UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

November 18, 1993

Easton

Thomas A. Borden, Esq.
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Richard J. Hughes Justice Complex
CN 093
Trenton, NJ 08625

Re: Docket Nos. 50-352/353, 50-322 (2.206)

Dear Mr. Borden:

The Commission has received your letter dated November 5, 1993, requesting that the Commission review and reverse the decision of the Director, Office of Nuclear Material Safety and Safeguards, dated October 22, 1993, denying the request by the New Jersey Department of Environmental Protection and Energy (NJDEPE) for immediate action to halt shipments of slightly irradiated fuel from the Shoreham plant to the Limerick plant pending a determination on the merits of your petition filed on October 8, 1993, under 10 C.F.R. 2.206. The Director's letter acknowledged receipt of your petition and stated that the merits of your petition would be addressed under section 2.206 within a reasonable time.

Regarding NJDEPE's request for immediate action to halt the ongoing shipments, the Director concluded, for reasons set forth in his letter, that you had made no showing that the shipments pose an immediate or substantial danger to public health and safety. The Director, therefore, denied your request for immediate action.

Your letter of November 5 cited section 2.206(c) as the basis for your request for Commission review. That section provides that, within 25 days of a Director's Decision denying in whole or in part a petition filed under section 2.206, the Commission may, on its own motion, review that Decision to determine if the Director has abused his discretion. Review is at the discretion of the Commission. Section 2.206(c)(2) further provides that no petition or other request for review of a Director's Decision under section 2.206 will be entertained by the Commission.

To the extent that the Director's October 22 denial of the immediately requested action is an interim response to the NJDEPE petition, the Commission has determined not to undertake a formal review. Under our general supervisory authority over delegated staff actions (*see* section 2.206(c)(1)), we have, however, considered the reasons for the Director's denial of immediate

action and see no reason to disturb his conclusion that the shipments pose no immediate or substantial danger to public health and safety. The merits of your section 2.206 petition, including your assertion that the Commission has violated the National Environmental Policy Act, the Coastal Zone Management Act, and the Atomic Energy Act remain pending before the Director.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

cc: Commission Legal Assistants
OGC
CAA
EDO
NMSS
Lawrence C. Lanpher, Esquire
Mark J. Wetterhahn, Esquire

OFFICE OF THE SECRETARY
DOCKETING AND SERVICE BRANCH CONTROL TICKET

TICKET NUMBER: DSB-93-181

UTILITY/ FACILITY: STATE OF NEW JERSEY

DOCKET NUMBER: MISC. 93-01

DOCUMENT TYPE: OTHER
DOCUMENT TITLE: LTR REQUESTING COMM REVIEW & REVERSE BERNERO DECISION...

AUTHOR: THOMAS BORDEN AFFILIATION:
REPRESENTING: STATE OF NEW JERSEY
RECEIPIENT: SECRETARY
SUBJECT: DENIAL OF NJDEPE REQUEST FOR IMMEDIATE ACTION

DOCUMENT DATE: 11/05/93 DOCKET DATE: 11/05/93
CROSS-REFERENCE:

ACTION OFFICE: OGC ACTION: RECOMMENDATION ACTION DUE: 11/12/93

COMMISSION ACTION EXPIRATION DATE: / /

DISTRIBUTION: CHM, CMRS, CHILK, OGC, CAA, OCA, OPA, EDO AND RECORDS
NOTES:
SPECIAL HANDLING: DSB NUMBER:

FRED DeVESA
ATTORNEY GENERAL
XXXXXXXXXXXX
ROBERT J. DEL TUFO
XXXXXXXXXXXX
ATTORNEY GENERAL

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 093
TRENTON 08625

JACK M. SABATINO
XXXXXXXXXXXXX
EDWARD J. DAUBER
ASSISTANT ATTORNEY GENERAL
DIRECTOR

(609) 633-8109

November 5, 1993

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: DENIAL OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY'S REQUEST FOR IMMEDIATE ACTION

Dear Mr. Secretary:

Please accept the following in response to the letter dated October 22, 1993 from Director Robert M. Bernero denying NJDEPE's request for immediate action in accordance with 10 C.F.R. § 2.206. Initially, we would like to thank you and Director Bernero for acting so promptly on NJDEPE's request. Although NJDEPE's request was acted upon in an expedited manner, Director Bernero, for the reasons set forth below, should have granted NJDEPE's request for immediate action pending a full review. Accordingly, it is hereby requested that the Commission review and reverse Director Bernero's decision in accordance with its authority under 10 C.F.R. § 2.206(c).

Director Bernero concluded that NJDEPE did not make a showing of an "immediate or substantial danger to public

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health", that NRC's regulations adequately protect the public against unreasonable risk in the transport of the fuel, and that the shipping package has been properly certified. NJDEPE has made a showing, however, that NRC has not performed any analysis of the risks or alternatives involved in the ongoing shipments as required by the National Environmental Policy Act ("NEPA"). Moreover, NJDEPE has established that both LIPA and PECo's licenses were issued in violation the Coastal Zone Management Act ("CZMA"). In such a case, NRC should not allow the shipments to continue where NJDEPE has made a prima facie showing that violations of two crucial federal environmental laws have occurred and continue.

Since PECo and LIPA have failed to perform the consistency certifications required by CZMA, and NRC has issued licenses to both PECo and LIPA in violation of 15 C.F.R. § 930.53(a), the existing licenses for the ongoing shipments should be voided. Southern Pacific Transportation Co. v. California Coastal Com'n, 520 F.Supp. 800, 803 (N.D. Cal. 1981)("it was Congress' intention to make compliance with the consistency review procedure mandatory as to any applicant for a required federal license or permit"). By not taking any immediate action, Director Bernero is evading the requirements under CZMA to ensure that federally approved activities will not violate New Jersey's coastal zone policies.

Director Bernero's decision not to take immediate action similarly avoids NRC's responsibilities under NEPA. An agency may not "avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." Lower Alloways Creek v. PSE&G, 687 F.2d 732, 741 (3rd Cir. 1982). Ironically, Director Bernero's decision is the first NRC document to date which addresses the risks associated with transporting the fuel by barge as required by NEPA. Where an agency has failed to take a hard look as required by NEPA, or any look as in this case, irreparable damage may be presumed. Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C.Cir. 1977); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984). In such cases, the agency that violated NEPA and the public are without the information necessary to determine the "environmental consequences" of the proposed action, i.e, whether there is a risk of irreparable injury. Realty Income Trust at 456. Accordingly, we urge the Commission to take another look at Director Bernero's decision.

In accordance with 10 C.F.R. § 2.206(c), the Commission may, within 25 days, review a Director's decision under 10 C.F.R. § 2.206.* NJDEPE's claims, that the agency has

* In a telephone conversation with NRC's Office of the General Counsel, I was advised that Director Bernero's decision could not be reviewed by the Commission since it constituted final agency action. Neither the decision itself or any NRC

violated federal laws such as CZMA and NEPA which were specifically promulgated to protect the public health and welfare, should not be dismissed so lightly. For the reasons set forth above and the reasons set forth in NJDEPE's October 8, 1993 petition, NJDEPE respectfully requests that the Commission review and reverse Director Bernero's decision and take the immediate action requested by NJDEPE.

Thank you for your immediate attention to this matter.

Respectfully submitted,

FRED DeVESA
ATTORNEY GENERAL OF NEW JERSEY
Attorney for NJDEPE

By: _____
Thomas A. Borden
Deputy Attorney General

c: attached service list

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regulations provides support for this position. Director Bernero's decision is clearly a denial in part of NJDEPE's request pursuant to 10 C.F.R. § 2.206 and thus is reviewable by the Commission under (c) of that section within 25 days of the decision. As you may know, there is case law to support the proposition that the 60 day Hobbs Act review period does not begin to run until the 25 day period for review by the Commission has expired. Arnow v. U.S. Nuclear Regulatory Com'n., 868 F.2d 223, 226 (7th Cir. 1989); Safe Energy Coalition v. U.S. Nuclear Reg. Com'n., 866 F.2d 1473, 1476 (D.C. Cir. 1989); Dickinson v. Zech, 846 F.2d 369, 371 (6th Cir. 1988). If the Commission maintains that Director Bernero's October 22nd decision was final agency action or not reviewable pursuant to 10 C.F.R. § 2.206(c), NJDEPE hereby requests that the rationale and regulatory support for this position be provided so that NJDEPE may protect its rights to appeal.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)
	)
STATE OF NEW JERSEY	)
	)
Department of Law and Public Safety's Requests	)

CERTIFICATION OF SERVICE

I, Thomas A. Borden, hereby certify that on this 5th day of November 1993, I served by facsimile on the following copies of New Jersey Department of Environmental Protection and Energy's Letter dated November 5, 1993.

Lawrence C. Lanpher, Esq.
Kirkpatrick & Lockhart
1800 M Street, NW
South Lobby, 9th Floor
Washington, D.C. 20036-5891 — Fax: (202) 778-9100

Edward J. Reis
Deputy Assistant General Counsel
for Reactor Licensing
U.S. Nuclear Regulatory Commission
Office of General Counsel
Washington, D.C. 20555 — Fax: (301) 504-3725

Ann Hodgdon Esq.
U.S. Nuclear Regulatory Commission
Office of General Counsel
Washington, D.C. 20555 — Fax: (301) 504-3725

Robert Rader, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502 — Fax: (202) 371-5950

Office of the Secretary
ATTENTION: Docketing and Service
Mail Stop: 16 G15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 — Fax: (301) 504-1672

Thomas A. Borden
Deputy Attorney General

[Docket Nos. 50–352; 50–353; 50–322]

Philadelphia Electric Co., Limerick Generating Station, Units 1 and 2, License Nos. NFP–39 and NFP–85; Long Island Power Authority, Shoreham Nuclear Power Station, License No. NFO–82; Receipts of Petition for Director's Decision Under 10 CFR 2.206

Notice is hereby given that by Petition filed October 8, 1993, with the Executive Director for Operations and the Commission, the State of New Jersey Attorney General's Office, on behalf of New Jersey Department of Environmental Protection and Energy (NJDEPE) (Petitioner), has requested that the Commission take immediate action to halt ongoing shipments of fuel from Long Island Power Authority's (LIPA's) Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECo's) Limerick Generating Station pending consideration of the merits of the Petition. Specifically, NJDEPE requests that the Commission: (1) Amend LIPA's license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to PECo; (2) perform an Environmental Assessment (EA), pursuant to 10 CFR 51.30, and determination based on the EA, pursuant to 10 CFR 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 CFR 1509.9(b) which addresses alternative means of transporting fuel from LIPA to PECo; and (4) immediately stay PECO's June 23, 1993, license amendments, Certificate of Compliance regarding IF–300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 CFR 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA). As a basis for this request, the Petitioner asserts that the NRC has violated NEPA, the CZMA, and the Atomic Energy Act by allowing the transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case specific environmental impact analysis, or any consideration of alternatives to the means of transport. Specifically, the Petitioner asserts that: (1) The NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECo's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

The Petitioner also included an alternative request to be granted late intervention and a hearing on PECo's license amendment allowing it to receive and possess Shoreham's fuel, and asserted that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham's fuel. That alternative request is being considered directly by the Commission, pursuant to an Order, dated October 14, 1993.

The remainder of the request is being treated pursuant to 10 CFR 2.206 of the Commission's regulations. That portion of the request has been referred to the Director of Nuclear Materials Safety and Safeguards. By letter dated October 22, 1993, the Petitioner's request that the Commission take immediate action has been denied. As provided by § 2.206, appropriate action will be taken on the remainder of the request within a reasonable time.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street NW., Washington, D.C. 20555.

Dated at Rockville, Maryland this 22nd day of October 1993.

For the Nuclear Regulatory Commission.

Robert M. Bernero,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 93–26658 Filed 10–28–93; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–259, 50–260 and 50–296]

Tennessee Valley Authority, Browns Ferry Nuclear Plant, Units 1, 2, and 3; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–33, DPR–52 and DPR–68 issued to Tennessee Valley Authority for operation of the Browns Ferry Nuclear Plant, Units 1, 2 and 3 located in Limestone County, Alabama.

The proposed amendment would revise the Browns Ferry Technical Specifications to implement the latest revision of 10 CFR part 20, incorporates guidance from Regulatory Guide 8N10, and makes some minor editorial changes.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC's staff's review is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes modify liquid and gaseous release rate limits, replace the old 10 CFR part 20 requirements with the new 10 CFR part 20 requirements and references, revise Technical Specification (TS) bases for the liquid holdup tank activity limit, incorporate guidance outlined in Regulatory Guide 8N10, and incorporate editorial changes. These proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated because there is no change in the types and amounts of effluents that will be released, nor will there be an increase in individual or cumulative occupational radiation exposure.

2. The proposed amendment does not create the possibility of a new or different kind of accident from an accident previously evaluated.

The proposed revisions will not create the possibility of a new or different kind of accident from any previously evaluated because the revisions are administrative and will not change the types and the amounts of effluents that will be released.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

EDO TICKET: Interim NMSS Ticket 9300527 Closeout

009407

DESCRIPTION: 2.206 REQUEST FOR IMMEDIATE ACTION RE LIMERICK & SHOREHAM (EDO NO. 009407) (NMSS 9300527)

Distribution: Docket Nos. 50-352, 353, 322
PDR/LPDR

J. Scinto, OGC
M. Malsch, OGC
J. Cordes, OGC
K. Cyr, OGC
L. Chandler, OGC
T. Martin, RI
K. Smith,RI
J. Goldberg
S. Lewis, OGC
S. Chidakel
L. Hazelwood
J. McGurren
D. Morris, EDO
W. Reamer
L. Pittiglio
F. Rinaldi
S. Brown
M. Knapp
L. Jacobs-Baynard
C. Poland
C. Estep
OGC R/F
NRC F/C
NMSS Dir. Ofc. R/F
NMSS R/F
IMNS C/F
STSB R/F

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 22, 1993

Docket Nos:
50-352; 50-353; 50-322
(10 C.F.R. 2.206)

Fred DeVesa, Esq.
Acting Attorney General of New Jersey
State of New Jersey
Department of Law and Public Safety
Division of Law
Richard J. Hughes Justice Complex
CN 093
Trenton, New Jersey 08625

Dear Mr. DeVesa:

This letter is to acknowledge receipt of your Petition filed October 8, 1993, with the Executive Director for Operations and the Commission, on behalf of the New Jersey Department of Environmental Protection and Energy (NJDEPE). You request that the Commission take immediate action to halt ongoing shipments of fuel from Long Island Power Authority's (LIPA's) Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECo's) Limerick Generating Station pending consideration of the merits of the Petition. Specifically, you request that the Commission: (1) amend LIPA's license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to PECo; (2) perform an Environmental Assessment (EA) pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with Section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b) which addresses alternative means of transporting fuel from LIPA to PECo; and (4) immediately stay PECO's June 23, 1993, license amendments, Certificate of Compliance regarding IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA).

As a basis for your request, you assert that the Nuclear Regulatory Commission has violated NEPA, the CZMA, and the Atomic Energy Act by allowing the transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case specific environmental impact analysis, or any consideration of alternatives to the means of transport. Specifically, you assert that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECo's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

By Order dated October 14, 1993, the Commission has directly requested answers by the State, PECo, LIPA and the NRC staff to questions regarding your alternative request to be granted late intervention and a hearing on PECo's license amendment allowing it to receive and possess Shoreham's fuel, and asserting that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham fuel. The remainder of your Petition has been referred to me pursuant to 10 CFR § 2.206 of the Commission's regulations.

Your request that the Commission take immediate action to halt ongoing shipments of fuel from Shoreham Nuclear Power Station to PECo's Limerick Power Station is denied. You have made no showing that there is any reason to believe that the shipments pose an immediate or substantial danger to public health and safety. The Commission has concluded on several occasions that its regulations for certifying shipping packages for radioactive material (10 CFR Part 71) are adequate to protect the public against unreasonable risk in the transport of these materials. The shipping package used to transport the Shoreham fuel, the IF-300, has been properly certified as meeting the Commission's standards. In addition, it should be noted that the IF-300 shipping package was certified for highly irradiated spent fuel up to 35,000 megawatt days per metric ton (MWD/MTU); the Shoreham fuel by comparison has a low degree of irradiation of 87 MWD/MTU (less than 1% of the value for which the package is certified).

As provided by Section 2.206, action will be taken on your petition within a reasonable time. I have enclosed for your information a copy of the notice that is being filed with the Office of the Federal Register for publication.

Sincerely,

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Enclosure: As stated

cc: Philadelphia Electric Company
Long Island Power Authority

By Order dated October 14, 1993, the Commission has directly requested answers by the State, PECo, LIPA and the NRC staff to questions regarding your alternative request to be granted late intervention and a hearing on PECo's license amendment allowing it to receive and possess Shoreham's fuel, and asserting that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham fuel. The remainder of your Petition has been referred to me pursuant to 10 CFR § 2.206 of the Commission's regulations.

Your request that the Commission take immediate action to halt ongoing shipments of fuel from Shoreham Nuclear Power Station to PECo's Limerick Power Station is denied. You have made no showing that there is any reason to believe that the shipments pose an immediate or substantial danger to public health and safety. The Commission has concluded on several occasions that its regulations for certifying shipping packages for radioactive material (10 CFR Part 71) are adequate to protect the public against unreasonable risk in the transport of these materials. The shipping package used to transport the Shoreham fuel, the IF-300, has been properly certified as meeting the Commission's standards. In addition, it should be noted that the IF-300 shipping package was certified for highly irradiated spent fuel up to 35,000 megawatt days per metric ton (MWD/MTU); the Shoreham fuel by comparison has a low degree of irradiation of 87 MWD/MTU (less than 1% of the value for which the package is certified).

As provided by Section 2.206, action will be taken on your petition within a reasonable time. I have enclosed for your information a copy of the notice that is being filed with the Office of the Federal Register for publication.

Sincerely,

ORIGINAL SIGNED BY

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Enclosure: As stated

cc: Philadelphia Electric Company
Long Island Power Authority

*See previous concurrence.

OFC	STSB	E	STSB	E	STSB	C	OGC	E	IMNS		IMNS	
NAME	*EEaston/lg		*FBrown		*CHaughney		*SHLewis		EBrach		CPaperiello	
DATE	10/22/93		10/22/93		10/22/93		10/22/93		10/ /93		10/22/93	

OFC	NMSS		NMSS	
NAME	GArlotto		RBernero	
DATE	10/ /93		10/22/93	

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U.S. NUCLEAR REGULATORY COMMISSION

Docket Nos. 50-352; 50-353; 50-322

PHILADELPHIA ELECTRIC COMPANY

Limerick Generating Station, Units 1 and 2

(License Nos. NFP-39 AND NFP-85)

LONG ISLAND POWER AUTHORITY

Shoreham Nuclear Power Station

(License No. NFP-82)

RECEIPT OF PETITION FOR DIRECTOR'S DECISION
UNDER 10 C.F.R. § 2.206

Notice is hereby given that by Petition filed October 8, 1993, with the Executive Director for Operations and the Commission, the State of New Jersey Attorney General's Office, on behalf of New Jersey Department of Environmental Protection and Energy (NJDEPE) (Petitioner), has requested that the Commission take immediate action to halt ongoing shipments of fuel from Long Island Power Authority's (LIPA's) Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECo's) Limerick Generating Station pending consideration of the merits of the Petition. Specifically, NJDEPE requests that the Commission: (1) amend LIPA's license and approval of LIPA's decommissioning plan to specifically address the transfer and transport of LIPA's fuel to PECo; (2) perform an Environmental Assessment (EA), pursuant to 10 C.F.R. § 51.30, and determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo which addresses the risks associated with the shipment of the fuel along and through New Jersey's coastal zone; (3) perform a Consideration of Alternatives in accordance with Section 102(2)(E) of the National Environmental Policy Act (NEPA) and 40 C.F.R. § 1509.9(b) which addresses alternative means of

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transporting fuel from LIPA to PECo; and (4) immediately stay PECO's June 23, 1993, license amendments, Certificate of Compliance regarding IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above actions and compliance with the consistency process under the Coastal Zone Management Act (CZMA). As a basis for this request, the Petitioner asserts that the NRC has violated NEPA, the CZMA, and the Atomic Energy Act by allowing the transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case specific environmental impact analysis, or any consideration of alternatives to the means of transport. Specifically, the Petitioner asserts that: (1) the NRC failed to consider alternatives under NEPA for the proposed action; (2) the NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel; (3) the NRC's EA for PECo's license amendments was inadequate; (4) the NRC violated NEPA by segmenting the approval of the transfer and transport by barge; (5) the NRC failed to require LIPA to obtain necessary approvals; and (6) the NRC violated the CZMA by failing to require necessary consistency reviews.

The Petitioner also included an alternative request to be granted late intervention and a hearing on PECo's license amendment allowing it to receive and possess Shoreham's fuel, and asserted that the Commission erred in not offering intervention and a hearing on LIPA's transfer and transportation of Shoreham's fuel. That alternative request is being considered directly by the Commission, pursuant to an Order, dated October 14, 1993.

The remainder of the request is being treated pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. That portion of the request has been referred to the Director of Nuclear Materials Safety and Safeguards. By letter dated October 22, 1993, the Petitioner's request that the Commission take immediate action has been denied. As provided by Section 2.206, appropriate action will be taken on the remainder of the request within a reasonable time.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, N.W., Washington, D.C. 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland
this 22nd day of October 1993.

The remainder of the request is being treated pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. That portion of the request has been referred to the Director of Nuclear Materials Safety and Safeguards. By letter dated October 22, 1993, the Petitioner's request that the Commission take immediate action has been denied. As provided by Section 2.206, appropriate action will be taken on the remainder of the request within a reasonable time.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, N.W., Washington, D.C. 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

ORIGINAL SIGNED BY

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland
this 22nd day of October 1993.

*See previous concurrence.

OFC	STSB		STSB		STSB		OGC		IMNS		IMNS	
NAME	*EEaston/lg		*FBrown		*CHaughney		*JGoldberg		EBrach		CPaperiello	
DATE	10/22/93		10/22/93		10/22/93		Steve Lewis for 10/22/93		10/22/93		10/22/93	

OFC	NMSS		NMSS	
NAME	GArlotto		RBernero	
DATE	10/ /93		10/22/93	

C = COVER/E = COVER & ENCLOSURE/N = NO COPY OFFICIAL RECORD COPY = A:\JERSEY

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

93 OCT 14 P3:29

In the Matter of

STATE OF NEW JERSEY

Department of Law and Public Safety's Requests,

dated October 8, 1993.

Docket No. Misc. 93-01

SERVED OCT 14 1993

ORDER

The State of New Jersey Department of Law and Public Safety ("State of New Jersey" or "State") lodged with the Secretary of the Nuclear Regulatory Commission and with the Executive Director of Operations a document captioned as follows:

RE: A REQUEST FOR IMMEDIATE ACTION BY THE NUCLEAR REGULATORY COMMISSION, OR ALTERNATIVELY, A PETITION FOR LEAVE TO INTERVENE, AND REQUEST FOR A HEARING

PHILADELPHIA ELECTRIC COMPANY, DOCKET NOS. 50-352 AND 50-353, LIMERICK GENERATING STATION, UNITS 1 AND 2, MONTGOMERY COUNTY, PENNSYLVANIA

LONG ISLAND POWER AUTHORITY, DOCKET NO. 50-322, SHOREHAM NUCLEAR POWER STATION, SUFFOLK COUNTY, NEW YORK

and dated October 8, 1993 (New Jersey's filing).

The request in New Jersey's filing for immediate action invoked our procedures under 10 C.F.R. § 2.206, and the request is currently under review by the Director of the cognizant NRC office.

9310260338 4pp.

With respect to the State's alternative request, characterized as a petition to intervene and request for a hearing, it appears that the state believes it "has good cause" to be granted late intervention and a hearing on Philadelphia Electric Company's (PECO's) license amendment allowing it to receive and possess Shoreham's fuel (New Jersey's filing at 44) and that the Commission erred in not offering intervention and a hearing on Long Island Power Authority's (LIPA's) "transfer and transportation of the [Shoreham] fuel." Id. at 46. In this light, the Commission requests answers to two questions: (1) Whether at this time either matter referenced by the State gives rise to any hearing right under Section 189 of the Atomic Energy Act? and, if so, (2) Based on the State's October 8, 1993 submittal, does New Jersey meet the applicable standards for intervention under 10 C.F.R. § 2.714?

In the interests of expedition the Commission is asking for simultaneous responses, not to exceed 10 pages to be filed by the State, PECO and LIPA and served on the other specified responders by 4 p.m Wednesday, October 20. NRC staff may file by noon Friday, October 22. Any responder who wishes may file a brief reply, not to exceed 5 pages, by noon, Tuesday, October 26. No

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMIS

In the Matter of

STATE OF NEW JERSEY

(Department of Law and Public
Safety's Requests)

CERTIFICATE OF

I hereby certify that copies of the fore
have been served upon the following pers
as otherwise noted and in accordance wi

* Lawrence J. Chandler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

** Lawrence C. Lanpher, Esq.
Kirkpatrick & Lockhart
1800 M Street, NW, South Lobby,
Washington, DC 20036

Dated at Rockville, Md. thi
14 day of October 1993

*HAND DELIVERED

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other responses will be permitted. All filings are to be faxed or hand-delivered. (Fax 301-504-1672).

For the Commission,

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of October, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

STATE OF NEW JERSEY

(Department of Law and Public Safety's Requests)

Docket No.(s) MISC. 93-01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER DTD 10/14/93 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

* Lawrence J. Chandler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

** Thomas A. Borden, Esq.
Deputy Attorney General
New Jersey Department of Environmental Protection and Energy
Richard J. Hughes Justice Complex
Trenton, NJ 08625

** Lawrence C. Lanpher, Esq.
Kirkpatrick & Lockhart
1800 M Street, NW, South Lobby, 9th Fl.
Washington, DC 20036

** Robert Rader, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Dated at Rockville, Md. this
14 day of October 1993

Kris Carter
Office of the Secretary of the Commission

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SUBJECT: Requests on behalf of Long Island Power Authority (LIPA) that NRC reject NJ 931008 petition re fuel shipments by LIPA from Shoreham to Limerick Generating Station.

