimed at expanding a municipal airport, e.g., runway resurfacing and access road improvement, the environmental effects of each project could be viewed independently. On this basis it concluded that an EIS was not required. On judicial review the court pointed out that while agencies may elect to define their actions as narrowly as they like for purposes of their own internal review, NEPA's requirements may not be so constricted, and a broader examination of the environmental effects of the projects would be necessary before the project could proceed:

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Cases dealing with "secondary impacts" illustrate the nature of the NRC's obligation in this case to look at the forest and not the trees. Where an agency undertakes an action that will lead to indirect environmental effects, such effects must be analyzed under NEPA even though they may be outside the agency's licensing jurisdiction, removed from the domain of its technical expertise, and indeed (to the agency's way of thinking) none of its business. For example, when an agency disregards the probable tendency of a rural highway project to induce increased commerce and population growth and thereby affect the tax bases and budgets of local municipalities, the failure to analyze these secondary impacts renders the impact statement invalid and justifies enjoining the highway project. 5/ In this case, as in those

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4/ -footnote con't from previous page-

> [A]n agency's description of a project and the environmental impacts it attributes to its project do not constitute the end of the NEPA inquiry.
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> Federal defendants contend that 42 U.S.C. §4332(2)(C) measures significant environmental impact only in terms of the narrow self-definition of a project. They argue for the strict enforcement of the agency's own project definition.... That contention is flatly contradicted by the statute, by judicial construction, and by CEQ guidelines and regulations). 477 F. Supp. 994, 999-1000 (D.N.H. 1979)(citations omitted.

5/ Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). To the same effect is City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).

cases, the agency's obligation is to give full consideration to all the reasonably forseeable environmental effects of its action even if, as a technical matter, its licensing jurisdiction does not extend that far.

The NRC Staff, in addition to urging the Board to disregard transportation-related environmental impacts under the guise of a narrow interpretation of its jurisdiction, has also argued that the same impacts were considered when Surry was initially licensed, and that consideration of such effects in these proceedings would constitute "double counting." See NRC Staff Response to Proposed Contentions of Concerned Citizens at 6. This is an extraordinary proposition in a number of respects. To begin with, to the extent that the impact statement prepared when the Surry operating license was issued ("Surry EIS") does contain some discussion of spent fuel transportation, that discussion is obviously based on obsolete data, outmoded thinking, and invalid assumptions. Statements such as

"Safety in routine transportation does not depend on special routing" and

"Protection of the public...is achieved by a combination of limitations on the contents [of the shipments], the package design, and the external radiation levels"

are in direct conflict conflict with current NRC policy on spent fuel transportation. See the preamble to the 1980 amendments to 10 CFR §73.37, 45 Fed. Reg. 37399 (June 3, 1980)(noting that cask design is not sufficient to protect public health and safety, and that routing restrictions and stringent security are therefore

necessary). Statements such as:

"[Spent fuel s]hipments move in routine commerce and on conventional transportation equipment;" and

"the shipper has essentially no control over the likelihood of an accident"

are plainly wrong. In addition, the failure of the EIS to consider even moderately severe transportation accidents is the kind of deficiency held violative of NEPA in City of New York v. Dep't of Transportation, 539 F. Supp. 1237 (S.D.N.Y. 1982).

But pointing out these deficiencies gives the Surry EIS more credit than it is due. The fact is that the document addresses exclusively the transportation risks attendant to shipping spent fuel over a specific route connecting the Surry plant with the reprocessing facility in Barnwell, South Carolina. The route consists of four highways: Va. 650, Va. 10, I-95, and S.C 64. The EIS makes it plain that in 1972 no one dreamed that Surry spent fuel would some day be wending its way through the streets of Mineral, Virginia, and that certainly no one ever gave a moment's thought to what the environmental implications of such an action might be. Had the Surry EIS said: "all environmental impacts associated with the transportation of Surry spent fuel to its ultimate resting place have been calculated and considered," that would be one thing. Instead, however, it looks no farther than the problems posed by the anticipated Surry-to-Barnwell shipments. What this shows is that the Staff's "double counting" argument is baseless, and that if the transportation-related environmental effects of shipping spent fuel from Surry to North

Anna are not considered in these proceedings they will have never been considered at all. In the event that such shipments occur, this would amount to a clear violation of NEPA.