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MIAMI, FLORIDA 33131-2305
(305) 374-8112

1500 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222-2379
(412) 355-6500

LAWRENCE COE LANPHER
(202) 778-9011

REF. EDO 9407

Bernero, NMSS f/action
cys: Taylor
Sniezek
Thompson
Blaha
Lieberman, OE
Murley, NRR
Martin, RI
Goldberg, OGC

October 20, 1993

VIA FACSIMILE

Mr. James M. Taylor
Executive Director for Operations
United States Nuclear Regulatory Commission
11555 Rockville Pike, 17th Floor
Rockville, Maryland 20852

Re: 10 C.F.R. § 2.206 Petition Filed by the State of New Jersey Pertaining to Fuel Shipments by the Long Island Power Authority

Dear Mr. Taylor:

On behalf of the Long Island Power Authority ("LIPA"), we are writing regarding the State of New Jersey's October 8, 1993, request that you and the Commission halt shipments of slightly irradiated fuel from the Shoreham Nuclear Power Station to the Limerick Generating Station. On October 14, 1993, the Commission issued an Order indicating that the Director of the cognizant NRC office would be considering the New Jersey filing insofar as it constitutes a request for action pursuant to 10 C.F.R. § 2.206. We understand in that regard that the cognizant NRC office to which LIPA's response should be referred is the Office of Nuclear Materials Safety and Safeguards. LIPA respectfully requests that the NRC Staff reject the New Jersey request for immediate action.[1/]

1/ LIPA is filing separately with the Commission a Response to the Commission's Order of October 14, 1993. As appropriate, LIPA will make a further filing in the future pertaining to 10 C.F.R. § 2.206 to address the New Jersey filing insofar as it does not seek immediate action.

DC-115458.1

On at least three prior occasions, requests have been filed with the NRC Staff, one of which was submitted under 10 C.F.R. § 2.206, requesting additional regulatory approvals or hearings for shipments of spent fuel or similar materials, and seeking to halt these shipments pending further NRC evaluations. Shipments of Spent Nuclear Fuel, DD-84-24, 20 N.R.C. 1557 (1984); Commonwealth Edison Co. (Shipment of Irradiated Fuel from West Valley, N.Y.), DD-83-14, 18 N.R.C. 726 (1983); Shipments of High-Level Nuclear Power Plant Waste Through and To Illinois, DD-83-12, 18 N.R.C. 713 (1983). In all three instances, the NRC Staff declined to require additional approvals or to halt, or even delay, the shipments. The Staff's reasoning on each occasion was that the NRC's regulations under 10 C.F.R. Parts 71 and 73 impose procedural, administrative and technical requirements designed to protect the public health and safety. E.g., 20 N.R.C. at 1558; 18 N.R.C. at 716. In one case, the Director of the Office of Nuclear Material Safety and Standards explained that over the years the NRC has reexamined the ability of these regulations to protect against unreasonable risk from the transport of licensed materials and concluded:

> [B]ased upon the analysis developed in the rulemaking proceeding, the public comments received, the safety record of transportation of licensed materials and other information, that present regulations were adequate to protect the public against unreasonable risk from the transport of radioactive materials.

18 N.R.C. at 716.

Because the NRC Staff previously has concluded that the NRC's existing regulations are sufficient to protect the public health and safety, and because New Jersey has provided no evidence suggesting that these regulations will not be satisfied in this case, LIPA requests that the Staff deny New Jersey's request for immediate relief. As prior NRC decisions indicate, immediate relief should be granted only when there has been a showing that substantial health and safety issues have been raised. Philadelphia Elec. Co. (Limerick Generating Station, Unit 1), DD-86-6, 23 N.R.C. 571, 572-73 (1986)(and cases cited therein).

New Jersey has failed to identify any substantial health and safety issues associated with LIPA's barge shipment of the Shoreham fuel. Indeed, New Jersey has failed to identify a single alleged defect in the casks that will be used to transport the fuel, or in the Operations Plan pursuant to which LIPA is shipping the fuel. In such circumstances, New Jersey's request for immediate relief is plainly inadequate.

Respectfully,

KIRKPATRICK & LOCKHART

By: Lawrence Coe Lanpher
Lawrence Coe Lanpher

Attorney for the Long
Island Power Authority

OF COUNSEL:

Richard P. Bonnifield, Esq.
General Counsel
Long Island Power Authority
200 Garden City Plaza
Garden City, New York 11530

cc: Attached Service List

CERTIFICATE OF SERVICE

I, Linda L. Raclin, hereby certify that on this 20th day of October, 1993, I served on the following parties, in the manner specified, a copy of a letter to James N. Taylor, Executive Director of Operations at the United State Nuclear Regulatory Commission dated October 20, 1993:

Fred Devesa, Esq.
Acting Attorney General
of New Jersey
Thomas J. Kowalczyk
Deputy Attorney General
Jack Van Dalen
Carol Grulacki
R. J. Hughes Justice Complex
CN 093
Trenton, New Jersey 08625
(609) 948-9315
(Facsimile/FEDEX)

Winston & Strawn
Robert Rader, Esq.
Mark J. Wetterhahn
1400 L Street, NW
Washington, DC 20005-3502
(202) 371-5950
(Courier)

Katherine W. Hazard, Esq.
Attorney, Appellate Section
Department of Justice
P. O. Box 23795
(L'Enfant Station)
Washington, DC 20026
(Courier)

Marjorie Nordlinger, Esq.
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20952
(301) 504-1616
(Facsimile/FEDEX)

Susan S. Chidakel, Esq.
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 504-3725
(Facsimile/FEDEX)

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, DC 20555
(First Class Mail)

Linda L. Raclin

Ref. EDO 9407
Action: Bernero, NMSS
cys: Taylor
Sniezek
Thompson
Blaha
Murley
Lieberman
TTMartin
Scinto

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 093
TRENTON 08625

ROBERT J. DEL TUFO
ACTING ATTORNEY GENERAL

JACK R. SABATINO
ASSISTANT ATTORNEY GENERAL
DIRECTOR

(609) 633-8109

October 13, 1993

James M. Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: PHILADELPHIA ELECTRIC COMPANY, DOCKET NOS. 50-352 AND 50-353, LIMERICK GENERATING STATION, UNITS 1 AND 2, MONTGOMERY COUNTY, PENNSYLVANIA

LONG ISLAND POWER AUTHORITY, DOCKET NO. 50-322, SHOREHAM NUCLEAR POWER STATION, SUFFOLK COUNTY, NEW YORK

Dear Executive Director and Secretary:

As a follow up to the October 8th request and petition submitted on behalf of the New Jersey Department of Environmental Protection and Energy ("NJDEPE"), enclosed please find Judge Garrett E. Brown's October 12th decision dismissing NJDEPE's request for injunctive relief.

9310210052 15pp.

Given the fact that Judge Brown dismissed NJDEPE's requested relief to enjoin the ongoing shipments of irradiated fuel, it has become even more imperative that the Nuclear Regulatory Commission take immediate action on NJDEPE's request.

Respectfully submitted,

FRED DeVESA
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for NJDEPE

By: _____
Thomas A. Borden
Deputy Attorney General

cc: Attached Service List (w/o attach)
Office of the General Counsel (with attach)
Charles L. Miller, NRC (with attach)
Pacific Nuclear Systems, Inc. (with attach)

tb.lipa.nrc

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, et al.,	:	
Plaintiffs,	:	Civ. No. 93-4269 (GEB)
v.	:	
LONG ISLAND POWER AUTHORITY, et al.,	:	**MEMORANDUM AND ORDER**
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on plaintiffs' application for an Order preliminarily enjoining defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge through New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, said shipments has been prepared as required under the National Environmental Policy Act (the "NEPA"), 42 U.S.C. § 4332(2)(c); and (2) defendant Long Island Power Authority ("LIPA") submits a consistency certification to the New Jersey Department of Environmental Protection and Energy (the "NJDEPE") and receives a consistency determination from the NJDEPE as required by the federal Coastal Zone Management Act (the "CZMA"), 16 U.S.C. § 1451 *et seq.* Also before the Court are defendants' cross-motions: (1) to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1); and (2) to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to FED. R. CIV. P. 56.

For the following reasons, the Court will: (1) Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties; (2) grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction as to Count I of the Verified Complaint; (3) deny defendants' cross-motions to

dismiss for failure to state a claim; (4) grant defendants' cross-motions for summary judgment as to Count III of the Verified Complaint; and (5) dismiss as moot plaintiffs' application for preliminary injunctive relief.

I. BACKGROUND

On September 21, 1993, plaintiffs, the State of New Jersey (the "State"), the NJDEPE, and Jeanne M. Fox—Acting Commissioner of the NJDEPE, commenced the instant action against: the LIPA, Thomas DeJesu—Executive Director of LIPA, the United States Nuclear Regulatory Commission (the "NRC"), the United States Coast Guard (the "Coast Guard"), and the Philadelphia Electric Company (the "PECo"), seeking temporary restraints and preliminary injunctive relief in an effort to enjoin the above-named defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge from the LIPA's Shoreham Nuclear Power Station located in New York (the "Shoreham Facility") to the PECo's Limerick Generating Station in located in Pennsylvania (the "Limerick Facility") by way of New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, the shipments has been prepared as required under the NEPA; and (2) defendant LIPA submits a consistency certification to the NJDEPE and receives a consistency determination from the NJDEPE as required by the CZMA. On September 22, 1993, after reviewing the written submissions and hearing the arguments of counsel, this Court denied plaintiffs' application for the issuance of temporary restraints. The Third Circuit then summarily denied plaintiffs' application for a stay of this Court's Order pending appeal by Order dated September 24, 1993.[1]

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1. Plaintiff's appeal to Associate Justice Souter of the United States Supreme Court was similarly denied.

The following facts are derived from plaintiffs' Verified Complaint. Plaintiffs assert that although low power testing of nuclear energy was performed at the Shoreham Facility as early as 1987, said facility has never been placed into commercial operation due, at least in part, to the absence of an adequate evacuation plan. V.Compl. ¶ 10. Consequently, the LIPA is currently decommissioning the Shoreham Facility and arranging for the disposal of the irradiated nuclear fuel that was used during the above-referenced low power testing.[2] *Id.* As part of the intended decommission of the Shoreham Facility, the LIPA proposes to transfer the fuel used by the Shoreham Facility to the Limerick Facility. *Id.* The current proposed transfer of fuel involves approximately thirty-three shipments by barge from the Shoreham Facility to the Limerick Facility by way of New Jersey's coastal waters and will take several months.[3] *Id.* ¶ 11. Plaintiffs assert that when they became aware of the planned shipments, they expressed their objections and concerns to LIPA and PECo officials.[4] *Id.*

In February of 1993, defendant LIPA filed an "Updated Decommissioning Plan" (a "UDP") with the NRC. *Id.* ¶ 14. Plaintiffs assert that the UDP "contained only a brief and tentative discussion of 'fuel disposal alternatives,' and that [the] LIPA acknowledged that as those alternatives emerged it would have to send any requests 'to the NRC as separate licensing submissions.'" *Id.* (citations omitted). On March 8, 1993, defendant PECo applied to defendant the NRC for a variance to its operating license that would allow it to receive and use the Shoreham Facility's fuel.

---

2. Plaintiffs assert that the nuclear fuel at issue consists of Uranium-235 and is radioactive—approximately 176,000 curies. *Id.*

3. According to the plaintiffs' Verified Complaint, "[t]he proposed barge route for the 33 shipments is a route from Long Island, south through the Atlantic Ocean 15 miles off-shore of the State's coast, around Cape May, through the State's waters in Delaware Bay and up the Delaware River, finally docking in Eddystone, Pennsylvania." *Id.* ¶ 13.

4. Plaintiffs objections and concerns centered around the potential damage to tourism and public confidence regarding the safety of the New Jersey shore should one of the barges be involved in an accident. *Id.* ¶ 12.

Id. ¶ 15. Thereafter, on June 23, 1993, defendant the NRC approved the variance sought by defendant PECo. *Id.* ¶ 17. Neither defendant PECo's application nor defendant the NRC's notice of approval published on July 7, 1993, discussed at length the proposed method or route by which the subject fuel would be transported. *Id.* ¶¶ 15, 17.

On or about July 7, 1993, defendant LIPA submitted a "Proposed Operations Plan" for the fuel's shipment by barge. *Id.* ¶ 18. Plaintiffs assert that although they were made aware of the possibility that the defendants *might* seek to transport the fuel by barge along New Jersey's coastline, this was "the first formal document in which [the] LIPA indicated its intention to move its fuel from [the] Shoreham [Facility] to [the] Limerick [Facility] by barge in part through the State's territorial waters and coastal zones." *See id.* Plaintiffs further contend that they did not receive this document until September 3, 1993. *Id.* ¶ 18. Plaintiffs assert that in the interim, on or about July 27, 1993, the defendant Coast Guard conditionally approved the LIPA's plan. *Id.* ¶ 19. Plaintiffs assert that the Coast Guard's conditional approval of the LIPA's proposed plan did not include (1) an assessment of the risks posed by the proposed method or route of transport, or (2) a discussion of reasonable alternatives. *Id.* Plaintiffs further aver that the Coast Guard's conditional approval "was issued without a certification by [the] LIPA that the proposed activity complies with the State's CZM program as required by the CZMA . . . ." *Id.*

On or about August 9, 1993, defendant LIPA submitted an "Application for a Certificate of Handling" (a "COH") to plaintiff the NJDEPE as required by N.J.A.C. § 7:28-12 since New Jersey's Radiation Protection Act, N.J.S.A. § 26:2D-1 *et seq.*, prohibits the transport of certain radioactive materials into or through New Jersey without first obtaining a COH issued by the NJDEPE. *Id.* ¶ 20. Defendants' application is currently under review. *Id.* Plaintiffs maintain that this was the first application by anyone to the NJDEPE seeking approval for the proposed shipments at issue. *Id.*

On August 19, 1993, defendant the NRC issued a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the Shoreham Facility's fuel. *Id.* ¶ 21. Plaintiffs assert that this certification was issued despite the fact that "[t]here was *no* analysis of the risks posed by barge transportation along any specific route, nor of a comparison of those risks versus those posed by other modes and routes of transportation, such as rail." *Id.* (emphasis in original).

Thereafter, on September 8, 1993, plaintiff the NJDEPE sent defendant Coast Guard a letter, with a copy to defendant LIPA, informing them that the LIPA was required under the CZMA to submit a "Consistency Certification" to both the Coast Guard and the NJDEPE certifying that the proposed transportation of radioactive material complied with the State's CZM program. *Id.* ¶ 22. It is also worth noting that on September 15, 1993, the NJDEPE wrote to the United States Department of Commerce—National Oceanic and Atmospheric Administration (the "NOAA") in an effort to have that federal administrative agency step in and require the defendants to submit to a consistency review under the CZMA. *Id.* ¶ 23. By letter dated October 1, 1993, the NOAA informed plaintiff that no such undertaking was required as "the proposed shipment by the LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in [the] CZMA." *See* Letter from Frank Maloney, Acting Director of the NOAA, to Jeanne M. Fox, plaintiff (Oct. 1, 1993) (attached to the Supplemental Letter Brief of the United States in support of its motion to dismiss) [hereinafter Maloney Letter.].

Plaintiffs maintain that "[t]o date [the] LIPA has refused [the] NJDEPE's demands that it withhold shipping the fuel until [the] LIPA has completed the CZMA process and until an adequate environmental assessment and alternatives analysis has been prepared." V.Compl. ¶ 23.

Consequently, plaintiff commenced the instant action on September 21, 1993, to enjoin the proposed shipments scheduled to begin on September 23, 1993.[5]

II. DISCUSSION

As an initial matter, in their Supplemental Briefs and at oral argument, plaintiffs formally withdrew Count II of their Verified Complaint alleging a violation of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* Accordingly, the Court will Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties.

A. Subject Matter Jurisdiction

Before this Court can address the merits of plaintiffs' application for preliminary injunctive relief, I must ascertain whether this Court possesses subject matter jurisdiction over this cause of action. *See A.E. Finley & Assocs., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990). For as the Sixth Circuit stated in *Gould, Inc. v. Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), *cert. dismissed*, 112 S. Ct. 1657 (1992): "[a] motion under Fed. R. Civ. P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim." *Id.* at 450 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

1. Standard for 12(b)(1) Motion to Dismiss

A district court may grant a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) based on the legal insufficiency of a claim. A dismissal pursuant to

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5. The Court has been advised by counsel that as of October 4, 1993—the date upon which this Court conducted oral argument on plaintiffs' application for preliminary injunctive relief—2 of the proposed 33 shipments had arrived in Eddystone, Pennsylvania without incident.

Rule 12(b)(1) is only proper, however, when the claim "'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (quoting *Bell v. Hood*, 327 U.S. 678, 683 (1946)). On a Rule 12(b)(1) motion, plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. *Id.* at 1409.

2. Third Circuit's Exclusive Jurisdiction

It is well settled that the courts of appeals are vested with exclusive subject matter jurisdiction to review all final orders issued by the NRC with respect to any proceeding granting, amending, revoking, or suspending of any license. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 739-41 (1985). Moreover, as stated in the Hobbs Act, 28 U.S.C. § 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . .
>
> (4) all final orders of the [NRC] made reviewable by section 2239 of title 42 . . . .

Id. Section 2239(b), in turn, provides in pertinent part that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U.S.C. § 2342]. . . ." *Id.* Subsection (a) of 42 U.S.C. § 2239 discusses, *inter alia*, the procedures by which the NRC must grant, suspend, revoke, or amend licenses. *See id.* Thus, a final order of the NRC which grants, suspends, revokes, or amends a license is subject to the judicial review provisions contained in the Hobbs Act set forth above.

After careful examination and review of the record presented to this Court and the well-documented written submissions of the parties and hearing the arguments of counsel, this Court finds

that Count I of plaintiffs' Verified Complaint is essentially challenging the validity of two final orders issued by the NRC—the first approving the variance sought by defendant PECo, and the second issuing a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the irradiated nuclear fuel at issue. *See* V.Compl. at Count I. Plaintiffs are attempting to amend those orders to include: (1) an evaluation of the method and route of the intended transport of the nuclear fuel, and (2) an assessment of the risks posed by the current proposed transport by barge along the New Jersey coastline. *See id.* As such, this Court concludes that plaintiff has failed to meet its burden in establishing that this Court may exercise subject matter jurisdiction over this action.[6] Accordingly, the Court will grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint.

B. CROSS-MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(6)

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a

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6. Because this Court find that plaintiffs are essentially challenging the validity of two final orders issued by the NRC, it necessary follows that plaintiffs' steadfast reliance on *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), is misplaced. *See Lorion*, 470 U.S. at 737, 739-41 (discussed *supra*).

valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a).

Because defendants' cross-motions for summary judgment are based upon the entire factual record presented to this Court, I must conclude that it is the more appropriate context within which to decide whether plaintiffs' remaining claim has merit. *See* FED. R. CIV. P. 12(b). Accordingly, the Court will deny defendants' cross-motions to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6).

C. CROSS-MOTIONS FOR SUMMARY JUDGMENT

1. Standard for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Applicability of the CZMA

The gravamen of Count III of plaintiffs' Verified Complaint is that "[the] LIPA applied for an obtained a Coast Guard approval for handling the fuel without submitting a CZM program

consistency certification to the Coast Guard in violation of the CZMA. 16 U.S.C. § 1456(c)(3)(A)."[7] *See* V.Compl. ¶ 40; see *generally id.* at Count III. Review of the CZMA reveals, however, that the application of 16 U.S.C. § 1456(c)(3)(A) is premised upon a finding that the LIPA is "[an] applicant for a required Federal license or permit." *See id.*

In the instant case, plaintiffs attempt to establish this predicate issue based upon a letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, wherein Captain Dickey used the word "approval" to inform officials at the Shoreham Facility that pending a routine safety inspection, the Coast Guard would not interfere with the proposed shipments. *See* Letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, to L.M. Hill, Resident Manager of the Shoreham Facility (Jul. 27, 1993) (annexed as Ex. D to Affidavit of Brant Aidikoff, Consultant to the General Electric Company, dated September 21, 1993 [hereinafter Aidikoff Aff.]). As alluded to in *supra* part I of this Memorandum and Order, however, the NOAA—the federal agency charged with administering this statute and making such findings—has already decided this issue, stating:

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7. 16 U.S.C. § 1456(c)(3)(A) provides in pertinent part:

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

Id.

> [We have] determined that the proposed shipment by [the] LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in [the] CZMA . . . . Therefore, the activity is not subject to consistency review under the CZMA.
>
> . . . [Although we] give[] a broad meaning to the definition of "federal license or permit" . . . , in the instant case, [the] LIPA has not applied for a Federal [sic] license or permit, an moreover, the Coast Guard has not proposed any activities concerning the shipment. [The] LIPA was not legally required to present the Coast Guard with its operation plan for review, but elected to do so on a voluntary basis. Although the Coast Guard could have exercised its statutory authority to control the shipment, no such control was asserted in this case. Absent this control, [the] LIPA could proceed with the shipment without Coast Guard review or approval.

See Maloney Letter. Consequently, absent significant evidence to the contrary, this Court will defer to the findings of the NOAA. For as the Ninth Circuit stated while articulating the appropriate standard of review in such cases: "deference is due an agency's interpretation of its own regulations and the statute it is charged with administering . . . . [T]he agency's decision should not be disturbed unless error is so clear as to deprive its decision of a rational basis." *American Petroleum Inst. v. Knecht*, 609 F.2d 1306 (9th Cir. 1979) (cited with approval in *Norfolk S. Corp. v. Oberly*, 632 F. Supp 1225, 1251 n.46 (D. Del. 1986)); *see also Southern Pac. Transp. Co. v. California Coastal Comm'n*, 520 F. Supp. 800, 803 (N.D. Cal. 1981) ("N.O.A.A. should be afforded considerable deference by the courts with respect to its interpretation of its own regulations." (citing *Knecht*, 609 F.2d at 1310).

After careful review of the evidence presented and hearing the arguments of counsel, this Court finds that plaintiffs have failed to produce *any* credible evidence to support a contrary finding to that announced by the NOAA. In fact, in addition to the findings of the NOAA set forth above, the evidence presented to this Court supports a finding that the Coast Guard did not issue a federal license or permit to the defendants in this case to transport the irradiated nuclear fuel at issue. *See, e.g.*, Declaration of Commander Phillip J. Heyl, United States Coast Guard, Captain of the Port-Long Island Sound, dated September 22, 1993 (decision not to exercise power to stop shipment does not

create a federal license or permit to go forward with shipment); Aidikoff Aff. ¶¶ 6-7 (submission of proposed plans of transport to Coast Guard reflected a customary industry practice not an application for a federal license or permit). As such, this Court must find that the procedures enunciated in the CZMA have not been triggered by the series of events which lead to the filling of the instant action. Accordingly, the Court will grant defendants' motions for summary judgment with respect to this issue.

In light of the foregoing, the Court will dismiss as moot plaintiffs' application for preliminary injunctive relief.

III. CONCLUSION

For the foregoing reasons,

It is this 12th day of October, 1993,

ORDERED that Count II of plaintiffs' Verified Complaint be and is hereby WITHDRAWN by consent of the parties; and it is

FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that defendants' motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) be and is hereby DENIED; and it is

FURTHER ORDERED that defendants' motion for summary judgment pursuant to FED. R. CIV. P. 56 as to Count III of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that plaintiffs' application for preliminary injunctive relief be and is hereby DISMISSED as MOOT.

GARRETT E. BROWN, JR., U.S.D.J.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of STATE OF NEW JERSEY Department of Law and Public Safety's Requests	Docket No. Misc. 93-01

PHILADELPHIA ELECTRIC COMPANY'S RESPONSE TO THE NUCLEAR REGULATORY COMMISSION'S OCTOBER 14, 1993 ORDER

INTRODUCTION

By Order dated October 14, 1993, the Secretary of the Nuclear Regulatory Commission ("NRC" or "Commission") requested responses to two questions from, inter alia, Philadelphia Electric Company ("PECo") relating to a request by the State of New Jersey Department of Law and Public Safety ("New Jersey" or "State"). New Jersey seeks additional NRC consideration of environmental impacts associated with the shipment of slightly irradiated fuel from the Shoreham Nuclear Power Station to PECo's Limerick Generating Station. The Secretary of the NRC has asked:

> (1) Whether at this time either matter referenced by the State gives rise to any hearing right under Section 189 of the Atomic Energy Act; and, if so, (2) Based on the State's October 8, 1993 submittal, does New Jersey meet the applicable standards for intervention under 10 C.F.R. § 2.714?

PECo submits that the answer to these two questions is a resounding "no." The NRC is barred from reconsidering the grant of the Limerick license amendments inasmuch as New Jersey failed to raise these issues before the expiration of the 60-day period for review by a

court of appeals under the Hobbs Act, 28 U.S.C. § 2342(4) (1988). The order of the NRC is final and beyond the jurisdiction of the courts. Hence, it is not subject to direct or collateral attack. PECo is entitled to rely on the authorization of the NRC to receive and utilize the fuel. Furthermore, even were a reopened hearing on late intervention potentially available to it, New Jersey has failed to demonstrate that it is entitled to such a hearing.

ARGUMENT

I. The NRC Lacks Jurisdiction To Consider New Jersey's Request for a Hearing and Late Intervention Because the Time for Judicial Review has Expired.

The Limerick license amendment permitting the receipt of the fuel from Shoreham was issued on June 23, 1993.[1/] Under the Hobbs Act, the period for judicial review of this final agency action expired on August 22, 1993. The NRC has held that until the period for judicial review has expired, it may give further consideration to its otherwise final licensing action. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650 (1980). However, although New Jersey admitted it knew about the planned barge shipments in early July, New Jersey elected not to bring its grievances before the NRC until October 8, 1993, long after the 60-day for review had expired.

The State's failure to request timely NRC action cannot be excused on the basis that discussions were ongoing among the parties, or that it was disappointed with the denial of relief

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1/ The NRC had published a notice of opportunity for hearing and a no significant hazards consideration on March 31, 1993 (58 Fed. Reg. 16,851, 16,867). On May 18, 1993, the NRC published notice of the issuance of an environmental assessment and a finding of no significant impact (58 Fed. Reg. 29,010). On July 7, 1993, notice of issuance of the PECo amendment was issued (58 Fed. Reg. 36,451).

by the District Court. The NRC has held that "a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify its late petition on that reliance when the other proceeding fails to encompass petitioner's interests." Consolidated Edison Co. (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982).

The expiration of the 60-day time period for judicial review is a jurisdictional bar to consideration of a final agency action by the courts. Energy Probe v. NRC, 872 F.2d 436, 437 (D.C. Cir. 1989); Natural Resources Defense Council v. NRC, 666 F.2d 595 (D.C. Cir. 1981). So, too, is it a bar for further consideration by the agency. See Florida Power and Light Co., supra, 12 NRC at 652; Pan American Petroleum Corp. v. Federal Power Comm'n, 322 F.2d 999, 1004 (D.C. Cir. 1963). Litigation and the threat thereof must end and finality be accorded to NRC decisions so that parties may rely on Commission action. As the Atomic Licensing Appeal Board has stated:

> the exclusion from a proceeding of persons or organizations who have slept on their rights does not offend any public policy favoring broad citizen involvement in nuclear licensing adjudications. Assuming that such a policy finds footing in Section 189a . . . it must be viewed in conjunction with the equally important policy favoring the observance of established time limits.

Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), ALAB-743, 18 NRC 387, 396 n. 37 (1983).

II. Petitioner Has Failed to Meet or Even Address the Standard for Reopening a Proceeding.

Assuming arguendo that the request for a hearing is not jurisdictionally time barred, New Jersey has failed to address and fulfill the requirements for reopening and late intervention.

When a petitioner seeks to intervene late in a proceeding for which the record is closed, both the late reopening and intervention criteria must be satisfied. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC 156, 161 n.1 (1993).

First, New Jersey's motion to reopen is not timely. "[T]he party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1065 (1983) (emphasis in original). The Freeman Affidavit (Attachment A) irrefutably shows that New Jersey could have sought reopening on barge impacts at least three months ago, when the time for judicial review had not elapsed. Neither has New Jersey attempted to demonstrate it meets the "exceptionally grave" issue exception contained in 10 C.F.R. § 2.734(a).

Second, contrary to the requirements of § 2.734(a)(2), New Jersey has failed to raise a significant safety or environmental issue. New Jersey has provided only speculation concerning hypothetical environmental or safety risks of severe barge accidents on the New Jersey coast and tourism. New Jersey has offered no technical data or scientific analysis to support these conjectural assertions. However, a party seeking to reopen an NRC proceeding must furnish affidavits "by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." 10 C.F.R. § 2.734(b).

Third, New Jersey's petition does not demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. This is the most important factor of the three-pronged test for reopening. Houston Lighting and Power Co., South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 672 (1986).

Nothing in New Jersey's petition alleges that the NRC would have reached a different conclusion if New Jersey's arguments had been before the Commission earlier. As discussed below, the NRC has already analyzed the environmental impacts of barge transportation of irradiated fuel from nuclear power reactors and determined that those impacts are within the bounds of the analysis of Table S-4. Petitioner does not even argue that the NRC should waive the applicability of Table S-4 per 10 C.F.R. § 2.758(b), let alone show that a different assessment of environmental impacts would result.

III. The State Has Failed To Meet The Commission Requirements For Late Intervention.

In addition to the requirements for reopening contained in 10 C.F.R. § 2.734, New Jersey must satisfy the separate criteria for a late filed petition for intervention. A nontimely request for hearing will not be entertained absent a showing that a balancing of the factors of 10 C.F.R. §§ 2.714(a)(1)(i)-(v) favors the petition.

A petitioner has a duty to confront the five lateness factors in its petition. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466, 468 (1985). Thus, a late petition to intervene which does not even discuss these criteria must be denied. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 353-54 (1980). New Jersey's late request for a hearing contains only a fleeting discussion of two of the lateness factors: good cause (Brief at 44), and availability of other means to protect the State's interests (Brief at 46).

In any event, a balancing of the five lateness factors would clearly call for denial of New Jersey's petition. Good cause for lateness is the most important factor, and, where good cause

is lacking, a petition must make a compelling showing on the other factors. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983) citing Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). The burden of proof is on the petitioner. New Jersey admits that it knew of the intention of Long Island Power Authority ("LIPA") to ship the fuel by barge in early July of this year (Brief at 10). Preoccupation with other matters does not excuse lateness. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979). Nor does poor judgment or imprudence or a late revelation of possible adverse effects from the licensing action. Id. Poor judgment is not good cause for late filing even if specific details unforeseen at first later surface. Id. at 714-715. Also, as noted previously, a claim that petitioner believed that its concerns would be addressed in another proceeding will not be considered good cause. As discussed in Attachment A, Affidavit of Jan Freeman, New Jersey was fully informed of the barge option in late May or early June 1993. New Jersey relied on informal discussions and the weight of its governmental influence to persuade PECo and LIPA to drop the barge option voluntarily. New Jersey's unsuccessful persuasion is not "good cause" for failing to invoke NRC procedures until after several shipments have already been made.

Absent a showing of good cause for late filing, New Jersey must make a "compelling showing" on the other four factors governing late intervention. Cleveland Electric Illuminating Co. & Toledo Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991). New Jersey has not met this heavy burden.

The first of the four remaining factors is the availability of other means whereby petitioner may protect its interest. The State has requested, in parallel, that pursuant to § 2.206 a proceeding be instituted and is now before the Court of Appeals for the Third Circuit requesting judicial review of the same matters. The second factor -- the extent to which petitioners' participation will assist in developing a sound record -- strongly suggests that New Jersey's petition should be denied. New Jersey has not submitted any affidavits of experts nor shown it has expertise in the shipment of nuclear fuel. The third factor -- the extent to which petitioner's interest will be represented by existing parties -- also does not weigh in New Jersey's favor. Petitioner's interest will be adequately protected by the Staff, which has a duty to ensure that the public interest is protected in the enforcement of the Atomic Energy Act. Indian Point, supra, 15 NRC at 41.

The final factor -- the extent to which petitioner's participation will broaden the issues or delay the proceeding -- has been characterized as "of immense importance in the overall balancing process," Perry; Davis-Besse, supra, 34 NRC at 247, citing Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). This factor most strongly compels the denial of the petition. The amendment process is long since over. The grant of New Jersey's request would result in a hearing which would otherwise not be held.

IV. New Jersey's Petition Fails To State An Admissible Contention.

The State's petition is also defective because it fails to state a contention. As to PECO's amendment, at most a single "concern" is contained in the petition. The petition contends that the NRC failed to comply with NEPA in determining that the environmental impacts of

transportation of fuel from Shoreham to Limerick had been adequately analyzed.[2] This contention, however, would be inadmissible because: (1) it constitutes an impermissible attack on Commission regulations under 10 C.F.R. § 2.758; and (2) it fails to meet the requirements set forth in 10 C.F.R. § 2.714.

The crux of New Jersey's petition is a challenge to the NRC's generic evaluation, by way of rulemaking, of the environmental effects of the transportation of radioactive materials to and from nuclear power plants.[3] Contrary to its argument, Table S-4 is applicable to barge transportation. The regulations clearly denote that the shipment of irradiated fuel from a reactor "by truck, rail, or barge" is covered by Table S-4. 10 C.F.R. § 51.52(a)(5) (emphasis added). The supporting documentation for Table S-4 explicitly includes a detailed analysis of the effects of an accident involving a barge carrying irradiated fuel. See "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants," WASH-1238 at 68-71 (December 1972). Thus, the petition seeking a site-specific assessment of environmental

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[2] In passing, New Jersey notes that its Coastal Zone Management Plan identifies NRC "permits and licenses required for the construction and operation of nuclear facilities under the AEA of 1954, Sections 6, 7, 8 and 10," as those for which applicants must consult with the NJDEPE for consistency review. However, the New Jersey plan only refers to the initial licensing for the construction and operation of facilities rather than to any amendments to those licenses. Moreover, the license amendments obtained by PECo relate to the receipt of fuel which does not affect the coastal zone.

[3] Table S-4 resulted from a generic study of the environmental impacts of transportation of fuel and wastes to and from nuclear reactors. 40 Fed. Reg. 1005 (January 6, 1975); 10 C.F.R. § 51.52. This analysis included "the probabilities of occurrences of transportation accidents, the expected consequences of such accidents, and an analysis of the potential radiation exposures to transportation workers and the general public under normal conditions of transport." 40 Fed. Reg. at 1005 (January 6, 1975).

impacts from barge transportation constitutes an impermissible attack on a Commission regulation per 10 C.F.R. § 2.758.

New Jersey may not question the validity of Table S-4 by way of contentions without an appropriate showing. 10 C.F.R. § 2.758. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91, n.9 (1990) citing Philadelphia Electric Co. (Peach Bottom Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). Contentions specifically challenging Table S-4 are inadmissible. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 543-44 (1986); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 793-94 (1985). Nor has New Jersey petitioned for a waiver of the applicability of Table S-4 nor identified how the Table has failed to accomplish its intended purpose. 10 C.F.R. § 2.758(b).

V. New Jersey Fails To Meet The Requirements For An Admissible Contention.

A petitioner is required by 10 C.F.R. § 2.714(b)(2) to explain the basis for the contention, provide a concise statement of the alleged facts or expert opinion which support the proposed contention, and provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC at 149, 155-56, Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992). The filing of vague, unparticularized contentions is not permitted. Duke Power Co. (Catawba Nuclear Station, Units

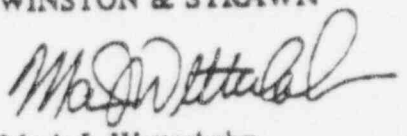
1 and 2), ALAB-687, 16 NRC 460, 468 (1982), rev'd. in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). New Jersey has failed to meet these requirements and its petition should be denied.

CONCLUSION

For the reasons stated above, the NRC lacks jurisdiction to consider New Jersey's request for a hearing pursuant to 10 C.F.R. § 2.714. The State has failed to demonstrate that it is entitled to a hearing to challenge PECo's amendment to permit it to receive the Shoreham fuel.

Respectfully submitted,

WINSTON & STRAWN



Mark J. Wetterhahn
Robert M. Rader
Counsel for Philadelphia Electric Company

October 20, 1993

AFFIDAVIT OF JAN H. FREEMAN

JAN H. FREEMAN, being duly sworn, does state under oath as follows:

1. I am Director of Public Policy for the Philadelphia Electric Company ("PECo"), and have held this position since September, 1991. I am responsible for the planning and briefing of federal, state and local elected and appointed government officials on issues of importance to PECo.

2. In March of this year, PECo, the Long Island Power Authority ("LIPA") and the General Electric Company ("GE") entered into an agreement for the transfer of slightly used nuclear fuel from the Shoreham Nuclear Power Station on Long Island, New York to PECo's Limerick Generating Station located in Montgomery County, Pennsylvania.

3. As part of PECo's decision making process regarding the shipment and receipt of the nuclear fuel, it was decided in May of 1993 that PECo should contact the appropriate state government officials in New Jersey and Delaware in order to apprise them of the possibility of a decision being made to select the barge/rail option. Similar contacts had been made with government officials in Pennsylvania.

4. Pursuant to PECo's decision to contact government officials in New Jersey and Delaware, in either late May or early June, I placed a call to Scott Weiner, who at that time was Commissioner for the New Jersey Department of Environmental

Protection and Energy (DEPE), to inform him of the barge/rail option and to ask that he arrange a meeting with appropriate New Jersey officials in order for LIPA and PECo to brief them on the possibility that the barge/rail option (an option that would take the nuclear fuel from Long Island off the coast of New Jersey and up the Delaware Bay and River) might be selected to transport the nuclear fuel. I knew Mr. Weiner personally from my previous position as Executive Director of the Pennsylvania Energy Office.

5. My conversation with Scott Weiner included a discussion of the barge/rail option. Mr. Weiner expressed concern over the possible route and timing of the shipments. We agreed to arrange a meeting so that we could brief his office on the particulars associated with the barge/rail option. The meeting was set up through DEPE Assistant Secretary Lance Miller's office. The original meeting date of June 14th was rescheduled for June 22nd at my request to accommodate a scheduling conflict.

6. The June 22nd meeting in Trenton, New Jersey was attended by representatives of LIPA, PECo and DEPE. In addition, and at DEPE's request, representatives of the U.S. Coast Guard were also present. The presence of the U.S. Coast Guard was an indication to me that DEPE had done their "homework" and realized that the Coast Guard had a role to play in the barge/rail option.

7. The June 22nd meeting (see attached list of attendees) went extremely well. After a formal presentation by PECo and LIPA personnel and the showing of a video on the integrity of the nuclear fuel transportation casks, there was a discussion on how

the Coast Guard was treating the shipment. A Coast Guard representative responded they are treating it like any other freight shipment. The DEPE staff acknowledged that New Jersey had no role to play and no need to approve the shipment. The DEPE went so far as to say "we hope you have good weather as you begin the process."

8. Prior to the June 22nd meeting in Trenton, a similar meeting was conducted on June 4th in Delaware City, Delaware with state emergency planning officials, representatives from the Division of Public Health, the State Police and other state agencies. Also in attendance was a representative from the New Jersey State Police, Sgt. Jim DeHart. (See attached attendance list.) The Delaware state officials were satisfied with the explanation of all emergency planning and security related activities.

9. On July the 8th, I participated in a telephone call with [redacted] Rick Sinding, DEPE Assistant Commissioner for Policy and Planning. Gerald Nicholls, a member of the DEPE staff, also participated in the phone call. Rick Sinding indicated that Scott Weiner had asked him to call and express DEPE's concern over a possible decision to ship the fuel by barge off the coast of New Jersey and up the Delaware Bay and River. Mr. Sinding indicated that DEPE had "no lingering concerns over the substance of the shipment." They were concerned over the potential perception that might occur over the shipment, especially since they had already dealt with other environmental issues like the

dredging and disposal of dioxin sediment. Concern was also expressed over the potential timing of these shipments, i.e. the potential impact in the commerce associated with the summer vacation season.

10. During the course of that July 8th conversation, the issue of the possible application of the Coastal Zone Management Act (CZMA) came up. It was suggested that New Jersey was looking into the act for possible application. I alerted LIPA and PECo officials of my conversation and asked our legal department to take a look at the CZMA to determine the possible application of this statute. At the end of the July 8th call, it was suggested that Scott Weiner give me a call or possibly meet with me to address any New Jersey concerns. I was never contacted by Scott Weiner or anyone from DEPE to set up a meeting. In addition, I asked that Mr. Sinding call Rich Bonnifield at LIPA, the shipper of the fuel, in order to share DEPE's concerns with LIPA. I understand after having spoken with Mr. Bonnifield that Mr. Sinding spoke with him about a week later and made no reference to the CZMA.

11. The next time that I heard from the DEPE was when I was on vacation and received a message from my office that Rick Sinding wanted to speak with me. When we spoke sometime during the latter part of August, Mr. Sinding said that he had returned from vacation and saw an article in the Philadelphia Inquirer suggesting that LIPA and PECo we were going forward with the shipment. Mr. Sinding said he was asked by his superior, Jeanne

Fox, Acting DEPE Commissioner, to call me and express their concern that LIPA and PECo were considering moving forward with the barge option. Once again, I explained the reasons why the barge shipment would not present any health of safety risk. Mr. Sinding said that he could not disagree with what I said, but that DEPE had a concern over public perception. The possible application of the CZMA was not raised during that conversation. If anything, I felt that Mr. Sinding was sympathetic with our situation and would work internally to resolve any concerns still shared by his department.

12. I never heard again from Mr. Sinding or any other DEPE official regarding any concerns which they might have until I became aware of a September 8, 1993, letter sent by Jeanne Fox to the U.S. Guard, in which DEPE asserted that a CZMA consistency certification was required.

Jan H. Freeman

Jan H. Freeman

Sworn to and subscribed before me
this 24th day of Sept. 1993

Suzanne Schwartz

Notarial Seal
Notary Public
Philadelphia, Phila. County
My Commission Expires

NAME	ORGANIZATION	Telephone
Rick Kinard	Phila. Electric Co. Mgr - EP	(215) 640-6880 x2806
Bob Scott	Phila Elec Co - Proj Mgr	215 327-1200
Tim Davies	N.J.S.P. OEM	609-538-6056
Lawrence Miller	NJDEPE	(609) 292-1250
GERALD NICHOLLS	NJDEPE/DESHAP	609-633-7964
Jill Lipoti	NJDEPE/RPP	609-987-6389
LTJG Joseph Gleason	USCG COTPNY/Admin	212-668-7933
BRANT AIDIKOFF	LIPA/GE	516 364-3244
CHUCK GULDENSCHUH	USCG MSO/GROUP PHILA	215-271-4803
JOHN P. HARRIS	LIPA.	516-929-8300 x.
Ed Lewin	NOAA SSC	(212) 668-6427
HEIDY PAUST	PHILA ELECT Co (PECo)	(215) 327-1200 x2
Ronald L Biller	PECo Security	(215) 841-4293
BILL JONES	PECO, MEDIA RELATIONS	215-841-4129
JAN FREEMAN	Phil. Elec. Co.	215-841-4643
SIVA KUMAR	LONG ISLAND POWER AUTHORITY	516-929-417
Richard Bonnifield	LIPA	516-742-220
Wayne Howitz	NJDEPE	(609) 633-1921
Stan Delikat	NJDEPE	609 633-2168
SCOTT KUHNER	USCG//MSO/GROUP PHILLY	(215) 271-4892
PETER RANDALL	USCG/PHILADELPHIA	(215) 271-4880/

DEC

Name	Agency	Telephone #
Emily Falk	De Emergency Management	(302) 834-4531
Rick Kinard	Philadelphia Electric - EP	(215) 640-6880
James W. Hoffman	DEPO	(302) 834-4531
Al Tapert	Del Div Public Health	302/739-3787
John Mohrman	DE DNREC	302/739-3694
[illegible]	DNR.	~~(302) 57[illegible]~~
Dave Freeman	Phil. Electric Co	215-841-4643
Siva Kumar	Long Island Power Authority	516-929-4177
Glen McCormick	Del. Emergency Management	302-834-4531
[illegible] Taylor	Secretary's Office Dept. Pub Safety	(302) 739-4311
Bill Jones	PECO, Media Relations	215-841-4129
Bob Scott	PECO Project Manager	215 327-~~[illegible]~~ x2E
Lt. Bob Yowler	Delaware State Police	302-739-5867
Sgt Albert L Heaton	Del. River & Bay Auth. Police	302-571-6346
Michael Dalton	DEPO	302-834-4531
Bill Butler	DEPO	
Millard Dawson	DEPO	
Sgt Jim DeHart	NJ SP OEM	609-561-1800 x337
Bud Foster	DEPO	302 834 4531

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	'93 OCT 20 P4:24
STATE OF NEW JERSEY	)	Docket No. Misc. 93-01
Department of Law and Public Safety's Requests	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

Name	-	Mark J. Wetterhahn
Address	-	Winston & Strawn 1400 L Street, N.W. Washington, D.C. 20005-3502
Telephone Number	-	Area Code 202-371-5703
Admissions	-	United States Supreme Court United States Court of Appeals for the District of Columbia
Name of the Party	-	Philadelphia Electric Company 2301 Market Street Philadelphia, Pennsylvania 19101

Pursuant to 10 C.F.R. § 2.712(b), service of correspondence and pleadings on Philadelphia Electric Company should be addressed specifically to the undersigned.

Mark J. Wetterhahn
Winston & Strawn
Counsel for Philadelphia Electric Company

Dated at Washington, D.C.
this 20th day of October, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of STATE OF NEW JERSEY Department of Law and Public Safety's Requests	Docket No. Misc. 93-01

CERTIFICATE OF SERVICE

I, Mark J. Wetterhahn, hereby certify that on this 20th day of October, 1993, I served on the following copies of "Philadelphia Electric Company's Response to the Nuclear Regulatory Commission's October 14, 1993 Order," and "Notice of Appearance" for Mark J. Wetterhahn both dated October 20, 1993.

Thomas A. Borden, Esq.*
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Ann Hodgdon, Esq.*
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Washington, D.C. 20555

Docketing and Service Section**
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Lawrence C. Lanpher, Esq.*
Kirkpatrick and Lockhart
1800 M Street, N.W.
Washington, D.C. 20036-5891

Richard P. Bonnifield, Esq.
General Counsel
Long Island Power Authority
200 Garden City Plaza
Suite 201
Garden City, New York 11530

Edward J. Cullen, Jr., Esq.
Philadelphia Electric Company
2301 Market Street
Philadelphia, Pennsylvania 19101

Mark J. Wetterhahn

* By facsimile
** By messenger

Ref. EDO 9407
Action: Bernero, NMSS
cys: Taylor
Sniezek
Thompson
Blaha

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 093
TRENTON 08625

ROBERT J. DEL TUFO
ACTING ATTORNEY GENERAL

JACK M. SABATINO
ASSISTANT ATTORNEY GENERAL
DIRECTOR

Murley
Lieberman
TTMartin
Scinto

(609) 633-8109

October 13, 1993

James M. Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: PHILADELPHIA ELECTRIC COMPANY, DOCKET NOS. 50-352 AND 50-353, LIMERICK GENERATING STATION, UNITS 1 AND 2, MONTGOMERY COUNTY, PENNSYLVANIA

LONG ISLAND POWER AUTHORITY, DOCKET NO. 50-322, SHOREHAM NUCLEAR POWER STATION, SUFFOLK COUNTY, NEW YORK

Dear Executive Director and Secretary:

As a follow up to the October 8th request and petition submitted on behalf of the New Jersey Department of Environmental Protection and Energy ("NJDEPE"), enclosed please find Judge Garrett E. Brown's October 12th decision dismissing NJDEPE's request for injunctive relief.

9310216052 15pp.

Given the fact that Judge Brown dismissed NJDEPE's requested relief to enjoin the ongoing shipments of irradiated fuel, it has become even more imperative that the Nuclear Regulatory Commission take immediate action on NJDEPE's request.

Respectfully submitted,

FRED DeVESA
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for NJDEPE

By: _____
Thomas A. Borden
Deputy Attorney General

cc: Attached Service List (w/o attach)
Office of the General Counsel (with attach)
Charles L. Miller, NRC (with attach)
Pacific Nuclear Systems, Inc. (with attach)

tb.lipa.nrc

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, et al.,	:	
Plaintiffs,	:	Civ. No. 93-4269 (GEB)
v.	:	
LONG ISLAND POWER AUTHORITY, et al.,	:	**MEMORANDUM AND ORDER**
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on plaintiffs' application for an Order preliminarily enjoining defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge through New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, said shipments has been prepared as required under the National Environmental Policy Act (the "NEPA"), 42 U.S.C. § 4332(2)(c); and (2) defendant Long Island Power Authority ("LIPA") submits a consistency certification to the New Jersey Department of Environmental Protection and Energy (the "NJDEPE") and receives a consistency determination from the NJDEPE as required by the federal Coastal Zone Management Act (the "CZMA"), 16 U.S.C. § 1451 *et seq.* Also before the Court are defendants' cross-motions: (1) to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1); and (2) to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to FED. R. CIV. P. 56.

For the following reasons, the Court will: (1) Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties; (2) grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction as to Count I of the Verified Complaint; (3) deny defendants' cross-motions to

dismiss for failure to state a claim: (4) grant defendants' cross-motions for summary judgment as to Count III of the Verified Compiaint: and (5) dismiss as moot plaintiffs' application for preliminary injunctive relief.

I. BACKGROUND

On September 21, 1993, plaintiffs, the State of New Jersey (the "State"), the NJDEPE, and Jeanne M. Fox—Acting Commissioner of the NJDEPE, commenced the instant action against: the LIPA. Thomas DeJesu—Executive Director of LIPA. the United States Nuclear Regulatory Commission (the "NRC"). the United States Coast Guard (the "Coast Guard"), and the Philadelphia Electric Company (the "PECo"), seeking temporary restraints and preliminary injunctive relief in an effort to enjoin the above-named defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge from the LIPA's Shoreham Nuclear Power Station located in New York (the "Shoreham Facility") to the PECo's Limerick Generating Station in located in Pennsylvania (the "Limerick Facility") by way of New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, the shipments has been prepared as required under the NEPA; and (2) defendant LIPA submits a consistency certification to the NJDEPE and receives a consistency determination from the NJDEPE as required by the CZMA. On September 22, 1993, after reviewing the written submissions and hearing the arguments of counsel, this Court denied plaintiffs' application for the issuance of temporary restraints. The Third Circuit then summarily denied plaintiffs' application for a stay of this Court's Order pending appeal by Order dated September 24, 1993.[1]

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1. Plaintiff's appeal to Associate Justice Souter of the United States Supreme Court was similarly denied.

The following facts are derived from plaintiffs' Verified Complaint. Plaintiffs assert that although low power testing of nuclear energy was performed at the Shoreham Facility as early as 1987, said facility has never been placed into commercial operation due, at least in part, to the absence of an adequate evacuation plan. V.Compl. ¶ 10. Consequently, the LIPA is currently decommissioning the Shoreham Facility and arranging for the disposal of the irradiated nuclear fuel that was used during the above-referenced low power testing.[2] *Id.* As part of the intended decommission of the Shoreham Facility, the LIPA proposes to transfer the fuel used by the Shoreham Facility to the Limerick Facility. *Id.* The current proposed transfer of fuel involves approximately thirty-three shipments by barge from the Shoreham Facility to the Limerick Facility by way of New Jersey's coastal waters and will take several months.[3] *Id.* ¶ 11. Plaintiffs assert that when they became aware of the planned shipments, they expressed their objections and concerns to LIPA and PECo officials.[4] *Id.*

In February of 1993, defendant LIPA filed an "Updated Decommissioning Plan" (a "UDP") with the NRC. *Id.* ¶ 14. Plaintiff's assert that the UDP "contained only a brief and tentative discussion of 'fuel disposal alternatives,' and that [the] LIPA acknowledged that as those alternatives emerged it would have to send any requests 'to the NRC as separate licensing submissions.'" *Id.* (citations omitted). On March 8, 1993, defendant PECo applied to defendant the NRC for a variance to its operating license that would allow it to receive and use the Shoreham Facility's fuel.

---

2. Plaintiffs assert that the nuclear fuel at issue consists of Uranium-235 and is radioactive—approximately 176,000 curies. *Id.*

3. According to the plaintiffs' Verified Complaint, "[t]he proposed barge route for the 33 shipments is a route from Long Island, south through the Atlantic Ocean 15 miles off-shore of the State's coast, around Cape May, through the State's waters in Delaware Bay and up the Delaware River, finally docking in Eddystone, Pennsylvania." *Id.* ¶ 13.

4. Plaintiffs objections and concerns centered around the potential damage to tourism and public confidence regarding the safety of the New Jersey shore should one of the barges be involved in an accident. *Id.* ¶ 12.