To the best of counsel's knowledge, transshipment of spent fuel has been raised in three NRC proceedings, and the decisions in those cases show that arguments against consideration of the environmental impacts of spent fuel transportation have either not been raised or, where raised, rejected. In Duke Power Co. (Amendment to License SNM-1773), the proceeding was largely involved with the environmental hazards associated with spent fuel transportation, and the decision of the Licensing Board shows that such concerns factored heavily in the decision against issuance of the requested license amendment. LBP-80-28, 12 NRC 459, 489-91 (1980). On review, the Appeal Board disagreed with many of the conclusions reached by the panel below, but its extensive discussion of transportation-related issues demonstrates that it deemed them an appropriate subject for adjudication.

In Carolina Power and Light Co (Shearon Harris Nuclear Power Plant, Units 1 & 2), Dkt. No. 50-400, Memorandum and Order, Sept. 22, 1982, the Licensing Board was presented with an argument by the Applicant to the same effect as that presented here by the Staff: spent fuel transportation was embraced within the original NEPA analyses for the plants at which the spent fuel was generated and thus could not be raised again. However, the Board accepted the argument, made by an intervenor as well as the

Staff, that since the transshipment plan constituted an extra round of shipping that had not been analyzed previously, contentions regarding transportation risks should be admitted. Id. at 18-19. And in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), the Licensing Board, though it initially harbored doubts as to its obligation to entertain transportation-related contentions, see LBP-82-16, 15 NRC 566, 579-580 (1982), ultimately determined that such contentions should be admitted. Memorandum and Order, July 8, 1982 at 6-7. In response to a "double-counting" argument apparently identical to that which has been raised in this case by the Staff, the Board concluded that if an earlier EIS weighed the environmental costs of shipping spent fuel to a reprocessing facility, then there was no need to replow that ground. To the extent, however, that newly-proposed transshipment involves an additional, unanalyzed trip for the spent fuel, it should be considered in the new proceeding.

> If the temporary diversion of the fuel to Catawba causes the total environmental impact for the full journey to be greater than that of a 1-step direct trip to a reprocessing plant, and if the impact of the diverted 2-step trip is appreciably greater than that previously taken into account (by the use of Table S-4), then the new additional costs should be considered in the Catawba OL proceedings now before us. Memorandum and Order, February 28, 1983 at 5-6.

Citizens submits that a similar approach to the issues now before the Board in this case is called for.[6/] Here, however, the

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6/ In Catawba, a contention concerning transshipment was ultimately excluded by the Board, on the ground that the concerns it raised had been addressed fully by the EIS for the Catawba operating license, which included Table S-4 as well as a special supplement dealing with transshipment. Such circumstances are absent from this case and thus do not impair the admissibility of Citizens' contentions.

shipment of Surry spent fuel to North Anna is anything but a "temporary diversion" on the way to the reprocessing plant. For one thing, Barnwell is south of Surry, and North Anna is more than one hundred miles to the north. Secondly, the North Anna shipments are to move through one of Virginia's major population centers, including residential areas in the vicinity of North Anna. As we have already shown, we are prepared to prove that the incremental impact of the Surry-to-North Anna shipments poses a significant environmental threat.

II. Even in the Event that the Proposed License Amendments are Determined not to Necessitate the Preparation of an EIS, the Board is Nevertheless Obligated Under §102(2)(E) of NEPA to Consider Alternatives Such as Dry Cask Storage

Section 102 of NEPA provides that:

> The Congress authorizes and directs that, to the fullest extent possible...
>
> (2) all agencies of the Federal government shall...
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -
>
> (i)the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action...
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

NEPA §102(2), 42 U.S.C. §4332(2)[7/] Although subsec. (C) is more familiar than subsec. (E), the latter provision is arguably the more important of the two because (1) as shown below, its reach extends beyond the reach of the EIS requirement, and (2) its mandate to "study, develop, and describe" alternatives has often been said to require a more intensive examination than that

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7/ When NEPA was enacted in 1969, the current subsec. (E) was designated §102(2)(D). The Act was amended in August, 1975, 89 Stat. 424, and subsec. (D) became subsec. (E). For simplicity's sake, when passages from pre-1975 cases are quoted below, references to (D) will be modified to refer to (E).

required in impact statements.[8] The question now before us, however, concerns the scope rather than the nature of the §102(2)(E) mandate.