Id. ¶ 15. Thereafter, on June 23, 1993, defendant the NRC approved the variance sought by defendant PECo. *Id.* ¶ 17. Neither defendant PECo's application nor defendant the NRC's notice of approval published on July 7, 1993, discussed at length the proposed method or route by which the subject fuel would be transported. *Id.* ¶¶ 15, 17.

On or about July 7, 1993, defendant LIPA submitted a "Proposed Operations Plan" for the fuel's shipment by barge. *Id.* ¶ 18. Plaintiffs assert that although they were made aware of the possibility that the defendants *might* seek to transport the fuel by barge along New Jersey's coastline, this was "the first formal document in which [the] LIPA indicated its intention to move its fuel from [the] Shoreham [Facility] to [the] Limerick [Facility] by barge in part through the State's territorial waters and coastal zones." *See id.* Plaintiffs further contend that they did not receive this document until September 3, 1993. *Id.* ¶ 18. Plaintiffs assert that in the interim, on or about July 27, 1993, the defendant Coast Guard conditionally approved the LIPA's plan. *Id.* ¶ 19. Plaintiffs assert that the Coast Guard's conditional approval of the LIPA's proposed plan did not include (1) an assessment of the risks posed by the proposed method or route of transport, or (2) a discussion of reasonable alternatives. *Id.* Plaintiffs further aver that the Coast Guard's conditional approval "was issued without a certification by [the] LIPA that the proposed activity complies with the State's CZM program as required by the CZMA . . . ." *Id.*

On or about August 9, 1993, defendant LIPA submitted an "Application for a Certificate of Handling" (a "COH") to plaintiff the NJDEPE as required by N.J.A.C. § 7:28-12 since New Jersey's Radiation Protection Act, N.J.S.A. § 26:2D-1 *et seq.*, prohibits the transport of certain radioactive materials into or through New Jersey without first obtaining a COH issued by the NJDEPE. *Id.* 20. Defendants' application is currently under review. *Id.* Plaintiffs maintain that this was the first application by anyone to the NJDEPE seeking approval for the proposed shipments at issue. *Id.*

On August 19, 1993, defendant the NRC issued a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the Shoreham Facility's fuel. *Id.* ¶ 21. Plaintiffs assert that this certification was issued despite the fact that "[t]here was *no* analysis of the risks posed by barge transportation along any specific route, nor of a comparison of those risks versus those posed by other modes and routes of transportation, such as rail." *Id.* (emphasis in original).

Thereafter, on September 8, 1993, plaintiff the NJDEPE sent defendant Coast Guard a letter, with a copy to defendant LIPA, informing them that the LIPA was required under the CZMA to submit a "Consistency Certification" to both the Coast Guard and the NJDEPE certifying that the proposed transportation of radioactive material complied with the State's CZM program. *Id.* ¶ 22. It is also worth noting that on September 15, 1993, the NJDEPE wrote to the United States Department of Commerce—National Oceanic and Atmospheric Administration (the "NOAA") in an effort to have that federal administrative agency step in and require the defendants to submit to a consistency review under the CZMA. *Id.* ¶ 23. By letter dated October 1, 1993, the NOAA informed plaintiff that no such undertaking was required as "the proposed shipment by the LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in [the] CZMA." *See* Letter from Frank Maloney, Acting Director of the NOAA, to Jeanne M. Fox, plaintiff (Oct. 1, 1993) (attached to the Supplemental Letter Brief of the United States in support of its motion to dismiss) [hereinafter Maloney Letter.].

Plaintiffs maintain that "[t]o date [the] LIPA has refused [the] NJDEPE's demands that it withhold shipping the fuel until [the] LIPA has completed the CZMA process and until an adequate environmental assessment and alternatives analysis has been prepared." V.Compl. ¶ 23.

Consequently, plaintiff commenced the instant action on September 21, 1993, to enjoin the proposed shipments scheduled to begin on September 23, 1993.[5]

II. DISCUSSION

As an initial matter, in their Supplemental Briefs and at oral argument, plaintiffs formally withdrew Count II of their Verified Complaint alleging a violation of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* Accordingly, the Court will Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties.

A. Subject Matter Jurisdiction

Before this Court can address the merits of plaintiffs' application for preliminary injunctive relief, I must ascertain whether this Court possesses subject matter jurisdiction over this cause of action. *See A.E. Finley & Assocs., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990). For as the Sixth Circuit stated in *Gould, Inc. v. Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), *cert. dismissed*, 112 S. Ct. 1657 (1992): "[a] motion under Fed. R. Civ. P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim." *Id.* at 450 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

1. Standard for 12(b)(1) Motion to Dismiss

A district court may grant a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) based on the legal insufficiency of a claim. A dismissal pursuant to

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5. The Court has been advised by counsel that as of October 4, 1993—the date upon which this Court conducted oral argument on plaintiffs' application for preliminary injunctive relief—2 of the proposed 33 shipments had arrived in Eddystone, Pennsylvania without incident.

Rule 12(b)(1) is only proper, however, when the claim "'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (quoting *Bell v. Hood*, 327 U.S. 678, 683 (1946)). On a Rule 12(b)(1) motion, plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. *Id.* at 1409.

2. Third Circuit's Exclusive Jurisdiction

It is well settled that the courts of appeals are vested with exclusive subject matter jurisdiction to review all final orders issued by the NRC with respect to any proceeding granting, amending, revoking, or suspending of any license. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 739-41 (1985). Moreover, as stated in the Hobbs Act, 28 U.S.C. § 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . .
>
> (4) all final orders of the [NRC] made reviewable by section 2239 of title 42 . . . .

Id. Section 2239(b), in turn, provides in pertinent part that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U.S.C. § 2342]. . . ." *Id.* Subsection (a) of 42 U.S.C. § 2239 discusses, *inter alia*, the procedures by which the NRC must grant, suspend, revoke, or amend licenses. *See id.* Thus, a final order of the NRC which grants, suspends, revokes, or amends a license is subject to the judicial review provisions contained in the Hobbs Act set forth above.

After careful examination and review of the record presented to this Court and the well-documented written submissions of the parties and hearing the arguments of counsel, this Court finds

that Count I of plaintiffs' Verified Complaint is essentially challenging the validity of two final orders issued by the NRC—the first approving the variance sought by defendant PECo and the second issuing a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the irradiated nuclear fuel at issue. *See* V.Compl. at Count I. Plaintiffs are attempting to amend those orders to include: (1) an evaluation of the method and route of the intended transport of the nuclear fuel, and (2) an assessment of the risks posed by the current proposed transport by barge along the New Jersey coastline. *See id.* As such, this Court concludes that plaintiff has failed to meet its burden in establishing that this Court may exercise subject matter jurisdiction over this action.[6] Accordingly, the Court will grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint.

B. CROSS-MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(6)

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a

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6. Because this Court find that plaintiffs are essentially challenging the validity of two final orders issued by the NRC, it necessary follows that plaintiffs' steadfast reliance on *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), is misplaced. *See Lorion*, 470 U.S. at 737, 739-41 (discussed *supra*).

valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a).

Because defendants' cross-motions for summary judgment are based upon the entire factual record presented to this Court, I must conclude that it is the more appropriate context within which to decide whether plaintiffs' remaining claim has merit. *See* FED. R. CIV. P. 12(b). Accordingly, the Court will deny defendants' cross-motions to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6).

C. CROSS-MOTIONS FOR SUMMARY JUDGMENT

1. Standard for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Applicability of the CZMA

The gravamen of Count III of plaintiffs' Verified Complaint is that "[the] LIPA applied for an obtained a Coast Guard approval for handling the fuel without submitting a CZM program

consistency certification to the Coast Guard in violation of the CZMA. 16 U.S.C. § 1456(c)(3)(A)."[7] *See* V.Compl. ¶ 40; see *generally id.* at Count III. Review of the CZMA reveals, however, that the application of 16 U.S.C. § 1456(c)(3)(A) is premised upon a finding that the LIPA is "[an] applicant for a required Federal license or permit." *See id.*

In the instant case, plaintiffs attempt to establish this predicate issue based upon a letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, wherein Captain Dickey used the word "approval" to inform officials at the Shoreham Facility that pending a routine safety inspection, the Coast Guard would not interfere with the proposed shipments. *See* Letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, to L.M. Hill, Resident Manager of the Shoreham Facility (Jul. 27, 1993) (annexed as Ex. D to Affidavit of Brant Aidikoff, Consultant to the General Electric Company, dated September 21, 1993 [hereinafter Aidikoff Aff.]). As alluded to in *supra* part I of this Memorandum and Order, however, the NOAA—the federal agency charged with administering this statute and making such findings—has already decided this issue, stating:

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7. 16 U.S.C. § 1456(c)(3)(A) provides in pertinent part:

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

Id.

> [We have] determined that the proposed shipment by [the] LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in [the] CZMA . . . . Therefore, the activity is not subject to consistency review under the CZMA.
>
> . . . [Although we] give[] a broad meaning to the definition of "federal license or permit" . . . , in the instant case, [the] LIPA has not applied for a Federal [sic] license or permit, an moreover, the Coast Guard has not proposed any activities concerning the shipment. [The] LIPA was not legally required to present the Coast Guard with its operation plan for review, but elected to do so on a voluntary basis. Although the Coast Guard could have exercised its statutory authority to control the shipment, no such control was asserted in this case. Absent this control, [the] LIPA could proceed with the shipment without Coast Guard review or approval.

See Maloney Letter. Consequently, absent significant evidence to the contrary, this Court will defer to the findings of the NOAA. For as the Ninth Circuit stated while articulating the appropriate standard of review in such cases: "deference is due an agency's interpretation of its own regulations and the statute it is charged with administering . . . . [T]he agency's decision should not be disturbed unless error is so clear as to deprive its decision of a rational basis." *American Petroleum Inst. v. Knecht*, 609 F.2d 1306 (9th Cir. 1979) (cited with approval in *Norfolk S. Corp. v. Oberly*, 632 F. Supp 1225, 1251 n.46 (D. Del. 1986)); *see also Southern Pac. Transp. Co. v. California Coastal Comm'n*, 520 F. Supp. 800, 803 (N.D. Cal. 1981) ("N.O.A.A. should be afforded considerable deference by the courts with respect to its interpretation of its own regulations." (citing *Knecht*, 609 F.2d at 1310).

After careful review of the evidence presented and hearing the arguments of counsel, this Court finds that plaintiffs have failed to produce *any* credible evidence to support a contrary finding to that announced by the NOAA. In fact, in addition to the findings of the NOAA set forth above, the evidence presented to this Court supports a finding that the Coast Guard did not issue a federal license or permit to the defendants in this case to transport the irradiated nuclear fuel at issue. *See, e.g.*, Declaration of Commander Phillip J. Heyl, United States Coast Guard, Captain of the Port-Long Island Sound, dated September 22, 1993 (decision not to exercise power to stop shipment does not

create a federal license or permit to go forward with shipment); Aidikoff Aff. ¶¶ 6-7 (submission of proposed plans of transport to Coast Guard reflected a customary industry practice not an application for a federal license or permit). As such, this Court must find that the procedures enunciated in the CZMA have not been triggered by the series of events which lead to the filling of the instant action. Accordingly, the Court will grant defendants' motions for summary judgment with respect to this issue.

In light of the foregoing, the Court will dismiss as moot plaintiffs' application for preliminary injunctive relief.

III. CONCLUSION

For the foregoing reasons,

It is this 12th day of October, 1993,

ORDERED that Count II of plaintiffs' Verified Complaint be and is hereby WITHDRAWN by consent of the parties; and it is

FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that defendants' motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) be and is hereby DENIED; and it is

FURTHER ORDERED that defendants' motion for summary judgment pursuant to FED. R. CIV. P. 56 as to Count III of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that plaintiffs' application for preliminary injunctive relief be and is hereby DISMISSED as MOOT.

GARRETT E. BROWN, JR., U.S.D.J.

FRED DeVESA
ACTING ATTORNEY GENERAL
ROBERT J. DEL TUFO
ATTORNEY GENERAL
XXXXXXXXXXX

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 093
TRENTON 08625

JACK M. SABATINO
XXXXXXXXXXXXX
ASSISTANT ATTORNEY GENERAL
DIRECTOR

(609) 633-8109
October 8, 1993

James M. Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: A REQUEST FOR IMMEDIATE ACTION BY THE NUCLEAR REGULATORY COMMISSION, OR ALTERNATIVELY, A PETITION FOR LEAVE TO INTERVENE, AND REQUEST FOR A HEARING

PHILADELPHIA ELECTRIC COMPANY, DOCKET NOS. 50-352 AND 50-353, LIMERICK GENERATING STATION, UNITS 1 AND 2, MONTGOMERY COUNTY, PENNSYLVANIA

LONG ISLAND POWER AUTHORITY, DOCKET NO. 50-322, SHOREHAM NUCLEAR POWER STATION, SUFFOLK COUNTY, NEW YORK

Dear Executive Director and Secretary:

Please accept the following request and petition on behalf of the New Jersey Department of Environmental Protection and Energy ("NJDEPE"). NJDEPE hereby submits a request for immediate action in accordance with 10 C.F.R. § 2.206 on the above captioned licenses including a stay of the licenses. Alternatively, in accordance with 10 C.F.R. § 2.714, NJDEPE

hereby files a petition for leave to intervene, and a request for a hearing.

This request involves the transfer and transport of irradiated fuel from Long Island Power Authority's ("LIPA") Shoreham Nuclear Power Station to Philadelphia Electric Company's ("PECo") Limerick Generating Station. Despite NJDEPE's continuing efforts to obtain injunctive relief in the federal courts, the barge shipments began on September 24, 1993 and several shipments have docked at Eddystone, Pennsylvania. Shipments are expected to continue every five to ten days until the campaign of 33 shipments is completed.

As discussed more fully below, NJDEPE maintains in this request and petition that the Nuclear Regulatory Commission's staff ("NRC") has violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 et seq., and the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011 et seq., by allowing the ongoing transfer and transport of LIPA's fuel to proceed absent any consideration of the potential effects on New Jersey's coastal zone, any case specific environmental impact analysis, or any consideration of alternatives to the means of transportation.

NRC staff published PECo's license amendments to receive and possess LIPA's fuel on July 7, 1993. The environmental assessment ("EA") for PECo was published on May 18, 1993. The main flaw in this process is that PECo's environmental report

and NRC's EA were prepared when the fuel was to be transported by rail through New York and Pennsylvania. The only means of transportation NRC staff ever mentioned in the three public notices for PECo was that the fuel would be transported by rail. When the method of transportation and route were changed to allow an unprecedented campaign of 33 shipments by barge along and through New Jersey's coastal zone, NJDEPE should have been given an opportunity to give NRC comment upon or challenge that change.

Given the last minute change in means and routes of transportation, it is not surprising that the effect and scope of the PECo EA is subject to different interpretations. In written submissions to Judge Garrett Brown of the District Court of New Jersey, counsel for PECo maintains that NRC staff evaluated in the PECo EA the environmental impacts associated with the fuel transportation. (Exhibit "Ex." "I", PECo's Brief in Opposition to Motion for TRO, p.2). On the other hand, counsel for LIPA maintained that PECo's licence did not pertain to the transportation of the fuel. (Ex. "J", LIPA's Brief on TRO, p.20-21). Counsel for NRC has simply maintained that the administrative record is complete and has not squarely addressed the issue of the scope of the EA.

NJDEPE clearly had no reason to be concerned when NRC staff amended PECo's license since the route altogether avoided New Jersey. Now that the route and means of transport have been drastically altered and thereby threaten New Jersey's

fragile coastal zone, NRC should hear NJDEPE's concerns and take action to address them. Otherwise, NJDEPE and the public will be left wondering why the possibly safer and cheaper rail alternative was abandoned in favor of this unprecedented campaign of barge shipments. The only evidence in the record as to why the rail alternative was not chosen was that there was "local opposition" by New York City. NRC's lack of clarity regarding the purpose and impact of PECo's EA and its tacit approval of LIPA's last minute decision to use barges is an contravenes NRC's and Congress's policy of encouraging public participation in NRC's decisionmaking.

With respect to LIPA, NJDEPE maintains that NRC staff has failed, in its approval of the ongoing transfer and transportation of LIPA's fuel, to either issue a proposed license amendment, an environmental assessment, a consideration of alternatives, or an examination of consistency with New Jersey's coastal policies under CZMA. The only affirmative NRC action taken with respect to LIPA is an EA regarding the proposed exemption from the emergency preparedness requirements pursuant to 10 C.F.R. § 50.54(q) which was published on September 22, 1993. Even though NRC staff is now aware of the method of transport, even this EA specifically avoids any indication that the transfer of the fuel will be accomplished by 33 barge shipments. Counsel for LIPA maintains that LIPA also holds a general license to transport its fuel pursuant to 10 C.F.R. § 71.12. However, NRC staff never performed any EA

regarding this general license. Such fragmentation of NRC's approval of the ongoing shipments has prejudiced NJDEPE's ability to voice any concerns over the 33 shipments through its waters.

Accordingly, pursuant to 10 C.F.R. § 2.206, NJDEPE hereby requests that NRC take the following actions:

> 1) Amend LIPA's license and any approval of LIPA's Decommissioning Plan to specifically address the transfer and transport of LIPA's fuel to PECo;
>
> 2) Perform an EA, pursuant to 10 C.F.R. § 51.30, and a determination based on the EA, pursuant to 10 C.F.R. § 51.31, regarding the proposed transfer and transport of the fuel by barge from LIPA to PECo which addresses the risks associated with the shipment of the irradiated fuel along and through New Jersey's coastal zone;
>
> 3) Perform a Consideration of Alternatives in accordance with Section 102(2)(E) of NEPA and 40 C.F.R. § 1509.9(b) which addresses the alternative means of transporting the fuel from LIPA to PECo, including but not limited to, the rail and barge alternatives; and
>
> 4) Immediately stay PECo's June 23, 1993 license amendments, the Certificate of Compliance regarding IF-300 issued to Pacific Nuclear Systems, and LIPA's license and general license to transfer the fuel pursuant to 10 C.F.R. § 71.12 pending completion of the above three NRC actions and compliance with the consistency process under CZMA.

Alternatively, should NRC decide not to take action on the above, NJDEPE hereby requests, in accordance with 10 C.F.R. § 2.714, leave to intervene, and a hearing. In either case since the shipments are ongoing, NJDEPE respectfully requests that NRC take immediate action to halt the ongoing shipments until the merits of this petition are addressed. If action is not

taken before the next shipment has departed, NJDEPE will be compelled to seriously consider pursuing other legal relief, including relief in the Court of Appeals.

I. FACTUAL BACKGROUND

In 1987, 30 hours of low power testing was performed at the Shoreham facility, but the facility was never placed into commercial operation due in part to the absence of an adequate evacuation plan. LIPA is presently decommissioning the Shoreham facility and is making arrangements for the disposal of the nuclear fuel that was used during the low power testing. That fuel consists of uranium, U-235. The fuel is radioactive, approximately 176,000 Curies, and it therefore must be handled and transported in the manner that precludes the release of radiation.

LIPA is presently transporting the fuel by barge from the Shoreham facility on Long Island to PECo's docking facility in Eddystone, Pennsylvania. LIPA commenced shipment of the fuel on or about September 23, 1993 and has completed several shipments to date. A total of 33 shipments is anticipated to be necessary to complete the transport of all of the fuel. It is estimated that it will take at least seven to ten months to complete the shipments, and that a shipment will take place every five to ten tads.

The barge route for the 33 shipments is a route from Long Island, south through the Atlantic Ocean 15 miles off-shore of the State's coast, around Cape May, through the State's waters in the Delaware Bay and up the Delaware River, finally docking in Eddystone, Pennsylvania.

In February 1993, LIPA filed with NRC an "Updated Decommissioning Plan" for Shoreham. (Ex. "A"). That plan contained only a brief and tentative discussion of "fuel disposal alternatives," and LIPA acknowledged that as those alternatives emerged it would have to send any requests "to the NRC as separate licensing submissions." (Ex. "A", Section 3.3.1, p. 3-19). LIPA has considered at least two other alternatives to the transfer of the fuel. One involved sending the fuel to France for reprocessing and the other involved the transfer by tractor-trailer and rail through New York and eastern Pennsylvania. The second plan faced "local opposition" according to a May 1993 NRC inspection report, and had LIPA begin to investigate other alternatives, including shipment by barge. (Ex. "B"). A more recent newspaper article stated that LIPA officials had "bow[ed] to pressure from New York City officials" in determining not to ship the fuel by rail through New York City. (Ex. "B").

On March 8, 1993, PECo applied to NRC for a change to its operating license that would allow it to receive and possess Shoreham's fuel. As part of its application, PECo included "information supporting a finding that the proposed change does

not involve a Significant Hazards Assessment and supporting an Environmental Assessment." (Ex. "C"). The application, although containing much information regarding the handling of the fuel once it reaches Limerick, contains only the following paragraph regarding the transportation of the fuel:

> The impact of the transportation of the slightly irradiated fuel from the SNPS site to the LGS site is minimal. 10 CFR 51.52, Table S-4, "Environmental Impact of Transportation of Fuel and Waste to and from Light Water-Cooled Nuclear Power Reactor," addresses the impact of transporting irradiated fuel and radioactive waste including normal transport and possible accidents. The proposed shipments meet the conditions specified in 10 CFR 51.52(a); and, therefore, the environmental impact of the proposed shipments is as set forth in Table S-4. In any event, the low level of radiation and the substantial elapsed time since the low power operation of the SNPS fuel make the assumptions used in Table S-4 conservative relative to the proposed shipments. Therefore, Table S-4 bounds the environmental impact of the transportation of the SNPS fuel.

On March 31, 1993, NRC published a notice of its proposal to determine that PECo's "amendment request involves no significant hazards consideration." 58 Fed. Reg. 16851, 16868 (March 31, 1993). NRC's only discussion of the mode or route of transportation was that it was "planned [to be] by rail." 58 Fed. Reg. at 16867 (Emphasis added).

On May 18, 1993, NRC published an EA and Finding of No Significant Impact ("FONSI") regarding PECo's license amendments. 58 Fed. Reg. 29010 (May 18, 1993). Although NRC described the "proposed action" as an amendment to PECo's license that would allow it to "receive and possess" the fuel

from Shoreham. Id. at 29010, NRC went on to recapitulate PECo's discussion about transportation:

> The impact of the transportation of the slightly irradiated fuel from the SNPS site to the LGS site is minimal. Table S-4 of 10 CFR 51.52, "Environmental Impact of Transportation of Fuel and Waste To and From One Light-Water-Cooled Nuclear Power Reactor," addresses the impact of transporting irradiated fuel and radioactive waste including normal transport and possible accidents. The proposed shipments meet the conditions specified in 10 CFR 51.52(a) since it does not (a) exceed 4 percent enrichment, (b) exceed an average irradiation level of 33,000 megawatt days-per-metric-ton, (c) come from a reactor with a power level in excess of 3800 megawatts and is not being shipped less than 90 days after discharge. Therefore, the environmental impact of the proposed shipments is as set forth in Table S-4. In any event, the low level of radiation and the substantial elapsed time since the low power operation of the SNPS fuel make the assumptions used in Table S-4 conservative relative to the proposed shipments. Therefore, Table S-4 bounds the environmental impact of the transportation of the SNPS fuel. [58 Fed. Reg. at 29011.]

NRC did not identify the mode or route of transportation to be used, and the only alternative to PECo's proposal NRC considered was that of requiring the fuel to be disposed of at an appropriate waste facility or reprocessed overseas. 58 Fed. Reg. at 29011. NRC staff did not address the various alternative modes and routes of transportation, e.g., barge versus rail.

On June 23, 1993, NRC issued the license amendments requested by PECo, along with a "Safety Evaluation." The Safety Evaluation analyzed in detail the handling of the subject fuel once it was received at the Limerick facility, but

it expressly excluded any analysis of the "movement of fuel from the SNPS to the LGS." (Ex. "D"). Notice of the issuance of the amendments was published on July 7, 1993. 58 Fed. Reg. 36449, 36451 (July 7, 1993). The license was issued by NRC staff without a certification by PECo that the proposed activity complies with the State's CZM program as required by the CZMA, 16 U.S.C. §1456(c)(3)(A).

On or about July 7, 1993, LIPA submitted to the Coast Guard a proposed "Operations Plan for Marine Transportation of Fuel Shipment from Shoreham, NY to Eddystone, PA." (Ex. "E"). This is the first formal document in which LIPA indicated its intention to move its fuel from Shoreham to Limerick by barge in part through the State's territorial waters and coastal zone. NJDEPE did not receive a copy of this document until September 3, 1993 when LIPA's general counsel supplied the State with a copy of it.

On several occasions during July of 1993, NJDEPE representatives clearly expressed to both PECo and LIPA representatives NJDEPE's objections to and serious concerns with the proposed shipment of nuclear fuel from Long Island through New Jersey's coastal zone to Pennsylvania. These concerns were first raised when then Commissioner Scott A. Weiner requested Richard V. Sinding, Assistant Commissioner for Policy and Planning, to contact a representative of PECo to express the State's concerns. On July 8th, 1993, and at least on two other occasions, Assistant Commissioner Sinding

participated in telephone conversations with PECo's Director of Public Policy, Mr. Jan Freeman. During these conversations, NJDEPE advised PECo that the State was having an excellent tourist season at the New Jersey shore due in part to improved water quality and enhanced public confidence regarding the safety of the shore. NJDEPE then expressed its serious concerns that 33 shipments of nuclear fuel could potentially have a devastating economic and environmental impact on the State's coastal zone should any one of the shipments be involved in an accident.

Mr. Freeman advised NJDEPE that the shipments would be equipped with various safety features which would protect the State's coastal zone. Mr. Freeman asked whether NJDEPE would require compliance with any environmental requirements. Assistant Commissioner Sinding advised him that there were various requirements regarding water quality and coastal zone protection which NJDEPE could impose. In one conversation, Assistant Commissioner Sinding expressed NJDEPE's concern that although the barge would be equipped with various safety measures, the State's coastal community including mayors and citizen groups had expressed similar concerns to NJDEPE and as of that time PECo and LIPA had failed to conduct sufficient public discussion with the coastal community in response to their fears and concerns in order to explain the need for the proposed shipment, the reasons why a coastal route was chosen over an inland route, and the various safety measures.

Assistant Commissioner Sinding advised Mr. Freeman that if PECo and LIPA could not address NJDEPE's concerns, it would be very difficult for the State to concur with the proposed shipment at that time. Mr. Freeman advised NJDEPE that PECo and LIPA would consider NJDEPE's objection and concerns.

During the July 8th conversation, Dr. Gerald P. Nicholls, the Director of NJDEPE's Division of Environmental Safety, Health and Analytical Programs, which includes NJDEPE's radiation protection program, was with Assistant Commissioner Sinding as part of a conference call. Director Nicholls' staff had previously met with LIPA and PECo representatives, including Mr. Freeman, to discuss the technical details of the possible use of a barge and the staff had been briefed on the safety features.

Upon Mr. Freeman's advice, Assistant Commissioner Sinding also contacted a LIPA representative to similarly express NJDEPE's objection and concerns. When a response from neither PECo nor LIPA was forthcoming, Assistant Commissioner Sinding assumed that the route through the State's coastal zone was abandoned or at least delayed until NJDEPE's concerns were addressed. However, upon return from vacation in the middle of August, 1993, Assistant Commissioner Sinding read in a newspaper article that PECo and LIPA planned to proceed irrespective of NJDEPE's objections. PECo and LIPA's plan was confirmed when he was advised by his staff that LIPA had submitted an application for NJDEPE's Certificate of Handling.

Assistant Commissioner Sinding was very surprised to learn of PECo and LIPA's plan to proceed absent NJDEPE's concurrence. (Ex. "K", Certification of Richard V. Sinding).

On or about July 27, 1993, the Coast Guard issued a conditional approval of LIPA's plan. (Ex. "J"). The Coast Guard approval did not include any analysis of the risks posed by the proposed shipments nor did it include an analysis of the proposed mode and route as compared to other modes and routes, e.g., by rail and/or truck through New York and Pennsylvania. Equally important, the Coast Guard approval was issued without a certification by LIPA that the proposed activity complies with the State's CZM program as required by the CZMA, 16 U.S.C. §1456(c)(3)(A).

On about August 9, 1993, LIPA submitted to NJDEPE an application for a Certificate of Handling ("COH"), as required by N.J.A.C. 7:28-12. (Ex. "F"). New Jersey's Radiation Protection Act, N.J.S.A. 26:2D-1 et seq., prohibits the transportation of certain radioactive material into or through New Jersey without first obtaining a COH issued by NJDEPE. That was the first application by any party to NJDEPE seeking approval of the proposed shipments.

On August 19, 1993, NRC issued a "Certificate of Compliance for Radioactive Materials Packages" to Pacific Nuclear Systems for the use of its IF-300 cask for shipping the Shoreham fuel to PECo by barge. (Ex. "G"). There was no analysis of the risks posed by barge transportation along any

specific route, nor of a comparison of those risks versus those posed by other modes and routes of transportation, such as rail.

On September 8, 1993, NJDEPE issued a letter to the Coast Guard, with a copy to LIPA, providing written notice that NJDEPE would require that LIPA submit a consistency certification to NJDEPE and the Coast Guard pursuant to the CZMA, 16 U.S.C. §§1451 et seq., certifying that LIPA's proposed activity complies with the State's approved CZM program. (See Ex. "H"). NJDEPE has adopted rules at N.J.A.C. 7:7E which set forth the substantive policies of the State's CZM Plan. To date LIPA has refused NJDEPE's demands that it withhold shipping the fuel until LIPA has completed the CZMA process and until an adequate environmental assessment and alternatives analysis has been prepared.

On September 15, 1993, NJDEPE sent a letter to the United States Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA") detailing the reasons why a consistency review was required. (Ex. "H"). Those reasons included the possibility of an adverse impact on the State's prime fishing areas, on marine life that supports endangered species (including that of the bald eagle and peregrine falcon), and on crucial recreational areas.

On September 22, 1993, the Honorable Garrett E. Brown of the United States District Court, District of New Jersey, denied NJDEPE's application for temporary restraints to halt

the proposed shipments. NJDEPE unsuccessfully appealed this order to the Third Circuit Court of Appeals and then to the United States Supreme Court. On October 4, 1993, Judge Brown, extended his September 22nd denial for ten days by which time a written opinion on NJDEPE's application for a preliminary injunction will be issued.

On September 22, 1993, NRC published an EA regarding the proposed exemption from the emergency preparedness requirements in 10 C.F.R. § 50.54(q) in the Federal Register on September 22, 1993 (58 Fed. Reg. 49332). The scope of the EA was limited to the proposed exemption and only briefly mentioned the transfer of LIPA's fuel.

II. CAUSES FOR ACTION BY NRC OR INTERVENTION BY NJDEPE

The following includes NJDEPE's basis for requesting NRC action pursuant to 10 C.F.R. § 2.206 and alternatively NJDEPE's causes for intervention as required by 10 C.F.R. § 2.714(a)(2). Since the causes for intervention are more specific, NJDEPE respectfully submits that the following satisfy both sets of regulations.

A. Reasons why NRC should take action or alternatively why NJDEPE should be permitted to intervene

1. NRC failed to consider alternatives under NEPA

Under NEPA federal agencies are required to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflict concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Even where an EA is issued, NEPA still imposes an "independent requirement" that the EA analyze alternatives to its recommended course of action. Sierra Club, 808 F.Supp. 852, 859 (D.D.C. 1991)(citing 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E)). Thus NEPA requires all federal agencies to take a "hard look" at the environmental impact of their activities and the potential alternatives to those activities. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989). Neither NRC, the Coast Guard, nor any other federal agency did so in connection with the proposed shipments of nuclear fuel through New Jersey's waters.*

NEPA's main purposes are to 1) "ensure 'that environmental concerns [are] integrated into the very process of agency decisionmaking," and 2) "'to inform the public that the agency has considered environmental concerns in its decisionmaking process.'" Lower Alloways Creek Tp. v. Public Service Electric & Gas Co., 687 F.2d 732, 748 (3d Cir. 1982)(citations omitted). Thus, in addition to ensuring that crucial information be given to the agency decisionmakers, NEPA "also guarantees that the

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* It is worth noting that where more than one federal agency is involved in approving an action that implicates NEPA, the federal agencies are required to coordinate their activities under the statute. 40 C.F.R. §§ 1501.1, 1501.5, 1508.16, and 1508.24.

relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989). It thereby requires federal agencies to provide the public with information that can provide "a springboard for public comment." 490 U.S. at 349.

It is clear from the EA for PECo that NRC staff failed to analyze any alternative means of transporting LIPA's fuel. That EA was issued in connection with PECo's application seeking the right only to possess the fuel, not to transport it, and the related Safety Evaluation expressly disclaimed any intent to analyze the movement of the fuel from Shoreham to Limerick. (Ex."G" at 6). As to alternatives, the EA contained only the following limited statement:

> Because the staff has concluded that there is no significant environmental impact associated with the proposed transfer of the SNPS [Shoreham] fuel to LGS [Limerick], any alternative would have either no impact or greater environmental impact.
>
> The principal alternative would be to deny the requested amendment. This would not reduce the impacts from operation of the facility since LGS reactors will continue to operate using new fuel obtained from existing sources. Denial of an amendment authorizing the transfer of the SNPS fuel to LGS could result in the SNPS fuel being disposed of at a Federal high-level waste repository or, through the expenditures of additional resources, reprocessed at an overseas facility for eventual reconstitution into fuel. [58 Fed. Reg. at 29011.]

These statements fail to satisfy NEPA's requirements for a variety of reasons. First, they fail to even identify the

routes and modes of transportation that will be used. Thus neither the public nor NJDEPE had any opportunity to provide any comment. It is self-evident that transportation by barge poses different risks, and therefore has different impacts, than does transportation by rail or highway. Further, it is equally self-evident that the risks of transporting the materials over different routes (e.g., urban vs. rural) are different. Thus, in order for the EA to be meaningful, it is necessary for the EA to identify the alternative routes and mode of transportation that were considered and to analyze the risks associated with them. Otherwise, neither the agency decisionmakers nor the public have the information they need to participate in the decisionmaking process required by NEPA. Robertson, 490 U.S. at 349.

Second, and related to the first, the EA completely fails to analyze the alternatives to what we now know is the route and mode that LIPA will use, i.e., shipment by barge down the entire length of New Jersey's fragile Atlantic Coast and up even more sensitive portions of the Delaware Bay and River. There is absolutely no discussion of the relative risks of this route and mode as compared to others, including the rejected rail shipment that would entirely avoid New Jersey's territory. Indeed, the evidence (never mentioned in the EA) is that the only reason that rail was rejected in favor of barging was that there was "local opposition," to the cheaper rail alternative. (Ex."B"). In the absence of a reasonable discussion of

alternatives to barging the nuclear fuel through New Jersey and the environmental impacts of those alternatives, the EA is fatally flawed. 42 U.S.C.A. § 4332(2)(E); 10 C.F.R. § 51.30(a)(1)(ii); Sierra Club, 808 F.Supp. at 870-875.

New Jersey's coast should not be left with the detritus from New York's Shoreham debacle, especially in the absence of a demonstration that the proposed shipment by barge is the most environmentally appropriate way to proceed. NJDEPE is cognizant that the PECo EA was limited in scope since it was issued prior to LIPA's definitive determination to use a barge for 33 shipments of the fuel. However, NJDEPE maintains that an alternatives analysis is altogether meaningless if it is performed without any discussion of the alternatives that were actually considered. It is clear in this case that both rail and barge alternatives were considered. NRC may not allow the proposed shipments to proceed without complying with the procedural aspects of NEPA as set forth in 10 C.F.R. § 51.30, 10 C.F.R. § 51.31, and 40 C.F.R. § 1509.9(b).

A comparison of this case to other cases where courts have reviewed environmental assessments for compliance with NEPA demonstrates the inadequacy of the current EA. In Sierra Club, the District Court enjoined the Department of Energy from shipping spent nuclear fuel rods through the port of Hampton Roads because it found that the EA regarding those shipments violated NEPA. The District Court in Sierra Club found that the EA contained an unacceptable alternatives analysis because

it analyzed the possibility of bringing the fuel shipments in through only two other ports, rather than the eleven other ports that plaintiff claimed should have been analyzed. Id. at 869-875. Because the unexamined alternatives were not "bizarre," and because the court was faced with a situation "involving nuclear material where the worst case scenario is catastrophic, if highly unlikely, and the subject of great public concern," the court ordered DOE to analyze the possibility of bringing the materials through a total of at least five alternative ports, two more than DOE had analyzed. Id. at 874, 875. In the present case, NRC staff did far less than DOE had done in Sierra Club; NRC analyzed only the alternative of shipping the materials to a waste repository, blithely ignoring the non-bizarre alternatives of shipping by rail or truck.

More recently, in Public Service Company of Colorado v. Andrus, 1993 W.L. 244090 (D.Idaho June 28, 1993), the District Court enjoined DOE from proceeding to implement a plan for the shipment and storage of nuclear fuel until an adequate EA was prepared. The EA was found to be inadequate in part because DOE had failed to consider alternatives to trucking the fuel, such as moving it by rail. Id. at p.8. It was also found to be inadequate because DOE's "narrow focus on fuel 'receipt and storage' amount[ed] to a segmented approach to the potential environmental impacts associated with this project." Id. at p.11. The parallels to the present case in which the EA failed

to consider any alternative modes or routes of transportation and instead focused almost entirely on how the fuel would be handled once it reached Limerick are inescapable, and indicate that NRC should stay its approval of the remaining shipments from proceeding until an adequate consideration of alternatives has been prepared pursuant to NEPA.

2. NRC failed to perform an EA for the transfer and barge transport of LIPA's fuel.

Under NEPA federal agencies are required to prepare an environmental impact statement ("EIS") whenever a proposed federal action constitutes a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. Parts 1500 to 1517 (regulations of the Council on Environmental Quality ("CEQ")); 10 C.F.R. Part 51 (NRC's regulations regarding NEPA).

In order to make the threshold determination as to whether an EIS is required, the agency is required to prepare an EA, which is accompanied by a Finding of No Significant Impact ("FONSI") if the EA supports such a finding. NRC's regulations require that an EA include:

> (i) The need for the proposed action;
>
> (ii) Alternatives as required by section 102(2)(E) of NEPA; [and]
>
> (iii) The environmental impacts of the proposed action and alternatives as appropriate. . . . [10 C.F.R. § 51.30(a)(1); see also 40 C.F.R. § 1501.4; 40 C.F.R. § 1508.9 (parallel CEQ regulations).]

Although NRC staff performed an EA for PECo's license amendments, the EA only addressed PECo's receipt and possession of LIPA's fuel. NRC staff has yet to prepare an EA for LIPA's transfer and transport of the fuel by barge. LIPA and PECo maintained before Judge Brown that the PECo EA was adequate and that no other EA was required since LIPA was covered by a general license to transport the fuel pursuant to 10 C.F.R. § 71.12. However, NRC's regulations require that:

> [a]ll licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion. [10 C.F.R. § 51.21 (emphasis added)]

NRC's regulations at 10 C.F.R. § 51.22(c) list the many categorical exclusions which do not require an EA; however, a general license to transport licensed material pursuant to 10 C.F.R. § 71.12 is not one of the listed categorical exclusions. Accordingly, NRC is required by its own rules to prepare an EA for LIPA's general license. NRC should certainly prepare an EA in this case when it proposes to use the general license to launch an unprecedented campaign of 33 barge shipments. It should be noted that one of the categorical exclusions is NRC's approval of package designs for the transportation of licensed materials pursuant to 10 C.F.R. § 51.22(c)13 but this clearly

is only one of the many requirements for a general license. Moreover, an EA for LIPA's general licence is not only required but appropriate since PECo's EA clearly did not address the risks and alternatives to 33 barge shipments.

3. NRC's EA for PECo's license amendments was inadequate.

Since the PECo EA was prepared when the fuel was to be transported by rail, NRC staff clearly inadequately analyzed the actual transportation of fuel by barge. The EA's only attempt to address transportation of the fuel consisted entirely of a reference to Table S-4 in 10 C.F.R. § 51.52. NRC's reliance on the table is misplaced. The use of the Table S-4 may have been somewhat appropriate for a rail analysis but the Table was not based on any risk data for barges since, at the time the Table was developed, shipments of irradiated fuel were made only by truck or rail. See "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants" (December 1972) ("the Survey") and its Supplement 1 (April 1975). The Survey reports that as of December 1972 "all shipments of irradiated fuel are made exclusive use, by truck or rail." (p.34). As to barge shipments, it reports only that some "may be made in the future." (Ibid.) Thus, in developing its Table S-4, the NRC had no data regarding actual shipments of irradiated fuel by barge.

Among the alternatives to the then existent regulatory structure that the Survey examined was that of imposing routing requirements. (pp.56-57). It recognized that such requirements "could reduce the probability of an accident occurring in many cases," but that if such requirements were to extend shipping distances, the probability of an accident might instead be increased. (p.56). It concluded that "[e]xamination of local conditions would be required in each case to determine whether such restrictions would be advantageous or not." (p.56, Emphasis added). In its general conclusion regarding alternatives to the then existent structure, the Survey concluded that the alternatives should not be adopted as "general requirements," but that "[a]doption of one or more of the alternatives in specific cases might be justified." (p.10). In PECo's EA, NRC staff failed to analyze any local conditions or routing requirements because it was based upon the assumption of rail transport.

The Department of Energy's "Historical Overview of Domestic Spent Fuel Shipments--Update" (July 1991)("the Overview") is also relevant. This document provides "available historic data on most commercial and research reactor spent fuel shipments that have been completed in the United States between 1964 and 1989." (p.1). It does not reflect any shipments by barge, but instead reflects that the "shipment mode" for all shipments was either truck or rail. (pp.8-16). More importantly, the document clearly identifies the IF-300 as

a casks that is designed for rail transport, not barge transport. (pp.17-18). Reliance on the Table S-4 for PECo's EA was clearly misplaced since the shipment is going to occur via a mode for which the NRC did not even have any actual data when it developed the generic table upon which NRC staff erroneously relied.

Further, the main reason for permitting the use of generic assessments, i.e., administrative efficiency, would not be at all compromised if NRC were to conduct an individualized assessment for a year-long campaign of 33 barge shipments of irradiated fuel. Such a campaign has never been launched before, and is unlikely to be launched again in the future. Clearly no undue burden would have been placed upon NRC staff if it had to prepare the type of risk assessment that NEPA requires. See, e.g., Sierra Club v. Watkins, 808 F.Supp. 852 (D.D.C. 1991); Public Service Company of Colorado v. Andrus, 1993 W.L. 244090 (D.Idaho June 28, 1993). Absent such an analysis, the citizens of the State of New Jersey are left with no reason as to why their coast is exposed to this risk other than that "local opposition" kept it out of New York City. NEPA demands more, especially given the fact that if the shipments were to be diverted off their designated route they could venture into water deeper than the 400 feet for which the casks encasing the fuel are certified. (Ex."I", at p.16). Moreover, the relevant case law demonstrates that the subject transaction is not one for which a "generic" environmental

assessment, such as that set forth in Table S-4, is suitable or acceptable.

In Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Commission, 869 F.2d 719 (3d Cir. 1989), the Court of Appeals for the Third Circuit held that a Final Environmental Statement was insufficient to satisfy NEPA in that it inappropriately relied upon a generic NRC determination. In the course of reaching its determination, the court held that "it is axiomatic that the generic approach of Baltimore Gas will not suffice where the underlying issues are not generic." 869 F.2d at 738 (citation omitted). Because "risk equals the likelihood of an occurrence times the severity of the consequences, ... the risk will vary with the potential consequences." Ibid. Further, because the consequences of an accident will vary with the density of the population and the makeup of the surrounding non-human environment where an accident could take place, risk will always vary where location can vary. Ibid. See also Lower Alloways Creek, 687 F.2d at 748 (noting that although the NRC had not used a generic assessment in that case, it also would not have been appropriate for it to have done so).

In the present case, there are a myriad of factors that can vary risk depending on the mode and route of transportation used. Trains and barges are subject to different kinds of accidents, and the primary consequences of those accidents will vary widely. For example, retrieval of the cask would be

unlikely to be a significant problem in the event of a railroad accident, but it will almost surely be such a problem in the event of a barge accident. Further, a railroad accident would be unlikely to have any effect on New Jersey's economy, while history and present record demonstrate that a barge accident will have a devastating effect on New Jersey's economy, even if radiation is released only in the levels predicted by NRC. As a final example, since population distribution will be different for every route, the "'magnitude and location of potential consequences from radiation releases'" will also be different. See Limerick Ecology, 869 F.2d at 738 (quoting the NRC from 48 F.R. at 16,020). In short, because each determination regarding the route and mode of transporting nuclear fuel implicates different risks, the NRC's conclusory reliance upon a generic table in this unprecedented campaign of 33 barges violates NEPA.

A comparison of this case to other cases where courts reviewed EAs for compliance with NEPA demonstrates the inadequacy of the risk assessment in PECo's EA. In Sierra Club, the District Court held that the EA was flawed because it failed to analyze risks that the NRC claimed were "not credible," although NRC also admitted that the facts that would create those risks were "possible." Id. at 867-869. Of course, in the present case NRC's entire risk analysis was nothing more than a rote citation to a generic table when the

decision of the means of transport was not clear to NRC staff. See also Andrus

Lastly, Table S-4 on its face is inapplicable to the issue of how to transfer partially spent nuclear fuel from one reactor for use at another. The table states only that it is to used for "the construction permit stage of a light-water-cooled nuclear power reactor." 10 C.F.R. § 51.52. In the present case, Limerick is well past its construction permit stage. Further, the table also states that it is to used only if:

> Unirradiated fuel is shipped to the reactor by truck; irradiated fuel is shipped from the reactor by truck, rail or barge; and radioactive waste other than irradiated fuel is shipped from the reactor by truck or rail...

10 C.F.R. § 51.52(a)(5). In the present case, there is no irradiated fuel being shipped "from" Limerick. Instead, the irradiated fuel is being shipped "to" Limerick by barge.

4. NRC violated NEPA by segmenting the approval of the transfer and transport by barge.

In Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 240-241 (3rd Cir. 1980), cert. den., 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981), the Third Circuit held that NRC would violate NEPA if it were to fragment or segment a project into smaller components. In Susquehanna, NRC failed to require the facility to apply for a construction permit prior to building a treatment system for contaminated

water, nor did NRC determine whether a license amendment was required prior to operation of the treatment system. Plaintiffs claimed that NRC had violated NEPA by failing to prepare any EA and NRC reacted by promptly preparing an EA. See Susquehanna Valley Alliance v. Three Mile Island, 485 F.Supp. 81, 82-84 (M.D.Pa. 1979). The Third Circuit was certainly concerned that:

> [B]y fragmenting its consideration the NRC postpones preparation of an impact statement until after private parties have been permitted to expend large sums on construction, the resulting change in the status quo has the almost inevitable effect of distorting the later view of both the agency and the reviewing court as to the desirability of the action in question. [Susquehanna, 619 F.2d at 240]

Similarly, in the present case NRC staff has not yet prepared an EA or considered alternatives to LIPA's proposed transfer and transport the fuel through New Jersey's coastal zone. NRC staff did prepare a cursory EA for PECo's license amendments; however these amendments only address PECo's ability to receive and possess the fuel. Moreover, PECo's analysis of the environmental impact, which NRC published in the EA almost word for word, was prepared in March of 1993 when the transportation was planned to be by rail. See 58 Fed. Reg. 16851, 16867 (March 31, 1993). When NRC staff was aware of the proposed use of barges, it approved Pacific Nuclear Systems' certificate for the barge and the cask without preparing an EA or NEPA alternatives analysis regarding the proposed shipment. Lastly NRC staff clearly was aware of the proposed use of

barges when it published its September 22, 1993 EA for LIPA's exemption from the emergency preparedness requirements without any discussion of the use of barges. Thus, as in Susquehanna, NRC and the United States Coast Guard have fragmented its review of LIPA's transfer and transport of the nuclear fuel to PECo and thereby avoided their responsibilities under NEPA to assess the environmental impacts of and examine the alternatives to the proposed 33 shipments of nuclear fuel through New Jersey's coastal zone.

Similarly, NRC staff and the Coast Guard have fragmented their respective responsibilities in the approval of the transfer and transport of the fuel. NRC staff appears only to be concerned with the integrity of the cask, while the Coast Guard claims that it is not concerned with anything and that LIPA contacted it only out of courtesy. Neither agency's staff is willing to say that it approved the shipments by barge along New Jersey's coast, and neither agency conducted an EA regarding that specific activity.

The effect of this fragmentation has prejudiced NJDEPE's ability to challenge any NRC action. As previously stated, NJDEPE has no quarrel with and therefore has no interest in challenging PECo's license amendment to the extent that it and the EA does what it says it does, i.e., allow PECo to receive and possess the subject fuel. Further, until now, NJDEPE had no reason to challenge the general permit allegedly issued to LIPA because there was no indication in that general permit

that it would be used to launch an unprecedented campaign of barging LIPA's spent fuel along New Jersey's coast. See 10 C.F.R. § 71.12. Thus, the EA required by NEPA was improperly fragmented and the federal agencies have conducted themselves in such a way that NJDEPE is left with no means with which to challenge that unlawful fragmentation other than this request for NRC action and its current actions in federal court.

5. NRC failed to require LIPA to obtain necessary approvals.

The Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011 et seq. provides that NRC:

> shall retain authority and responsibility with respect to regulation of - (1) the construction and operation of any [nuclear] production or utilization facility or any uranium enrichment facility . . . [and] (4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Pursuant to this authority, NRC has adopted regulations which provide that no person "shall receive title to, own, acquire, deliver, receive, possess, use, or transfer special nuclear material except as authorized in a license issued by the Commission." 10 C.F.R. § 70.3 (Emphasis added). See 10 C.F.R. § 70.42.

According to LIPA's COH application, the nuclear fuel is characterized as "special nuclear material of low strategic significance" and, therefore, is covered by the NRC's licensing

requirement. 10 C.F.R. § 70.4. NRC violated the AEA and NRC's own regulations by failing to require LIPA to apply for a license amendment or requiring LIPA to amend its Decommissioning Plan prior to the proposed shipment of LIPA's fuel. Although LIPA maintains that it has a general license pursuant to 10 C.F.R. § 71.12, such a license only allows a licensee to transport not transfer licensed materials. As with the requirement to perform an EA for a general license, NRC's regulations at 10 C.F.R. § 51.22(c), which list the categorical exclusions do not include the specific license to transfer special nuclear material. Accordingly, NRC is required by its own rules to prepare an EA before issuing a license to LIPA to transfer its fuel to PECo.

6. The NRC violated the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 et seq., by failing to require necessary consistency reviews.

The CZMA provides for the development of a coastal zone management ("CZM") program by each participating coastal state to foster better coastal management and planning. The coastal states are intended to be "especial" beneficiaries of the CZMA. Indeed, in enacting the 1990 amendments to the CZMA, Congress specifically found:

> [b]ecause of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the

> development of state ocean resource plans as part of their federally approved coastal zone management programs.

16 U.S.C.A. § 1451(m)(emphasis added). Thus, the CZMA was specifically enacted to foster better coastal management and planning by state agencies, to protect substantial state interests. Moreover, the legislative history of the CZMA confirms that the CZMA was, in fact, enacted for the special benefit of the coastal states as follows:

> [The CZMA] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. The bill authorizes Federal grants-in-aid to coastal states to develop coastal zone management programs. Additionally, it authorizes grants to help coastal states implement these management programs once approved, and States would be aided in the acquisition and operation of estuarine sanctuaries. Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.

S.Rep.No. 753, 92nd Cong., 2d Sess., 1, reprinted in 1972 U.S. Code Cong. & Admin. News 4776 (emphasis added).

Any applicant for a required federal approval, license, or permit "to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state" is required to include in the federal application a certification that the proposed activity complies with the enforceable policies of the State's approved

CZM program. 16 U.S.C. § 1456(c)(3)(A). The definition of "Federal license or permit" set forth in the CZMA regulations states that a "Federal license or permit means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant." 15 C.F.R. § 930.51(a) (emphasis added).