It has been established conclusively that §102(2)(E) imposes affirmative analytical requirements upon agencies not only with respect to "major Federal actions significantly affecting the quality of the human environment,"[9] but also with respect to "lesser" actions which do not trigger NEPA's EIS requirement because their environmental effects are not "significant." [10]

8/ See, e.g., W. Rodgers, **Environmental Law** §7.9 at 797 (1977)("Section 102(2)(C) requires only a 'detailed statement' on 'alternatives to the proposed action' while section 102(2)(E) makes clear that the agencies must 'study, develop, and describe appropriate alternatives'"). See also Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975); Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 296 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).

9/ Environmental Defense Fund v. Froehlke, 368 F. Supp. 231, 245 (W.D.Mo. 1973).

10 Environmental Defense Fund v. Costle, 657 F.2d 275, 296 (D. C. Cir. 1981)("[Section 102(2)(E)] requires the development and analysis of alternatives apart from those usually found in an environmental impact statement"), aff'g 8 ELR 20786, 20788 (D.D.C. 1978)("the requirement of §102(2)(E) is independent of and broader than the EIS requirement of §102(2)(C)(iii)"); Aertsen v. Landrieu, 637 F.2d 12, 20 (1st Cir. 1980)("[The §102(2)(E)] obligation to describe alternatives is not limited to a proposed major action significantly affecting the human environment"); Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 232 (7th Cir. 1975)("These duties are obligatory whether or not an impact statement is to be filed"); Natural Resources Defense Council v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975)("This re-

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This is evident not only from the structure of the statute - §102(2)(E) contains no reference to "significant effects" - but as well from the fact that if this were not the case either §102(2)(C)(iii) or §102(2)(E) would be superfluous.[11] Therefore, even in cases where it has not been alleged that the given federal action will have significant environmental effects, the agency must consider alternative courses of action carefully, and

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10/ - footnote con't from previous page -

quirement is independent of and of wider scope than the duty to file the EIS."); Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975)("Federal agencies must consider alternatives under §102(2)(E) of NEPA without regard to the filing of an environmental impact statement..."); Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974); Hanly v. Kleindienst, 471 F.2d 823, 834 (2d Cir. 1972)("We do not share the Government's view that the procedural mandates of [§102(2)(E)] apply only to the actions found by the agency itself to have a significant environmental impact"); City of New York v. Dep't of Transortation, 539 F. Supp. 1237, 1277 ("this duty extends to cases where an EIS is not necessary"); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R.), vacated on other grounds sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981); California v. Bergland, 483 F.2d 465, 488 (E.D. Cal. 1980); Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639, 650 (D. Neb. 1979)(the §102(2)(E) obligation is "independent of and wider than" the EIS requirement), aff'd sub nom. Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083 (8th Cir. 1979); Joseph v. Adams, 467 F. Supp 141, 158 (E.D. Mich. 1979); City of New Haven v. Chandler, 446 F. Supp. 925, 937 (D. Conn. 1978); Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204, 218-19 (S.D.N.Y. 1978); Illinois ex rel. Scott v. Butterfield, 396 F. Supp. 632, 641 (E.D. Ill. 1975); see also W. Rodgers, **Environmental Law** §7.9 at 795 (1977)("It is clear that Section 102(2)(E) of NEPA requires federal decision-makers to weigh alternatives without regard for the need tor preparing an impact statement under §102(2)(C)").

11/ Aertsen, supra, 637 F.2d at 20; Hanly v. Kleindienst, supra, 471 F.2d at 834.

its failure to do so violates the Act and constitutes grounds for injunctive relief.[12]/

While research discloses no instances in which a court of law has suggested that §102(2)(E)'s mandate is subject to a "significance" threshold, there appear to be six Licensing Board or Appeal Board panel decisions in which NEPA has been so read.[13]/ It is difficult to criticize the reasoning of these decisions because none attempts to distinguish contrary judicial precedent, to explain how §102(2)(E) might apply differently in NRC proceedings, or otherwise to provide a thoughtful treatment of the issue. But it seems that in at least some of these cases the intervenors had not demonstrated the merits of the alleged alternatives, and the lack of a sufficient factual showing was of importance to the Board.[14]/ In any case, we submit, in light of the judicial precedent cited above these decisions are wrongly decided.