Furthermore, federal regulations require the states to develop and submit a list, as part of their CZM programs, of those federal approvals which are likely to affect the coastal zone and which the state wishes to review for consistency with its CZM program. 15 C.F.R. § 930.53(b). In September 1980, the National Oceanic and Atmospheric Administration ("NOAA") approved NJDEPE's CZM PLan which identifies federal licenses and permits for which applicants must consult the NJDEPE for consistency review pursuant to CZMA. This list specifically includes NRC "permits and licenses required for the construction and operation of nuclear facilities under the Atomic Energy Act of 1954, Sections 6, 7, 8 and 10." Accordingly, both NRC's approval of PECo's license amendments and LIPA's general license for the shipment of nuclear fuel were "listed" approvals in accordance with NJDEPE's 1980 CZM plan for which consistency certifications should have been submitted to the NRC.

PECo, however, applied for and obtained its NRC license amendments without submitting a CZM program consistency certification to the NRC. Furthermore, LIPA obtained NRC

approval to transfer and transport the nuclear fuel without submitting a CZM program consistency certification to the NRC. Although LIPA is allegedly shipping under a general license to transport fuel, consistency review applies when such a permit is to be used that affects the interests of New Jersey and its coastal zone. Therefore, pursuant to the explicit mandate of the CZMA, PECo and LIPA should have submitted their consistency certifications to NRC and the NJDEPE. See, Southern Pacific Transportation Co. v. California Coastal Com'n, 520 F.Supp. 800, 803 (N.D. Cal. 1981)("it was Congress' intention to make compliance with the consistency review procedure mandatory as to any applicant for a required federal license or permit"). Since both LIPA and PECo violated CZMA by failing to submit a consistency certification to NRC, NRC should stay the effectiveness of the licenses until such time as the certifications are submitted to and approved by NJDEPE.

In addition, federal regulations provide that "[n]o Federal license or permit described on an approved list shall be issued by a Federal agency" until state agency review of the application is completed. 15 C.F.R. § 930.53(e). Since NRC issued licenses to both PECo and LIPA in violation of 15 C.F.R. § 930.53(e) and thereby has failed to respect New Jersey's interests in ensuring that federally approved activities conform with the CZM, the NRC should stay PECo's license amendments and LIPA's general license to transfer fuel pending compliance with the CZMA.

As to the effect on New Jersey's coastal zone, the proposed nuclear-laden shipments will travel through the Atlantic Ocean, outside of but near to New Jersey's territorial waters, for the entire length of New Jersey's Atlantic coast and, more significantly, will directly traverse New Jersey's territorial waters for a significant length of the proposed route through the Delaware Bay and the Delaware River, thus directly affecting New Jersey's coastal zone. New Jersey's CZM plan includes enforceable policies to protect special areas and priority uses (recreational uses and commercial fishing) within New Jersey's coastal zone. N.J.A.C. 7:7E-3.1 et seq. and N.J.A.C. 7:7E-3.1 et seq. Special areas include, without limitation, shellfish beds (N.J.A.C. 7:7E-3.2), prime fishing areas (N.J.A.C. 7:7E-3.4), finfish migratory pathways (N.J.A.C. 7:7E-3.5), wetlands (N.J.A.C. 7:7E-3.27), endangered or threatened wildlife habitats (N.J.A.C. 7:7E-3.38), critical wildlife habitats (N.J.A.C. 7:7E-3.39), and public open space (N.J.A.C. 7:7E-3.40). All of these special use areas are found in the Delaware Bay region. In addition, New Jersey's coastal zone management specifically protects recreational beaches (N.J.A.C. 7:7E-3.22) and specifically makes resort and recreational uses and commercial fisheries uses the highest priority uses in Cape May County (N.J.A.C. 7:7E-7.3).

Despite the foregoing, NRC staff, PECo and LIPA failed to submit to the required consistency review process and indeed have not made any attempt to quantify the potential risk of an

accidental release of radioactive material in connection with the proposed nuclear fuel shipments in relation to these unique characteristics of New Jersey's coastal zone. NRC staff, PECo and LIPA have also failed to present any analysis of alternative routes for the shipments. Such an analysis is critical in this case because the proposed activity may adversely impact the highest priority uses of New Jersey's coastal zone. NJDEPE is demanding the opportunity to conduct a consistency review of the proposed activity to enable it to evaluate this risk and the potential for mitigating it. Even if the probability of an accidental release of radioactive material occurring in connection with the proposed shipments were demonstrated to be low, any such release will have a devastating effect on the protected uses of New Jersey's coastal zone and the economy of the coastal zone. Indeed, any mishap in the shipments, even if there is no actual release of radioactivity, could adversely affect these priority uses.

Two recent examples illustrate the type of devastating effect that the proposed shipments can have on New Jersey's coastal zone and coastal zone economy. Specifically, in the late 1980's, New Jersey's coastal community suffered a significant loss of income when many of New Jersey's beaches had to be closed as medical waste washed ashore. Communities that survive on income from tourism and recreational activities were devastated and have just begun to recover. In another incident, the New Jersey fishing industry was significantly

impacted when drums of arsenic were accidentally released in New Jersey's coastal waters. Although the arsenic never escaped from the drums, there was an adverse affect on the State's coastal economy for several months. Regardless of whatever actual danger the waste on the beaches or the arsenic spill posed to those who would use the beaches or consume New Jersey's ocean products, the public perception of the danger sufficed to have an enormous adverse impact on tourism and the market for products from New Jersey's fisheries. (Ex. "L"). In sum, New Jersey has had more than its fair share of maritime accidents that have had sever impacts on its coast.

In the present case, NRC's inadequate EA and LIPA and PECo's failure to apply for a CZMA consistency determination, or NRC's failure to require the same, make it almost impossible to determine the extent of the risks actually posed by the subject shipments of nuclear fuel. However, it is self-evident that moving 33 shipments of nuclear fuel with a total radioactivity level of 176,000 curies through 50 miles of New Jersey's fragile coast poses a risk of damage to the environment (including endangered species such as the bald eagle and peregrine falcon), human health, and the State's coastal economy.

B. Interests of NJDEPE

The following include NJDEPE's arguments for compliance with the intervention standards at 10 C.F.R. § 2.714(a)(2). NJDEPE's interests in this proceeding include the potential injury to New Jersey's residents, natural resources, and economy. NJDEPE is authorized and duty-bound to represent and protect both 1) the interests of the residents of the State of New Jersey, including their health, welfare, and economic well being, and 2) the natural resources of the State, including its water resources, aquatic biota, and ecological systems associated with New Jersey's coastal zone. N.J.S.A. 13:1D-1 et seq.; N.J.S.A. 13:19-1 et seq.; N.J.S.A. 58:10-23.11 et seq.; N.J.S.A. 26:2D-1 et seq.; and N.J.S.A. 58:10A-1 et seq. NJDEPE has been designated as the lead State agency for overseeing ard implementing the State's federally approved Coastal Zone Management ("CZM") Program pursuant to the Coastal Zone Management Act, 16 U.S.C. §§1451 et seq. ("CZMA"). Furthermore, NJDEPE is authorized pursuant to the State's Radiation Protection Act, N.J.S.A. 26:2D-1 et seq., to administer and oversee the State's program regarding radiation protection.

NRC and the Coast Guard's approval of the shipment of irradiated nuclear fuel along the State's coastal zone and through the State's waters on each of the thirty-three separate shipments without compliance with clear nondiscretionary duties to comply with NEPA, AEA, and CZMA will cause irreparable harm to NJDEPE, the State's citizens, and the environment NJDEPE is

duty-bound to protect. NJDEPE will suffer further irreparable harm if the proposed activity is allowed to proceed without a determination that the activity is consistent with the State's CZM program. This damage includes the potential effect on the State's natural resources, including endangered species, and human health of the State's residents along the entire State coastal zone from Sandy Hook to the populated shoreline south of Philadelphia.

The specific impacts that the proposed activity may have on the State's coastal zone include: (1) potential adverse effects on all recreational, tourist, and commercial activities on the Atlantic shore and in the Delaware Bay and Delaware River; (2) potential adverse effects on important species in prime commercial and recreational fishing area (including, shad, herring, striped bass, weakfish, drumfish, bluefish, and flounder, as well as shellfish); (3) potential adverse effects on endangered species habitat (including the shortnose sturgeon which is an endangered species on both the federal and the State lists); (4) potential adverse effects on marine life that supports avian endangered species (such as the bald eagle and the peregrine falcon, which are also both listed on the federal and State lists of endangered species); and (5) potential adverse effects on critical wildlife habitat.

Any release of radioactive material occurring in connection with the proposed shipments will likely have a devastating effect on the protected uses of the State's coastal

zone, as well as the economy of the region and the State. Any mishap in the shipments even short of a release could adversely affect these priority uses. The Delaware Bay area is one of the single most important ecological, commercial and recreational marine resources within the State's coastal zone. In the late 1980's, the State's coastal community suffered a significant loss of income when many of the State's beaches had to be closed as medical waste washed ashore. In addition, the State's fishing industry and tourism industry was significantly impacted when drums of arsenic were released during transport in the State's coastal waters even though the drums containing the arsenic remained intact. The threat of another devastating incident to New Jersey's coastal region and the State's economy cannot be tolerated without strict compliance with federal safeguards described above to ensure that the shipment of radioactive fuel is carried out in the safest possible manner.

In addition to the potential threat the subject shipments pose to human health and the environment, the subject shipments also pose a severe threat to the state's coastal economy even if no radiation were to be released in a maritime accident. Recent New Jersey history bears out this assertion. The State's tourism and fishing industries were nearly crippled on two occasions during the last few years when accidents related to hazardous materials occurred. This harm occurred despite the fact that the accidents resulted in no actual harm or substantial threat to human health or the environment. (Ex.

"L" at pp.10-11). Once the public perceived a threat, it stopped using New Jersey's beaches and eating its fish.

Based on recent history, if one of the 33 barges carrying LIPA's irradiated nuclear fuel sinks or is otherwise involved in a maritime accident, a significant portion of the public would cease to use New Jersey's beaches or to eat its fish out of a fear of radiation contamination. Such a consequence would have a devastating impact on the good will and good reputation that is essential to the State's fishing, tourism, and other coastal industries.

Courts have long recognized that threats to a party's good will, customers, business viability, and profits can constitute the legal standard of irreparable harm. Hansen Savings Bank v. Office Thrift Supervision, 758 F.Supp. 240 (D.N.J. 1991); Coca-Cola Bottling Co. 749 F.2d 124, 125-26 (2d Cir. 1984); John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 28-29 (2d Cir.), cert. denied, 440 U.S. 960, 99 S.Ct. 1502 (1979); Zurn Constructors, Inc., v. B.F. Goodrich Co., 685 F.Supp. 1172 (D. Kan. 1988); Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969); Sunbeam Corp. v. Windsor-Fifth Avenue, 14 N.J. 222, 233, 102 A.2d 25, 31 (1953). In determining whether such losses constitute irreparable harm, courts look not simply to the quantity of harm but also to its quality. That is, they must decide whether the quality of harm is irremediable by a monetary damage award. Zurn Constructors, Inc., 685 F.Supp. at 1181.

The loss of confidence in New Jersey's coastal resources that could result from a maritime incident involving the subject fuel is likely to have boundless and enduring negative consequences which are beyond reasonable financial calculation. Especially given NEPA's purpose of giving the public the level of comfort to which it is entitled regarding the federal government's environmental decision-making, NRC should take the action NJDEPE seeks by preventing any further shipments from taking place until NEPA, AEA and CZMA are complied with.

C. How NJDEPE's interests are affected and reasons why NRC should take action or why NJDEPE should be permitted to intervene.

It is clear from the section above that NRC's actions and inaction in approving the transfer and transport of LIPA's fuel that NRC has violated NEPA, AEA, and CZMA. NJDEPE's interests can only be protected if NRC has adequately examined the environmental risks associated with the transfer, has considered the alternative routes to transport the fuel, and has provided New Jersey with its authority to review activities for consistency under CZMA. NJDEPE maintains that its interests will not be protected unless NRC does not allow the proposed shipments to proceed and complies with NEPA, AEA, and CZMA. Should even one of the 33 shipments be involved in an accident, the increased radiological risk and the public perception of that risk could potentially affect the natural resources and human health along the entire New Jersey coastal

zone from Sandy Hook to the densely populated shoreline south of Philadelphia.

In addition to concerns over human health and natural resources, much of the New Jersey economy is dependant upon New Jersey's coastal zone. These interests support the factors in 10 C.F.R. § 2.714(d)(1)(i) & (ii) regarding NJDEPE's right to be a party and the nature and extent of NJDEPE's property, financial, and other interests in the proceeding. Failure to address the risks in the EA and consider the alternatives pursuant to NEPA clearly jeopardizes the environmental, human health, and economic interests of NJDEPE. However, proper CZMA review and an adequate EA and consideration of alternatives under NEPA for PECo's license or LIPA's license would provide a greater level of protection for NJDEPE's interests.

Furthermore, NJDEPE has good cause for failure to file a request or petition at any prior date. As set forth in the March 31, 1993 notice in the Federal Register, LIPA was planning to transport the fuel by rail outside of the State's jurisdiction and thus NJDEPE's interests where not in jeopardy at that time. 58 Fed. Reg. 16867. NJDEPE's request for NRC action or petition for intervention should be granted at this date because, as discussed above, NJDEPE was only given notice by LIPA on August 9, 1993 that they had finally decided to transport the fuel along New Jersey's coastal zone. By that time, NRC staff had already issued the PECo license amendment

as a final action.* There has been no delay on the part of NJDEPE once it learned of the intended uses of barges. By July 1993, only a matter of days after having first been informed that LIPA was contemplating the possibility of shipping their nuclear fuel through New Jersey, NJDEPE expressed to both LIPA and PECo its opposition to the subject shipments. Further, within less than 30 days of being informed that LIPA intended to proceed with the shipments despite NJDEPE's opposition, NJDEPE, on September 8, 1993, filed formal, legal opposition to the shipments. The filing of that letter led to a series of discussions between LIPA, NJDEPE, and both parties' counsel, the purpose of which was to seek a resolution of this dispute without having to involve NRC or the Federal District Court. When it became clear on Monday, September 20, that an amicable solution could not be reached prior to the first scheduled date of shipment, i.e., September 23, NJDEPE immediately proceeded to file an action in Federal District Court on September 21. On October 4, 1993, Judge Brown extended his September 22nd denial of NJDEPE's request for a temporary restraining order for ten days by which time a written opinion on NJDEPE's application for a preliminary injunction will be issued. Because the federal courts have thus far failed to grant

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* It is clear from the record that no NRC public notice ever mentioned the barge option. Therefore, NJDEPE had no reason to challenge the PECo license until now since some parties are maintaining that the PECo EA covered the risks of the 33 shipments by barge.

NJDEPE's requests for relief, NJDEPE is pursuing relief before NRC.

Furthermore, NJDEPE's requests should be granted since NRC staff has not proposed to amend LIPA's license nor has it prepared an EA or consideration of alternatives for the proposed trarsfer and transportation of LIPA's fuel. Since the shipments began on September 23, 1993 and NRC staff has not issued any notice on LIPA's proposed transfer and transportation of the fuel, the only forum to raise NJDEPE's concerns is pursuant to 10 C.F.R. §§ 2.206 and 2.714.

The fact that NRC staff did not address the risks of or alternatives to the proposed shipment in either PECo's license amendment or in any LIPA approval, NJDEPE is limited to this request for relief. Thus, the factor of the availability of other means to protect NJDEPE's interest in 10 C.F.R. § 2.714(a)(1)(ii) weighs in NJDEPE's favor since it is NRC's responsibility to comply with the requirements of NEPA. In addition, NJDEPE has been unsuccessful in its efforts to obtain relief in the federal courts and with NOAA. Accordingly, the appropriate relief for NRC's failure to comply with NEPA is to stay PECo's license, LIPA's license, and Pacific Nuclear System's certification of compliance pending full compliance with NEPA, AEA, and CZMA.

With respect to consideration of the factor in 10 C.F.R. § 2.714(d)(1)(iii) regarding the effect of any order that may be entered in the proceeding on NJDEPE's interest, NJDEPE

maintains that the effect of any order resulting from a proceeding will be positive since it may resolve the unaddressed issues of risks and alternatives pertaining to the ongoing shipments.

CONCLUSION

For the reasons set forth above, NJDEPE respectfully requests that NRC take the above requested immediate action.

Respectfully submitted,

FRED DeVESA
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for NJDEPE

By: _____
Thomas A. Borden
Deputy Attorney General

cc: Attached Service List
Office of the General Counsel
Charles L. Miller, NRC Project Director
Pacific Nuclear Systems, Inc.

tb.lipa.petition2

Service List

LIPA

Kirkpatrick & Lockhart
Lawrence C. Lanpher, Esq.
Barry M. Hartman (202)778-9301
1800 M Street, NW
South Lobby, 9th Floor
Washington, D.C. 20036-5891
Tel: (202) 778-9000
Fax: (202) 778-9300

Cohen, Shapiro, Polisher, Shiekman and Cohen
Paul G. Shapiro, Esq. or
Vincent Gentile
Princeton Pike Corporate
1009 Lenox Drive, Building Four
Lawrenceville, NJ 08648
Tel: (609) 895-1600
Fax: (609) 895-1329 (Philadelphia Office (215) 592-4329)

PECO

Winston & Strawn
Robert Rader, Esq. (202) 371-5745
Mark J. Wetterhahn (202) 371-5703
1400 L Street, NW
Washington, DC 20005-3502
Fax: (202) 371-5950

J.W. Durham, Sr., Esq.
Senior Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA, 19101
Tel: (215) 841-6798 or 841-4250 (D)

U.S. GOVERNMENT

Bette E. Uhrmacher,
Assistant U.S. Attorney Chief, Civil Division
United States Attorney's Office
970 Broad Street
Newark, NJ 07102
Tel: (201) 645-2841
Fax: (201) 645-6284 or (201) 645-2702

Caroline Meredith Zander
U.S. Department of Justice
Environmental and Natural Resources Division
General Litigation Section

Regular Mail
P.O. Box 663
Washington, D.C. 20044-0663

Overnight Mail
601 Pennsylvania, N.W.
Room 5614
Washington, D.C. 20004

Tel: (202) 272-6211
Fax: (202) 724-5836

LONG ISLAND POWER AUTHORITY

SHOREHAM NUCLEAR POWER STATION

NRC Docket No. 50-322

UPDATED
DECOMMISSIONING PLAN

FEBRUARY 1993

3.3.1 Fuel Disposal

Although fuel disposal is not specifically considered part of decommissioning as defined in Reference 3-2, LIPA recognizes that fuel disposal activities must be carefully integrated into the overall plan for decommissioning the Shoreham plant, since removal of the spent fuel is a prerequisite of complete release of the site for unrestricted use. Thus, LIPA's options for fuel disposal are briefly discussed herein; requests for NRC approvals that may be necessary to carry out any of these options will be developed and sent to the NRC as separate licensing submissions.

As a result of the limited period of plant operation, the total burnup of the fuel is only about two (2) effective full power days, or 48 megawatt days per metric ton. Presently, all 560 fuel assemblies are stored in the Spent Fuel Storage Pool in the Reactor Building. LILCO's Defueled Safety Analysis Report (DSAR) (Ref. 3-3) estimates that approximately 176,000 Curies of radioactivity are contained in the fuel (as of June, 1990). This estimation is based on a two year decay from the last burnup period. Gaseous activity in the fuel is primarily krypton-85, comprising approximately 1500 Curies of the total activity.

LIPA and LILCO are considering three options for the Shoreham irradiated fuel: (1) shipment to a reprocessing facility; (2) transfer of the fuel to another licensed utility; and (3) dry storage at an Independent Spent Fuel Storage Installation (ISFSI). Shipment to a reprocessing facility entails the transfer of the fuel from the storage pool to licensed casks which would then be shipped off-site to a licensed reprocessing facility. LIPA is considering two overseas vendors offering reprocessing services. The second option involves a similar scope of Shoreham plant activities, followed by cask shipment to another licensee. The transfer of fuel off-site for both options is estimated to be completed by mid 1994. On-site fuel storage is considered an option of last resort because it would not yield the desired result of removing all radioactive material from the Shoreham site. However, these fuel disposal options are still under review and many details have not been determined. Details on two options that resulted in permanent removal of the fuel from the site were provided in Reference 3-14, but even these details are still under review. For example, contrary to the information in Reference 3-14, fuel might be shipped to a facility other

than Nine Mile Point, Unit 2, and dredging of the Intake Canal may be required.

Fuel and cask handling activities have been considered by LIPA in the development of Shoreham's decommissioning methodology and the decommissioning schedule which is provided in Section 2.2. As the schedule and scope of site activities are very similar for both off-site disposal options, the selection of either option will have no impact on the decontamination and dismantlement activities that are discussed throughout this DP. The coordination of fuel handling and decommissioning activities, and measures to protect the irradiated fuel in the fuel storage pool are discussed in Section 6.1.1.

3.3.2 Radioactive Waste Processing

During the Shoreham Site Characterization Program, it was determined that the plant's radwaste solidification and off-gas systems were not contaminated. Site characterization further revealed that portions of the liquid radwaste system were slightly contaminated. It had been originally planned that LILCO would decontaminate this system using "soft" decontamination techniques to meet the site release criteria prior to the start of decommissioning activities. Due to prioritization of work activities and the results of soft decontamination efforts to date, however, this system will not be decontaminated prior to decommissiong as originally planned. It is LIPA's current intent to dismantle the contaminated piping in this system and to mechanically decontaminate the tanks and sumps which are contaminated above the site release criteria. The Reactor Building ventilation system will remain operable during the duration of decommissioning activities.

Radioactive wastes generated during decommissioning will be processed as necessary using temporary systems supplied by experienced vendors and contractors where appropriate. The temporary waste treatment system will be connected to existing non-contaminated tanks for storage of processed water prior to discharge. Once it has been verified that the stored processed water meets the allowable discharge limits specified in the Shoreham Offsite Dose Calculation Manual, the water will be released through the existing discharge system. These systems may include temporary ventilation with filtration for airborne contamination, portable demineralizers for liquid waste processing and compactors for volume reduction of DAW. In addition,

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
475 ALLENDALE ROAD
KING OF PRUSSIA, PENNSYLVANIA 19406-1415

Docket No. 50-322

Mr. Leslie M. Hill
Shoreham, Resident Manager
Long Island Power Authority
Shoreham Nuclear Power Station
P. O. Box 628, North Country Road
Wading River, New York 11792

Dear Mr. Hill:

SUBJECT: NRC Inspection No. 50-322/93-01

This letter transmits the results of safety inspections conducted by Mr. R. L. Nimitz and others during the period January 1 - May 7, 1993, at the Shoreham Nuclear Power Station, Wading River, New York. The inspectors focused their attention on issues important to safety, and based their findings on independent observations of on-going activities, interviews, and document reviews. The inspection findings were discussed with you and members of your staff periodically during the inspection and were summarized at the exit meeting on May 7, 1993.

Areas reviewed during the inspection are fully discussed in the enclosed inspection report. The areas reviewed included decommissioning status and activities; action on previous findings; termination surveys; organization, staffing, training and qualifications; radiological controls; radioactive waste activities; maintenance and surveillance; quality assurance; fire protection and security.

The inspectors' review indicated that, overall, decommissioning and termination survey activities were conducted in accordance with the approved Decommissioning and Termination Survey Plans. Training of personnel performing termination survey activities was considered very good. The inspectors' review of quality assurance oversight during decommissioning indicated that very good oversight was provided. Several unresolved items were identified by the inspectors. These involved replacement of out-of-date procedures, maintenance of final termination survey records, soil sampling, identification of isolated contamination on the main turbine, and personnel entry into the hotwell. These items are discussed in the enclosed inspection report and will be reviewed further during a future inspection. Weaknesses associated with document control for temporary modifications were identified by the inspectors but corrected by the end of the inspection. Concerns associated with lifting of heavy loads were identified and are the subject of Special Inspection No. 50-322/93-02, which was issued on June 1, 1993.

No safety concerns or violations were identified and no response to this letter is required.

Exhibit 3
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specifies that maintenance, that can affect the performance of safety-related equipment, be properly pre-planned and performed in accordance with written procedures, documented instructions, or drawings appropriate to the circumstances.

A LIPA Deficiency Report, LDR 92X060, was initiated for maintenance action and root cause analysis. The maintenance action involved inspection and repair/replacement of the damaged bus bar conductors. The root cause was attributed to: "I&C technicians involved used questionable judgement in deciding to operate the polar crane, and also by not positioning themselves with an unobstructed view ..." The corrective action to prevent recurrence included meetings with all I&C technicians to advise them that only qualified personnel are allowed to operate the crane. The inspector reviewed the documentation that all personnel had attended the requisite training. The licensee subsequently provided similar training to other work groups (i.e., contractors and other maintenance personnel) when it was noted by the inspector that these individuals may be working near or around the crane. The inspector did note that only certain maintenance personnel are qualified to operate the crane.

The inspector concluded that the above observation was a licensee identified violation of procedure SP32X002.01, Revision 2, which required that only qualified personnel operate the crane. The inspector reviewed this matter relative to the criteria for exercise of discretion (for non-issuance of a Notice of Violation), specified in 10 CFR 2, Appendix C, and concluded that the licensee met the criteria. As a result, this unresolved item is administratively closed and considered a non-cited licensee identified violation of Technical Specification 6.7.

4.0 Facility Status

The Shoreham Nuclear Power Station was shut down in 1989. The maximum power attained was 5% reactor power, with a total core history of 2 megawatt (MW) days. In June 1991, a Possession Only License (POL) (effective July 19, 1991) was issued to Long Island Lighting Company (LILCo). On February 29, 1992, the NRC approved the transfer of the license to the Long Island Power Authority (LIPA). On June 11, 1992, the NRC issued an Order authorizing the decommissioning of Shoreham.

The LIPA Board of Trustees voted on November 30, 1992, to award a fuel disposition contract to *Compagnie General des Matieres Nucleaires* (COGEMA) for shipment of the fuel to France. The contract was signed on December 1, 1992. However, the licensee has not been successful in obtaining an export permit for the fuel.

On February 25, 1993, LIPA reached an agreement with the Philadelphia Electric Company (PECO) to transfer the slightly irradiated fuel from the Shoreham Nuclear Power Station to PECO for use at PECO's Limerick Nuclear Power Station. The agreement provides for transport of Shoreham Station's fuel (560 fuel elements representing the reactor's initial core load) in special shipping casks by rail from Long

Island to the Limerick Station. The shipments will use solely designated trains. The transfer would require about 33 separate shipments. Transfer of the fuel from Shoreham to the nearest rail head will be accomplished by use of heavy haulers.

LIPA has encountered local opposition to shipment of the fuel via rail. At the close of this inspection period the licensee was evaluating other shipping alternatives including shipment of the fuel by barge. The licensee's plans were to start fuel shipping activities in June 1993 and end by February 1994. The licensee indicated that fuel transfer will result in all fuel being removed from the Shoreham site, provide for earlier completion of the Termination Survey Program, and provide for earlier license termination.

The reactor vessel has been segmented and the segments have been disposed of. The reactor vessel bottom head was left intact and the licensee was attempting to decontaminate and leave it in place. The reactor vessel head remains on site. All fuel remains in the spent fuel pool.

Contaminated systems continued to be removed and segmented and shipped off-site for burial. Essentially all contaminated systems were removed and disposed of with the exception of the liquid radwaste system and the fuel pool clean-up system. These systems were needed to support decommissioning activities and maintain fuel pool water quality. The licensee installed a temporary fuel pool filter demineralizer to allow for removal of portions of the spent fuel pool clean-up system.

The licensee was conducting activities in accordance with the Decommissioning Plan or, as necessary, has requested appropriate changes.

5.0 Termination Survey Planning and Performance

5.1 Planning and General Information

On December 2, 1992, the licensee formally submitted the Shoreham Decommissioning Project Termination Survey Plan (Survey Plan), Revision 0, to the NRC for review and approval. The Survey Plan describes the methodology and techniques to be used by the licensee to survey the site for unrestricted access. The NRC reviewed the Survey Plan and provided comments to the licensee in a letter dated December 16, 1992. The licensee subsequently responded to the comments in a letter (LSNRC-2045) dated April 15, 1993. The NRC reviewed the response and subsequently approved the Shoreham Decommissioning Project Termination Survey Plan, Revision 0, on April 16, 1993

Attachment 1 to this inspection report contains the licensee's termination survey schedule.

5.2 Procedure Reviews

As part of this inspection, the inspectors reviewed the following documents pertaining

L.I. Agency Drops Plan to Ship Shoreham Fuel Via New York

By MATTHEW L. WALD

The Long Island Power Authority, bowing to pressure from New York City officials, yesterday dropped a plan to ship radioactive fuel from the Shoreham nuclear power plant by rail through Queens and the Bronx to Pennsylvania, and said instead that the fuel would go by barge. But the plan is likely to raise the cost of shutting down the plant by $25 million or more.

The new plan is for the barge to go around Montauk Point into the open ocean, and then up the Delaware River to a port near the Philadelphia Airport, where a shipping cask will be loaded on a Conrail train for the rest of the journey to the Limerick Generating Station, near Pottstown.

But this, too, is uncertain because Philadelphia may hold hearings on whether it should allow passage of the fuel, now that New York City has found it undesirable.

The executive director of LIPA, Thomas DeJesu, refused yesterday to estimate the additional cost of the new shipping route. But when the plan was to send the fuel by rail, the shipments were supposed to be completed by January, before the Limerick plant, which is owned by the Philadelphia Electric Company, is to shut for about three months for refueling. Now, counting the three-month refueling shutdown, when the plant will not be able to accept new shipments, the schedule calls for completion by September of next year.

A Costly Delay

The difference is important because it costs between $2 million and $2.5 million a month to maintain Shoreham while the fuel is there — meaning a total of about $20 million. In addition, the barge will cost about $5 million more than rail transportation would have, according to experts. Both costs would fall on LIPA.

Slowing the whole process is a lack of shipping casks for radioactive fuel. The power authority has been able to obtain only two, so 33 trips must be made. And the barge is slower than the train, and subject to delays from weather and tides.

A LIPA spokesman, John B. Howard, said, however, that it might have been impossible to complete the rail shipments by January anyway.

LIPA, which acquired Shoreham from the Long Island Lighting Company for $1 after an agreement to abandon the reactor, is trying to close the plant to relieve itself of the cost of security and maintenance, as required by the Nuclear Regulatory Commission, which runs to about $80,000 a day.

The authority struck a deal with Philadelphia Electric in February to send Shoreham's 560 bundles of uranium fuel to Limerick. The authority is to pay Philadelphia Electric $45 million, and Philadelphia Electric says that the benefit to its customers will be $70 million.

The source of the authority's problem is that the United States has no centralized site, permanent or temporary, to store spent nuclear fuel.

Dinkins Is 'Gratified'

Yesterday, in a joint statement, the authority and the Pennsylvania utility described the 70-ton shipping casks as "virtually indestructible." In an accident, the casks would float, the authority said. It did not address the question of which method of shipment was safer.

Mayor David N. Dinkins said yesterday that he was gratified to learn of the decision. "Clearly, any proposal to ship nuclear waste through an area as densely populated as New York City was unacceptable and grossly misguided," he said.

In the 1980's, New York City tried to block shipments with far higher radioactivity from Brookhaven National Laboratory, in Upton, L.I., but after a lengthy legal battle over whether national or local rules applied to transportation of radioactive wastes, the city lost. Mr. DeJesu said yesterday, however, that he feared that city lawyers could have delayed the shipments, at enormous cost to the authority.

Lottery Numbers

Sept. 14, 1993

New York Numbers — 807

New York Win 4 — 1633

New York Pick 10 — 10, 11, 12, 15, 16, 18, 19, 26, 31, 36, 39, 41, 53, 55, 61, 66, 68, 69, 72, 73

New York Take 5 — 8, 16, 20, 36, 39

New Jersey Pick 3 — 346

New Jersey Pick 4 — 5000

Connecticut Daily — 314

Connecticut Play 4 — 2376

Connecticut Lotto — 5, 19, 21, 27, 29, 42

Sept. 13, 1993

New York Pick 10 — 1, 3, 7, 11, 15, 19, 20, 23, 32, 33, 34, 37, 40, 49, 61, 63, 65, 67, 68, 76

truth, read a Miranda [illegible] their rights as witnesses and [illegible] the chance to buy a tape record[illegible] their testimony.

Mr. Crane, a veteran of many appearances before the Appropri[illegible] Committee, objected to having to raise his right hand this [illegible] "Putting people under oath has m[illegible] to do with theater than substance," he said.

Rodney P. Frelinghuysen, chairman, again spurned the Democrats' charge of political grandstanding, as he had Monday when he appealed to the Assembly's two-to-one Republican majority for the power to subpoena witnesses.

"The process by which the state and its authorities issue bonds may be imperfect in many respects," he said before taking Mr. Crane's testimony. "But never in so many quarters where bonding is a common practice, whether it be the Treasurer's office, the New Jersey Turnpike Authority, the Sports and Exposition Authority or the Health Care Facilities Financing Agency, have there been so many rumors of self-dealing, personal gain and centralized management of both the fiscal and political details of bond issuances."

Aide to Florio

A Justice Department investigation is under way into allegations of kickbacks in the underwriting of New Jersey Turnpike Authority bonds involving a company half owned by Joseph P. Salema, who was Gov. [illegible] no's chief of staff until May.

Mr. Salema, maintaining that his interest in the firm, Armacon Securities Inc., was in a blind trust and that he had done nothing wrong, resigned soon after the existence of the investigation became public in May.

The Securities and Exchange Commission has also asked for [illegible] records from the Sports and Exposition Authority in connection with the Armacon inquiry.

The December refinancing [illegible] Lazard Frères worked like this: the banking house underwrote the issuance of $1.8 billion in new bonds for the state, half of which was [illegible] marked to retire old debt that was at higher interest rates, and the other half to go into a series of funds for capital and debt payment outlays.

Because the old bonds had staggered call dates, the dates when the state can pay them off, the [illegible] raised in the new bond sales was used to buy short-term Federal Treasury notes from Lazard Frères. The innovation that won Lazard the refinancing contract from the state, despite misgivings by some of Mr. Cr[illegible] own subordinates, was the way the banking house arranged the [illegible] of treasury notes whose maturity dates coincided with the call dates of the old bonds.

Lazard Frères has not disclosed the size of its profit in selling Treasury notes to New Jersey. The Wall Street Journal has put the figure at $10 million, and that number is widely taken as fact at today's session.

Mr. Crane, however, argued [illegible]

NYT, 9/15/93

10 CFR 50.90

PHILADELPHIA ELECTRIC COMPANY

NUCLEAR GROUP HEADQUARTERS

955-65 CHESTERBROOK BLVD.

WAYNE, PA 19087-5691

(215) 640-6000

NUCLEAR SERVICES DEPARTMENT

March 8, 1993

Docket Nos. 50-352
50-353

License Nos. NPF-39
NPF-85

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555

Subject: Limerick Generating Station, Units 1 and 2
Operating License Change Request 93-03-0

Gentlemen:

Philadelphia Electric Company (PECo) requests a change to Operating License Nos. NPF-39 and NPF-85 for Limerick Generating Station, (LGS) Unit 1 and Unit 2, respectively. The proposed change revises paragraph 2.B.(5) to allow LGS, Unit 1 and Unit 2, to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station (SNPS).

PECo requests this change to authorize it, as the licensee for LGS, Unit 1 and Unit 2, to receive and possess the slightly irradiated SNPS fuel. SNPS never commenced commercial operation and is currently being decommissioned. Our objective is to obtain the enriched SNPS fuel for eventual use in the LGS Unit 1 and Unit 2 reactors.

Attachment 1 contains information supporting a finding that the proposed change does not involve a Significant Hazards Consideration and information supporting an Environmental Assessment. Attachment 1 also contains a description of the SNPS fuel, an assessment of its general suitability for future use at LGS, and the protective packaging and shipping methods that will be used if this proposed change is approved. Attachment 2 contains the Operating License pages showing the proposed change.

150020

Exhibit C

A001

We request the NRC's prompt attention to this matter due to schedular considerations related to the movement of the fuel from the SNPS site to the LGS site, and the refueling schedules for LGS Unit 1 and Unit 2. If approved, we request that the amendments be made effective by June 1, 1993.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

G. A. Hunger, Director
Licensing Section

Attachments

cc: T. T. Martin, Administrator, Region I, USNRC w/attachments
T. J. Kenny, USNRC Senior Resident Inspector, LGS w/attachments
W. P. Dornsife, Director, PA Bureau of Radiological Protection, w/attachments

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF CHESTER :

G. R. Rainey, being first duly sworn, deposes and says:

That he is Vice President of Philadelphia Electric Company, the Applicant herein; that he has read the foregoing Application for Amendment of Facility Operating License Nos. NPF-39 and NPF-85 (Operating License Change Request No. 93-03-0) to allow Limerick Generating Station to receive and possess fuel assemblies and fuel channels from the Shoreham Nuclear Power Station, and knows the contents thereof; and that the statements and matters set forth therein are true and correct to the best of his knowledge, information and belief.

G R Rainey
Vice President

Subscribed and sworn to
before me this 3rd day
of March 1993.

Notarial Seal
Erma A. Sutton, Notary Public
Tredyffrin Twp, Chester County
My Commission Expires June 10, 1996

ATTACHMENT 1

LIMERICK GENERATING STATION
Units 1 and 2

Docket Nos. 50-352
50-353

License Nos. NPF-39
NPF-85

OPERATING LICENSE CHANGE REQUEST

"Allow Receipt and Storage of
Fuel Assemblies and Fuel Channels from
Shoreham Nuclear Power Station"

Supporting Information for Changes - 14 pages

Philadelphia Electric Company (PECo), licensee under Facility Operating License Nos. NPF-39 and NPF-85 for Limerick Generating Station (LGS), Unit 1 and Unit 2, requests that these licenses be amended as proposed herein to allow LGS to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station (SNPS).

This Operating License Change Request for LGS, Unit 1 and Unit 2, provides a discussion and description of the proposed change, a safety assessment, information supporting a finding of No Significant Hazards Consideration, and information supporting an Environmental Assessment.

We request that, if approved, the change to the Operating Licenses for LGS, Unit 1 and Unit 2, be effective by June 1, 1993.

Discussion and Description of the Proposed Change

Paragraph 2.B.(5) of Operating License Nos. NPF-39 and NPF-85 states that LGS is authorized:

> "Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility."

The word "facility," as used in these licenses, refers to LGS, Unit 1 and Unit 2. This wording limits possession of any byproduct and special nuclear materials in fuel elements to that which is produced at LGS, Unit 1 and Unit 2.

The Long Island Power Authority (LIPA) is the holder of NRC Possession Only License (POL) No. NPF-82 for SNPS. SNPS never commenced commercial operation and is presently undergoing decommissioning while in a non-operating, defueled condition with all fuel (i.e., 560 fuel assemblies) stored in the spent fuel pool.

Approval of the following proposed change to paragraph 2.B.(5) of Operating License Nos. NPF-39 and NPF-85 will authorize receipt and possession of the slightly irradiated SNPS fuel assemblies and fuel channels at LGS, Unit 1 and Unit 2. Approval of the proposed change will result in the beneficial use of the SNPS fuel by its eventual use in the LGS Unit 1 and Unit 2 reactors. We expect to use only the enriched SNPS fuel in the LGS Unit 1 and Unit 2 reactor cores in the future. Also, approximately 76

of the SNPS fuel channels may be shipped to LGS and used to channel the natural uranium assemblies in the LGS spent fuel pools. The slightly irradiated SNPS zircaloy fuel channels will be shipped separately from the SNPS fuel as radioactive material in accordance with the requirements of 49 CFR 172 and 49 CFR 173. The SNPS fuel channels will not be used in the LGS reactors.

The proposed change to paragraph 2.B.(5) of Operating License Nos. NPF-39 and NPF-85 would authorize LGS:

> "Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station."

Safety Assessment

The purpose of these proposed changes is to authorize PECo to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the 560 slightly irradiated fuel assemblies and fuel channels from the SNPS.

LIPA is the licensee for SNPS and would be responsible for the transportation of the fuel from SNPS to LGS. The following is a description of the SNPS fuel, an assessment of its general suitability for future use at LGS, and the packaging, shipping, handling and storage methods that will be employed to ensure that the enriched fuel can be safely handled and stored at LGS, Unit 1 and Unit 2, and to ensure that the enriched fuel remains suitable for future use.

A. Description of the SNPS Fuel

The SNPS fuel consists of 560 GE6 (P8x8R) pressurized, C-lattice, non-barrier fuel assemblies fabricated by the General Electric (GE) Company. Of the 560 SNPS fuel assemblies, 340 are enriched to 2.19 weight percent (w/o) U-235, 144 are enriched to 1.76 w/o U-235, and the remaining 76 are natural uranium (i.e., 0.711 w/o U-235). These fuel assemblies are similar to the LGS Unit 1 initial core described and evaluated in the LGS Final Safety Analysis Report (FSAR).

The SNPS fuel has been operated intermittently at low power (i.e., less than 5% of the SNPS full power rating of 2436

megawatts thermal) for testing purposes only. The fuel has been irradiated to a core average exposure of approximately 48 megawatt days per metric ton (MWD/MT). The SNPS fuel was removed from the reactor and placed in the SNPS spent fuel pool in August 1989. As of June 1992, the calculated decay heat rate for the entire core was 265 watts (i.e., 900 Btu/hr). The fission product inventory for the entire SNPS core is less than 0.02% of the source term assumed in the analysis of the design basis loss of coolant accident described in the LGS Updated Final Safety Analysis Report (UFSAR).

A detailed inspection of two of the SNPS fuel assemblies was performed during August 1990. This inspection included eddy current testing of a number of individual fuel and water rods and a visual inspection of the whole fuel assembly. This inspection, performed by GE, determined that the SNPS fuel is in excellent condition and is suitable for future use.

An evaluation of the water chemistry history of both the SNPS reactor and spent fuel pool was performed to assess the impact on the fuel. This evaluation determined that while in the reactor or spent fuel pool at SNPS, the fuel was not exposed to an adverse environment that would preclude its future use.

B. Packaging and Shipping Criteria

The SNPS fuel will be transported in the IF-300 Series spent fuel cask. This cask is designed in accordance with all NRC and Department of Transportation (DOT) regulations governing the shipment of radioactive material of this type (i.e., 10 CFR 71 and 49 CFR 173). The cask is operational under NRC Certificate of Compliance 9001. The IF-300 Series spent fuel cask will be used with a 17 element (i.e., fuel assembly) basket designed to accommodate the shipment of slightly irradiated fuel that is intended for reuse. The holder of NRC Certificate of Compliance 9001 is requesting an amendment of the Certificate of Compliance to reflect the design of the basket and packaging.

Special packaging designed to protect the fuel from damage during shipment will be used inside the IF-300 cask basket. This packaging will consist of a special stainless steel shipment channel and plastic cluster separators. The plastic cluster separators will be inserted between the rods in each fuel assembly to support the rods while the fuel assembly is horizontal. The stainless steel channel will support and protect each fuel assembly and hold the plastic cluster separators in place.

The plastic cluster separators consist of ribbed polyethylene mounted to a polyethylene outer shell. The separators are made of the same material as the separators used during shipment of new fuel. The separators are inserted from opposite faces and each extends halfway across the assembly width. A total of 32 pairs of cluster seperators will be used per fuel assembly. A specially designed installation device will be used to push one cluster separator at a time into position while supporting and aligning the assembly. The separators will be inserted while the fuel is in the SNPS spent fuel pool.

After the cluster separators are inserted and the installation is inspected, the fuel assembly will be moved to the SNPS fuel prep machine and a stainless steel channel will be installed over the fuel assembly containing the cluster separators. The stainless steel shipment channel is similar to a normal zircaloy channel but has a larger inside dimension. The top of the stainless steel fuel channel will have corner clips similar to the normal zircaloy fuel channel. The top of the channel will be bolted to the fuel assembly upper tie plate to provide support to the tie plate. The bottom of the channel will slide over the existing fuel assembly finger springs and terminate below the finger springs in the machined area of the lower tie plate.

C. Handling of the Cask and Irradiated Fuel

Upon arrival at the LGS site, the IF-300 cask with the SNPS fuel assemblies will be lifted from the railcar by the reactor enclosure (RE) main hoist to the refueling floor through the equipment hatch. All cask handling and fuel handling activities are consistent with the methods described in LGS UFSAR Section 9.1.4.2.10, "Description of Fuel Transfer." The SNPS fuel is of the same mechanical design as originally described and evaluated in the LGS FSAR and is compatible with all existing LGS fuel handling equipment.

The RE main hoist is designed to handle loads with a maximum weight of 125 tons while maintaining a safety factor of five (5). The IF-300 cask weighs approximately 85 tons, including the basket, the 17 fuel assemblies, and the redundant cask lifting yoke. The RE main hoist is designed so that the failure of any single component does not result in a sudden displacement or dropping of the load. The single failure proof design of the RE main hoist is described in Section 9.1.5.4 of the LGS UFSAR and was reviewed and approved by the NRC in section 9.1.5 of NUREG-0991, Supplement 4, "Safety Evaluation Report Related to the Operation for Limerick Generation Station, Units 1 and 2," dated May, 1985. While handling the IF-300 cask, the requirements of

NUREG-0554, "Single Failure Proof Cranes for Nuclear Power Plants" and NUREG-0612, "Control of Heavy Loads at Nuclear Power Plants" will be met by the use of a single failure proof redundant yoke and by restricting the critical load of the RE main hoist to 110 tons.

Restricting the RE main hoist critical load to 110 tons and the use of single failure proof equipment satisfies the single failure criteria and precludes a cask drop due to a single failure. Therefore, as stated in UFSAR Section 15.7.5, an analysis of the spent fuel cask drop is not required. At no time will the cask be lifted or carried over spent fuel or the reactor cores.

D. Storage of Irradiated Fuel

New fuel and spent fuel are stored in the LGS spent fuel pool as described in the LGS UFSAR, Section 9.1.2, "Spent Fuel Storage." Spent fuel pool cooling capacity, storage capacity, and the effects of the SNPS fuel assembly packaging material on spent fuel pool criticality have been evaluated.

The contribution of the SNPS fuel to the spent fuel pool heat load is negligible. The spent fuel pool cooling system is designed to accommodate a heat load of 16.3×10^6 Btu/hr. The maximum heat rate of the spent fuel for a one-third core discharge during refueling is approximately 13×10^6 Btu/hr. As of June 1992, the full core calculated decay heat rate of the SNPS fuel was approximately 900 Btu/hr.

The capacity of each of the LGS spent fuel pools is 2,040 spaces. Currently, a total of 3,336 spaces have been installed in both pools and 1,692 spaces contain discharged fuel assemblies. Storage of the SNPS fuel in the LGS Unit 1 and Unit 2 spent fuel pools will not exceed the Technical Specification (TS) limit for the spent fuel pools and will not preclude full core discharge until approximately the end of 1996. Plans are currently being made to re-rack the spent fuel pools to increase capacity.

LGS UFSAR Section 9.1.2.3.1 describes the criticality analysis for the LGS spent fuel pool. This analysis assumed fuel assemblies with uniform 3.5 w/o enriched U-235. This analysis also assumed the presence of zircaloy channels which is a more reactive configuration than a fuel assembly stored without zircaloy channels. The worst case value of k_{∞} under these conditions was determined to be 0.933. The SNPS fuel has a significantly lower enrichment than the enrichment assumed in the LGS fuel pool criticality analysis. The highest average assembly

enrichment of the SNPS fuel is 2.19 w/o U-235 and the maximum planar enrichment is 2.33 w/o U-235. Therefore, the criticality analysis in UFSAR Section 9.1 2.3.1 bounds the storage of the SNPS fuel because of the much lower enrichment of the SNPS fuel compared to the enrichment assumed in the LGS fuel pool criticality analysis.

The SNPS fuel will arrive at LGS packaged with polyethylene spacers and a protective stainless steel channel. A criticality analysis performed by GE evaluated the effect of the polyethylene spacers and stainless steel channels on fuel pool criticality. The presence of the polyethylene spacers will increase the hydrogen concentration in the vicinity of the fuel and, therefore, neutron moderation. However, the lower enrichment of the SNPS fuel compared to the enrichment used in the UFSAR criticality analysis causes a much greater negative effect on reactivity than the positive reactivity resulting from the presence of the polyethylene spacers. Therefore, SNPS fuel containing the polyethylene spacers is bounded by the criticality analysis in LGS UFSAR 9.1.2.3.1. Furthermore, the stainless steel channels add negative reactivity and, in all cases, the presence of stainless steel channels lowers the spent fuel pool k_{eff}.

The GE analysis determined that storage of the SNPS fuel in the LGS spent fuel pool, including storage with or without the polyethylene spacers and/or stainless steel channels, will not result in a k_{eff} equal to or greater than the limit of 0.95 delineated in LGS TS Section 5.5.1.1.

E. General Suitability for Future Use

The acceptance criteria for the shipment of the SNPS fuel will be the same as applied to the shipment of new GE fuel, and is specified in GE topical report NEDE-23542 P, "Fuel Assembly Evaluation of Shipping and Handling Loads" dated March 1977. GE has determined that if the maximum acceleration and loading acceptance criteria for a fuel assembly are not exceeded during handling and shipping, the SNPS fuel will be maintained in a condition suitable for future use at LGS.

To ensure that the SNPS fuel assemblies arrive in a condition suitable for future use, a dummy test assembly will be inspected after being subjected to a shaker table test to simulate the loading and accelerations expected during shipment. During shipment, each cask will be instrumented to measure accelerations to determine compliance with the shipping criteria discussed above. Additionally, one or more fuel assemblies from the first

shipment will be disassembled and inspected before and after shipment. A procedure for this inspection process will be established. This inspection procedure may be repeated on selected fuel assemblies from subsequent shipments if determined necessary.

All the fuel assemblies shipped from SNPS to LGS will be visually inspected with optical equipment or closed circuit television before packaging to provide a record of the fuel assembly condition on film or video tape. After packaging, all fuel assemblies will be visually re-inspected to confirm all required plastic cluster separators are in place.

After arrival at LGS, all assemblies will be inspected to the same acceptance criteria used for the receipt inspection of new fuel. Any SNPS fuel assembly that does not meet the acceptance criteria established for these inspections will be excluded from future use in the LGS reactor cores unless it is repaired and meets appropriate acceptance criteria.

At the time the SNPS fuel is considered for use in either the LGS reactor cores, a cycle-specific core nuclear analysis will be performed. This analysis will be based on the latest NRC approved revision of GE licensing topical report NEDE-24011-P-A, "General Electric Standard Application for Reactor Fuel GESTAR II." The effect of the SNPS fuel on the thermal-hydraulic stability of the reactor core will also be evaluated in accordance with our commitments in response to NRC Generic Letter 88-07, Supplement 1, "Power Oscillations in Boiling Water Reactors (BWR)." These are the same evaluations that would be performed for all reactor reload core designs.

An evaluation was performed to determine if any changes are required to the cycle-specific core nuclear analysis to account for the prior operating history, handling, and transportation of the SNPS fuel. Each GESTAR II criterion and licensing bases was assessed to determine if any special evaluations will be required to utilize the SNPS fuel in the LGS reactor cores. The conclusion was that the SNPS fuel will meet all the licensing bases documented in the NEDE-24011-P-A. Therefore, no exceptions to GESTAR II will be needed when the SNPS fuel is analyzed for use in the LGS reactors.

Preliminary calculations were performed using the GENIE computer code, an NRC approved methodology, to evaluate the feasibility of using the SNPS fuel in the LGS reactor cores. The conclusion of these calculations was that the SNPS fuel can be used in the LGS reactor cores and will result in significant fuel cost savings. Reactor core designs using the SNPS fuel will limit the number of

SNPS fuel assemblies utilized each cycle and will use the SNPS assemblies only in low duty locations in the reactor core. Only the enriched fuel assemblies will be used in the LGS, Unit 1 and Unit 2, reactor cores.

Information Supporting a Finding of
No Significant Hazards Consideration

We have concluded that the proposed change that authorizes PECo to receive and possess the slightly irradiated SNPS fuel assemblies and fuel channels at LGS, Unit 1 and Unit 2, does not involve a Significant Hazards Consideration. In support of this determination, an evaluation of each of the three standards set forth in 10 CFR 50.92 is provided below.

1) The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

As explained below, the receipt and storage of the SNPS fuel and fuel channels at LGS, Unit 1 and Unit 2, will not increase the probability of occurrence of any accident previously evaluated in the LGS UFSAR.