12/ Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978), rev'd sub nom. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

13/ See Duke Power Co. (Amendment to License SNM-1773), ALAB651, 14 NRC 307, 322 (1981); Public Service Electric & Gas Co. (Salem Nuclear Generating Sta., Unit 1), ALAB-650, 14 NRC 43, 65 n.33 (1981); Virginia Electric and Power Co. (North Anna Power Sta., Units 1 and 2), ALAB-584, 11 NRC 451, 457 (1980); ;Portland Gas and Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 (1979); Commonwealth Edison Co. (Zion Nuclear Plant, Units 1 and 2), LBP-80-7, 11 NRC 245, 255-56 (1980);Duke Power Co. (Catawba Nuclear Sta., Units 1 and 2), Dkt. No. 50-413, Memorandum and Order, February 28, 1983.

14/ This is so with respect to Salem and North Anna, supra.

In what appears to be the only instance in which the Appeal Board has even cursorily examined the cases establishing the prevailing judicial interpretation of §102(2)(E), its conclusion was that

> [s]ection 102(2)(E) of NEPA is not limited to major federal actions wth significant effects on the environment and may require consideration of alternatives even when an EIS is not otherwise required.

Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 n. 41 (1981)(citations omitted). See also Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 73 (1980)("Section 102(2)(E) comes into play...irrespective of whether an impact statement must be prepared"). We urge the Board in this case to follow Big Rock Point, LaCrosse, and the court decisions cited above.

Two questions remain. If §102(2)(E) is not subject to a "significance" threshold, what threshold (if any) is applicable, and do the environmental impacts of VEPCO's proposed license amendments meet it?

By its own terms, §102(2)(E) applies only to actions which involve "unresolved conflicts concerning alternative uses of available resources. Since the "statutory language 'might encompass an almost limitless range' of federal action," City of New York v. Dep't of Transportation, 539 F. Supp. 1239, 1276 (S.D.N.Y. 1982)(citation omitted), it seems that virtually any federal action is covered by §102(2)(E). According to one authority, the provision applies "whenever an action can be achieved

in one or more ways having different impacts on the environment. W. Rodgers, supra, at 795. Accord, Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975). A district court has held that the magnitude of the environmental impacts involved is irrelevant, and that the question is whether the proposal constitutes a "major Federal action." City of New Haven v. Chandler, 446 F. Supp. 925, 929 (D. Conn. 1978). This is essentially the approach taken by the Licensing Board in LaCrosse, (1980), where it pointed out that §102(2)(E) applies "irrespective of the magnitude of environmental impacts in question." 11 NRC at 73.

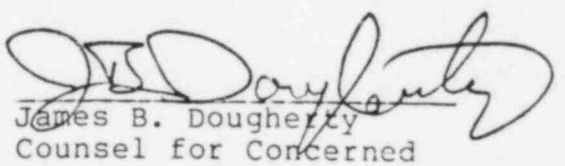
Whatever the proper standard, the licensing action that is now before this Board clearly passes the test. For one thing, it is more expensive, more resource-intensive, and more environmentally significant than the actions which were found to have passed the threshold in the cases discussed above. See Trinity, supra, (establishment of income limits for public housing project), Chandler, supra, (issuance of permit to construct three power line towers across river), and LaCrosse, supra, (spent fuel pool modification). Moreover, the fundamental question here involves a choice among alternative ways of storing nuclear waste. This is clearly the kind of resource allocation question with respect to which Congress intended agency decisionmakers to at least consider alternative ways of proceeding.

III. Conclusion

Citizens recognizes that VEPCO has authority under 10 CFR §70.42(b)(5) to ship spent fuel from Surry, and we thus do not argue that under the Atomic Energy Act the Board must make findings on the "common defense and security" or "public health and safety" aspects of VEPCO's transshipment program. The Board's duties under NEPA, however, are not susceptible to such fine jurisdictional line drawing. Because transshipment and the resultant environmental impacts are interrelated with the license amendment proposals that are now before the Board, a unified environmental analysis of the entire project is necessary.

Although we assert that this environmental analysis must take the form of an EIS pursuant to NEPA §102(2)(C), the authorities cited above make it quite clear that even if an EIS is not required, alternatives to the VEPCO proposal such as dry cask storage must be thoroughly reviewed under §102(2)(E) of the statute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that copies of the foregoing BRIEF OF CONCERNED CITIZENS OF LOUISA COUNTY ON JURISDICTIONAL ISSUES were served this 1st day of April, 1983, by deposit in the U.S. Mail, First Class, upon the following:

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