The SNPS fuel is similar to fuel previously received, stored, and used at LGS, and the SNPS fuel is the same mechanical design as originally evaluated for Unit 1 in the FSAR. Handling of the SNPS fuel will not differ significantly from the fuel handling procedures described in LGS UFSAR Section 9.1.4, "Fuel Handling System." The impact on the LGS spent fuel pool criticality is bounded by the fuel pool criticality analysis in LGS UFSAR Section 9.1.2.3.1. Furthermore, the impact of the SNPS fuel decay heat on the LGS spent fuel pool cooling capacity is negligible. The radiological consequences of a dropped fuel assembly involving the slightly irradiated Shoreham fuel are bounded by the fuel handling accident involving highly irradiated spent fuel described in LGS UFSAR Section 15.7.4 "Fuel Handling Accident." The physical consequences of a dropped fuel assembly (i.e., on fuel assemblies and structures) are within the scope of LGS UFSAR Section 9.1.2.3.2.3, "Dropped Fuel Bundle Analyses." Restricting the RE main hoist critical load to 110 tons and the use of single failure proof equipment precludes a cask drop due to single failure. Therefore, as stated in LGS UFSAR Section

15.7.5, an analysis of the spent fuel cask drop is not required.

At the time the SNPS fuel is considered for use in either of the LGS reactor cores, a cycle-specific core nuclear analysis will be performed, and will include the effect on the thermal-hydraulic stability in accordance with NRC Generic Letter 88-07, Supplement 1. The SNPS fuel will be used only if the results of the cycle specific analysis are acceptable.

Therefore, the proposed change does not involve an increase in the probability or consequences of an accident previously evaluated.

2) <u>The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated</u>.

No physical alterations of plant configuration, changes to set points, or changes to operating parameters are involved in implementing the proposed change. The receipt, handling, and storage of the irradiated SNPS fuel is essentially the same as the movement of irradiated fuel using a spent fuel cask that is discussed in UFSAR Section 9.1.4.2.1, "Spent Fuel Cask." The impact of the SNPS fuel and its packaging material on the LGS spent fuel pool criticality is bounded by the fuel pool criticality analysis in LGS UFSAR Section 9.1.2.3.1. Furthermore, the impact of the SNPS fuel decay heat on the LGS spent fuel pool cooling capacity is negligible.

The proposed change does not affect the function or operation of any system or equipment; therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3) <u>The proposed change does not involve a significant reduction in a margin of safety</u>.

The margin of safety established in the UFSAR and maintained by compliance with the Technical Specifications will be maintained. The effect of the SNPS fuel on LGS spent fuel pool cooling capability, storage capacity, and criticality is bounded by existing analyses in the UFSAR as discussed

above. Because the fuel is only slightly irradiated and of a similar design to that used at LGS, the movement of the SNPS fuel does not involve any changes in fuel handling practices, types of fuel handling accidents that need to be considered, or occupational radiation exposure from spent fuel pool operations or fuel transfer. The proposed change does not increase the risk or degree of radiological dose to the general public from that previously evaluated.

The operating limits established in the Core Operating Limits Report (COLR) will be submitted to the NRC as required by TS Section 6.9.1.9 prior to using the SNPS fuel in the LGS reactor cores.

Therefore, the proposed change will not involve a reduction in a margin of safety.

Information Supporting an Environmental Assessment

The proposed changes have been evaluated against the criteria in 10 CFR 51.21 for the identification of licensing and regulatory actions requiring an environmental assessment. We have concluded that the proposed changes do not meet the criteria for categorical exclusion as defined in 10 CFR 51.22(c)(9). Therefore, in accordance with the requirements in 10 CFR 51.30, the following information is provided to support an Environmental Assessment.

1) Need for the Proposed Change

The proposed change is requested because transfer of the SNPS fuel to LGS would benefit PECo and its customers by providing a low cost source of fuel for LGS.

Additionally, the proposed change to the LGS Operating Licenses would benefit the environment and is in the National interest because of benefits that would accrue from the transfer and utilization of the SNPS fuel at LGS. These benefits include: recovery of the available energy from the fuel that might otherwise be lost; reduction in the need to mine and process uranium and fabricate fuel assemblies that would otherwise be required; and, reduction in the amount of spent nuclear fuel that would otherwise require storage and disposal at a Federal high level waste repository. Finally, the transfer of the SNPS fuel to LGS facilitates the decommissioning of the SNPS.

2) Alternatives and Alternative Use of Resources

If the proposed change to the LGS Operating Licenses is not approved, the LGS reactors will continue to operate using new fuel obtained from existing sources. If the proposed change is not approved for the transfer the SNPS fuel to LGS or to another facility, the SNPS fuel will eventually be disposed of at a Federal high level waste repository without the beneficial utilization of the energy in the fuel, or will be reprocessed at an overseas facility for eventual reconstitution into fuel. Compared with reprocessing at an overseas facility, the proposed change would require less resources for transportation, and would avoid expenditure of additional resources associated with the reprocessing activities prior to the beneficial utilization of the energy in the fuel.

Inasmuch as there are no unresolved conflicts concerning the availability or use of alternative resources associated with the proposed change, no further evaluation of alternatives is required.

3) Environmental Impact of the Proposed Action

The approval of the proposed change to the LGS Operating Licenses will result in no significant effect on the human environment. This conclusion considers the potential impact of: normal transport and transportation accidents; the uranium fuel cycle; radioactive effluents; low level radioactive waste; and, occupational exposure.

The impact of the transportation of the slightly irradiated fuel from the SNPS site to the LGS site is minimal. 10 CFR 51.52, Table S-4, "Environmental Impact of Transportation of Fuel and Waste to and from Light Water-Cooled Nuclear Power Reactor," addresses the impact of transporting irradiated fuel and radioactive waste including normal transport and possible accidents. The proposed shipments meet the conditions specified in 10 CFR 51.52(a); and, therefore, the environmental impact of the proposed shipments is as set forth in Table S-4. In any event, the low level of radiation and the substantial elapsed time since the low power operation of the SNPS fuel make the assumptions used in Table S-4 conservative relative to the proposed shipments. Therefore, Table S-4 bounds the environmental impact of the transportation of the SNPS fuel.

The impact of the transfer of SNPS fuel to LGS on the uranium fuel cycle is neutral or positive. The NRC's original evaluation of this impact is documented in NUREG-0974, "Final Environmental Statement related to the operation of Limerick Generating Station, Units 1 and 2," dated April, 1984. NUREG-0974 used 10 CFR 51.51, "Uranium Fuel Cycle Environmental Data -- Table S-3," to assess the effect of the uranium fuel cycle on the operation of LGS Unit 1 and Unit 2. Transfer of the slightly irradiated SNPS fuel to LGS and the subsequent future use of this fuel results in a reduction in total amount of uranium mined and fabricated into fuel and a reduction in the amount of spent fuel that will eventually be stored at a Federal high level waste repository. Therefore, with regard to the uranium fuel cycle, the evaluation in NUREG-0974 remains unchanged.

The impact on the radioactive effluents discharged from the LGS site is neutral whether or not the SNPS fuel is used. The shipment of the SNPS fuel assemblies will meet the packaging and shipping criteria required for shipments of new fuel, so there will be no increase in fuel failure probability due to the shipping process. Specifically, an increase in fuel failures either due to shipping effects on the fuel or the design of the fuel is not likely as a result of the shipping criteria and inspections that will be employed. Finally, no increase in radioactive liquid and gaseous effluents is expected as a result of the receipt, unpacking, and inspection of the SNPS fuel.

The impact of the transfer of SNPS fuel to LGS on the generation of low level radioactive waste will be low. Solid waste in the form of Dry Active Waste (DAW) including fuel assembly packaging materials will be shipped offsite for volume reduction and disposal. The volume of DAW will be minimized, wherever possible, by the re-use of packaging and shipping material for the multiple shipments required to transfer all of the SNPS fuel.

The impact of the transfer of SNPS fuel to LGS on occupational exposure will be within existing estimates for LGS. The slightly irradiated Shoreham fuel will be packaged inside shipping casks designed to handle highly irradiated spent fuel assemblies. The casks will be opened and unloaded while submerged in the LGS cask storage pit, and handling of the slightly irradiated fuel will be the same as handling the highly irradiated fuel during refueling operations. Appropriate actions to maintain exposure as low as reasonably achievable (ALARA) will be taken.

Non-radiological impacts at the LGS site are limited to removal of paving material sufficient to permit wheel clearance on 600 feet of existing rail spur and the replacement of a number of railroad ties. Since the work is minor and the site area was previously disturbed during site preparation and construction, this type of environmental impact has been previously addressed and no further environmental assessment of this activity is required.

Therefore, we have concluded that the NRC does not need to prepare a supplemental environmental impact statement in connection with the issuance of this amendment to the LGS Operating Licenses in accordance with criteria of 10 CFR 51.22(b).

Conclusion

The Plant Operations Review Committee and the Nuclear Review Board have reviewed this proposed change to the Operating Licenses for LGS, Unit 1 and Unit 2, and have concluded that the changes do not involve an unreviewed safety question, do not involve a significant hazards consideration, and do not endanger the health and safety of the public.

ATTACHMENT 2

LIMERICK GENERATING STATION
Units 1 and 2

Docket Nos. 50-352
50-353

License Nos. NPF-39
NPF-85

PROPOSED OPERATING LICENSE CHANGE

List of Attached Pages

License No. NPF-39
Page 1 - For Information Only
Page 3

License No. NPF-85
Page 1 - For Information Only
Pages 3 and 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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PHILADELPHIA ELECTRIC COMPANY
DOCKET NO 50-352
LIMERICK GENERATING STATION, UNIT 1
FACILITY OPERATING LICENSE

License No. NPF-39

1. The Nuclear Regulatory Commission (the Commission or the NRC) has found that:

   A. The application for license filed by Philadelphia Electric Company (the licensee) complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I, and all required notifications to other agencies or bodies have been duly made;

   B. Construction of the Limerick Generating Station, Unit 1 (the facility) has been substantially completed in conformity with Construction Permit No. CPPR-106 and the application, as amended, the provisions of the Act and the regulations of the Commission;

   C. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the regulations of the Commission (except as exempted from compliance in Section 2.D. below);

   D. There is reasonable assurance: (i) that the activities authorized by this operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below);

   E. The licensee is technically qualified to engage in the activities authorized by this license in accordance with the Commission's regulations set forth in 10 CFR Chapter I;

   F. The licensee has satisfied the applicable provisions of 10 CFR Part 140, "Financial Protection Requirements and Indemnity Agreements", of the Commission's regulations;

   G. The issuance of this license will not be inimical to the common defense and security or to the health and safety of the public;

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(3) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess and use at any time any byproducts, source and special nuclear material as sealed neutron sources for reactor startup, sealed sources for reactor instrumentation and radiation monitoring equipment calibration, and as fission detectors in amounts as required;

(4) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess, and use in amounts as required any byproduct, source or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components; and

(5) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission;s regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below) and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

The licensee is authorized to operate the facility at reactor core power levels not in excess of 3293 megawatts thermal (100% rated power) in accordance with the conditions specified herein and in Attachment 1 of this license. The items identified in Attachment 1 to this license shall be completed as specified. Attachment 1 is hereby incorporated into this license.

(2) Technical Specifications and Environmental Protection Plan

The Technical Specifications contained in Appendix A and the Environmental Protection Plan contained in Appendix B, both of which are attached hereto, are hereby incorporated into this license. The licensee shall operate the facility in accordance with the Technical Specifications and The Environmental Protection Plan.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

PHILADELPHIA ELECTRIC COMPANY

DOCKET NO. 50-353

LIMERICK GENERATING STATION, UNIT 2

FACILITY OPERATING LICENSE

License No. NPF-85

1. The Nuclear Regulatory Commission (the Commission or the NRC) has found that:

   A. The application for license filed by Philadelphia Electric Company (the licensee) complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I, and all required notifications to other agencies or bodies have been duly made;

   B. Construction of the Limerick Generating Station, Unit 2 (the facility) has been substantially completed in conformity with Construction Permit No. CPPR-107 and the application, as amended, [illegible] provisions of the Act and the regulations of the Commission;

   C. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the regulations of the Commission (except as exempted from compliance in Section 2.D. below);

   D. There is reasonable assurance: (i) that the activities authorized by this operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below);

   E. The licensee is technically qualified to engage in the activities authorized by this license in accordance with the Commission's regulations set forth in 10 CFR Chapter I;

   F. The licensee has satisfind the applicable provisions of 10 CFR Part 140, "Financial Protection Requirements and Indemnity Agreements," of the Commission's regulations;

   G. The issuance of this license will not be inimical to the common defense and security or to the health and safety of the public;

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(4) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess, and use in amounts as required any byproduct, source or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components; and

(5) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below) and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

Philadelphia Electric Company is authorized to operate the facility at reactor core power levels of 3293 megawatts thermal (100 percent rated power) in accordance with the conditions specified herein.

(2) Technical Specifications

The Technical Specifications contained in Appendix A and the Environmental Protection Plan contained in Appendix B, and hereby incorporated into this license. PECo shall operate the facility in accordance with the Technical Specifications and the Environmental Protection Plan.

(3) Fire Protection (Section 9.5, SSER-2)*

The licensee shall maintain in effect all provisions of the approved fire protection program as described in the Final Safety Analysis Report for the facility through Revision 58 and as approved in the SER through Supplement 9, and in the Fire Protection Evaluation Report through Revision 12, subject to the following provisions a and b below:

*The parenthetical notification following the title of license conditions denotes the section of the Safety Evaluation Report and/or its supplements wherein the license condition is discussed.

a. The licensee shall make no changes to features of the approved fire protection program which would decrease the level of fire protection in the plant without prior approval of the Commission. To make such a change the licensee must submit an application for license amendment pursuant to 10 CFR 50.90.

b. The licensee may make changes to features of the approved fire protection program which would decrease the level of fire protection without prior Commission approval after such features have been installed as approved, provided such changes do not otherwise involve a change in a license condition or technical specification or result in an unreviewed safety question (see 10 CFR 50.59). However, the licensee shall maintain, in an auditable form, a current record of all such changes including an evaluation of the effects of the change on the fire protection program and shall make such records available to NRC inspectors upon request. All changes to the approved program made without prior Commission approval shall be reported to the Director of the Office of Nuclear Reactor Regulation, together with supporting analyses, annually.

(4) Physical Security and Safeguards

The licensee shall fully implement and maintain in effect all provisions of the physical security, guard training and qualification and safeguards contingency plans previously approved by the Commission and all amendments and revisions to such plans made pursuant to the authority of 10 CFR 50.90 and 10 CFR 50.54(p). The plans, which contain Safeguards Information protected under 10 CFR 73.21, are entitled: "Limerick Generating Station, Units 1 & 2, Physical Security Plan," with revisions submitted through October 31, 1988; "Limerick Generating Station, Units 1 & 2, Plant Security Personnel Training and Qualification Plan," with revisions submitted through October 1, 1985; and "Limerick Generating Station, Units 1 & 2, Safeguards Contingency Plan," with revisions submitted through November 15, 1986.

D. The facility requires exemptions from certain requirements of 10 CFR Part 50 and 10 CFR Part 70. These include (a) exemption from the requirement of paragraph III.D.2.(b)(ii) of Appendix J, the testing of containment air locks at times when the containment integrity is not required (Section 6.2.6.1 of the SER and SSER-3) (b) exemption from the requirements of paragraphs II.H.4 and III.C.2 of Appendix J, the leak rate testing of the Main Steam Isolation Valves (MSIVs) at the peak calculated containment pressure, Pa, and exemption from the requirements of paragraph III.C.3 of Appendix J that the measured MSIV leak rates be included in the summation for the local leak rate test (Section 6.2.6.1 of SSER-3), (c) exemption from the requirement of paragraphs II.H.1 and III.C.2 of Appendix J,

J J Shea
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 23, 1993

Docket Nos. 50-352
and 50-353

Mr. George A. Hunger, Jr.
Director-Licensing, MC 52A-5
Philadelphia Electric Company
Nuclear Group Headquarters
Correspondence Control Desk
P.O. Box No. 195
Wayne, Pennsylvania 19087-0195

Dear Mr. Hunger:

SUBJECT: LICENSE AMENDMENT TO RECEIVE, POSSESS, AND USE SHOREHAM FUEL, LIMERICK GENERATING STATION, UNITS 1 AND 2 (TAC NOS. M85941 AND M85942)

The Commission has issued the enclosed Amendment No. 62 to Facility Operating License No. NPF-39 and Amendment No. 27 to Facility Operating License No. NPF-85 for the Limerick Generating Station (LGS), Units 1 and 2. These amendments consist of changes to the Operating License for each unit in response to your application dated March 8, 1993, as supplemented by letter dated June 2, 1993.

These amendments would revise paragraph 2.B.(5) to the Operating License Nos. NPF-39 and NPF-85 for the Limerick Generating Station, Units 1 and 2, respectively, to allow the licensee to receive, possess, and use, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

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Exhibit D

A copy of our Safety Evaluation is also enclosed. Notice of Issuance will be included in the Commission's biweekly Federal Register notice.

Sincerely,
/S/
Frank Rinaldi, Project Manager
Project Directorate I-2
Division of Reactor Projects - I/II
Office of Nuclear Reactor Regulation

Enclosures:
1. Amendment No. 62 to
License No. NPF-39
Amendment No. 27 to
License No. NPF-85
2. Safety Evaluation

cc w/enclosures:
See next page

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OFFICE	PDI-2/LA	PDI-2/PM	PRPB*	SRXB*	SLPB*
NAME	MO'Brien	FRinaldi:rb	LCunningham	RJones	CMcCracken
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NAME	MSlosson	CMacDonald	JAustin	APH	CMiller
DATE	05/21/93	05/21/93	05/24/93	05/27/93	6/23/93

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A copy of our Safety Evaluation is also enclosed. Notice of Issuance will be included in the Commission's biweekly Federal Register notice.

Sincerely,

Frank Rinaldi, Project Manager
Project Directorate I-2
Division of Reactor Projects - I/II
Office of Nuclear Reactor Regulation

Enclosures:
1. Amendment No. 62 to
License No. NPF-39
Amendment No. 27 to
License No. NPF-85
2. Safety Evaluation

cc w/enclosures:
See next page

Mr. George A. Hunger, Jr.
Philadelphia Electric Company

Limerick Generating Station,
Units 1 & 2

cc:

J. W. Durham, Sr., Esquire
Sr. V.P. & General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, Pennsylvania 19101

Mr. Rod Krich 52A-5
Philadelphia Electric Company
955 Chesterbrook Boulevard
Wayne, Pennsylvania 19087-5691

Mr. David R. Helwig, Vice President
Limerick Generating Station
Post Office Box A
Sanatoga, Pennsylvania 19464

Mr. John Doering
Plant Manager
Limerick Generating Station
P.O. Box A
Sanatoga, Pennsylvania 19464

Regional Administrator
U.S. Nuclear Regulatory Commission
Region I
475 Allendale Road
King of Prussia, PA 19406

Mr. Neil S. Perry
Senior Resident Inspector
US Nuclear Regulatory Commission
P. O. Box 596
Pottstown, Pennsylvania 19464

Mr. Craig L. Adams
Superintendent - Services
Limerick Generating Station
P.O. Box A
Sanatoga, Pennsylvania 19464

Mr. William P. Dornsife, Director
Bureau of Radiation Protection
PA Dept. of Environmental Resources
P. O. Box 8469
Harrisburg, Pennsylvania 17105-8469

Mr. James A. Muntz
Superintendent-Technical
Limerick Generating Station
P. O. Box A
Sanatoga, Pennsylvania 19464

Mr. James L. Kantner
Regulatory Engineer
Limerick Generating Station
P. O. Box A
Sanatoga, Pennsylvania 19464

Library
US Nuclear Regulatory Commission
Region I
475 Allendale Road
King of Prussia, PA 19406

Mr. Larry Hopkins
Superintendent-Operations
Limerick Generating Station
P. O. Box A
Sanatoga, Pennsylvania 19464

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON D C 20555-0001

PHILADELPHIA ELECTRIC COMPANY

DOCKET NO. 50-352

LIMERICK GENERATING STATION, UNIT 1

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 62
License No. NPF-39

1. The Nuclear Regulatory Commission (the Commission) has found that:

A. The application for amendment by Philadelphia Electric Company (the licensee) dated March 8, 1993, as supplemented by letter dated June 2, 1993, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I;

B. The facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission;

C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;

D. The issuance of this amendment will not be inimical to the common defense and security or to the health and safety of the public; and

E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

2. Accordingly, paragraph 2.B.(5) on page 3 of Facility Operating License No. NPF-39 is hereby amended to read as follows:*

Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

3. This license amendment is effective as of its date of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

Charles L. Miller

Charles L. Miller, Director
Project Directorate I-2
Division of Reactor Projects - I/II
Office of Nuclear Reactor Regulation

Attachment:
Page 3 of Operating
License No. NPF-39

Date of Issuance: June 23, 1993

*Page 3 is attached, for convenience, for the composite license to reflect this change.

(3) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess and use at any time any byproduct, source and special nuclear material as sealed neutron sources for reactor startup, sealed sources for reactor instrumentation and radiation monitoring equipment calibration, and as fission detectors in amounts as required;

(4) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess, and use in amounts as required any byproduct, source or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components; and

(5) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below) and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

The licensee is authorized to operate the facility at reactor core power levels not in excess of 3293 megawatts thermal (100% rated power) in accordance with the conditions specified herein and in Attachment 1 to this license. The items identified in Attachment 1 to this license shall be completed as specified. Attachment 1 is hereby incorporated into this license.

(2) Technical Specifications

The Technical Specifications contained in Appendix A and the Environmental Protection Plan contained in Appendix B, as revised through Amendment No. 62 , are hereby incorporated in the license. PECo shall operate the facility in accordance with the Technical Specifications and the Environmental Protection Plan.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

PHILADELPHIA ELECTRIC COMPANY

DOCKET NO. 50-353

LIMERICK GENERATING STATION, UNIT 2

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 27
License No. NPF-85

1. The Nuclear Regulatory Commission (the Commission) has found that:

   A. The application for amendment by Philadelphia Electric Company (the licensee) dated March 8, 1993, as supplemented by letter dated June 2, 1993, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I;

   B. The facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission;

   C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;

   D. The issuance of this amendment will not be inimical to the common defense and security or to the health and safety of the public; and

   E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

2. Accordingly, paragraph 2.B.(5) on page 3 of Facility Operating License No. NPF-85 is hereby amended to read as follows:*

Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

3. This license amendment is effective as of its date of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

Charles L. Miller

Charles L. Miller, Director
Project Directorate I-2
Division of Reactor Projects - I/II
Office of Nuclear Reactor Regulation

Attachment:
Page 3 of Operating
License No. NPF-85

Date of Issuance: June 23, 1993

*Page 3 is attached, for convenience, for the composite license to reflect this change.

(4) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to receive, possess, and use in amounts as required any byproduct, source or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components; and

(5) Pursuant to the Act and 10 CFR Parts 30, 40 and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility, and to receive and possess, but not separate, such source, byproduct, and special nuclear materials as contained in the fuel assemblies and fuel channels from the Shoreham Nuclear Power Station.

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission's regulations set forth in 10 CFR Chapter I (except as exempted from compliance in Section 2.D. below) and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

Philadelphia Electric Company is authorized to operate the facility at reactor core power levels of 3293 megawatts thermal (100 percent rated power) in accordance with the conditions specified herein.

(2) Technical Specifications

The Technical Specifications contained in Appendix A and the Environmental Protection Plan contained in Appendix B, as revised through Amendment No. 27 , are hereby incorporated into this license. Philadelphia Electric Company shall operate the facility in accordance with the Technical Specifications and the Environmental Protection Plan.

(3) Fire Protection (Section 9.5, SSER 2)*

The licensee shall maintain in effect all provisions of the approved fire protection program as described in the Final Safety Analysis Report for the facility through Revision 58 and as approved in the SER through Supplement 9, and in the Fire Protection Evaluation Report through Revision 12, subject to the following provisions a and b below:

a. The licensee shall make no change to features of the approved fire protection program which would decrease the level of fire protection in the plant without prior approval of the Commission. To make such a change the licensee must submit an application for license amendment pursuant to 10 CFR 50.90.

*The parenthetical notation following the title of license conditions denotes the section of the Safety Evaluation Report and/or its supplements wherein the license condition in discussed.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

RELATED TO AMENDMENT NOS. 62 AND 27 TO FACILITY OPERATING

LICENSE NOS. NPF-39 AND NPF-85

PHILADELPHIA ELECTRIC COMPANY

LIMERICK GENERATING STATION, UNITS 1 AND 2

DOCKET NOS. 50-352 AND 50-353

1.0 INTRODUCTION

By letter dated March 8, 1993, as supplemented by letter dated June 2, 1993, the Philadelphia Electric Company (the licensee) submitted a request for changes to paragraph 2.B.(5) to the Operating License Nos. NPF-39 and NPF-85 for the Limerick Generating Station (LGS), Units 1 and 2. The requested changes would allow the receipt, possession and use of the fuel assemblies and fuel channels previously irradiated in the Shoreham Nuclear Power Station (SNPS). The fuel was fabricated by General Electric Company (GE) and consists of 560 GE6-(P8X8R) pressurized, C-lattice, non-barrier fuel assemblies. The 560 fuel assemblies include 340 enriched to 2.19 w/o U-235, 144 enriched to 1.76 w/o U-235, and the remaining 76 are natural uranium (i.e., 0.711 w/o U-235). These fuel assemblies are similar to those utilized in the LGS, Unit 1 initial core loading. The supplemental letter provided clarifying information that did not change the initial proposed no significant hazards consideration determination.

The fuel was used at SNPS in a limited testing program at 5% power. It has been irradiated to a core average exposure of approximately 48 megawatt days per metric ton (MWD/MT). The estimated core fission inventory is less than 0.02% of the source term, and its decay heat rate is approximately 265 watts (i.e., 900 Btu/hr) as of June 1992. The fuel transport between the two sites will utilize the GE IF-300 Series spent fuel cask. The GE IF-300 has received an NRC Certificate of Compliance (No. 9001), that has been amended to address the specific pay load to be utilized for the proposed transport of the SNPS fuel to the LGS site. The staff has confirmed that 1) a current amendment to the NRC Certificate of Compliance No. 9001 has been issued for the spent fuel cask; 2) a security plan has been established for the transport of the subject fuel; 3) an Environmental Assessment and Finding of No Significant Impact has been issued; and 4) a complete technical evaluation of all aspects affecting the receipt, possession and use of the subject fuel at the LGS site has been performed.

2.0 EVALUATION

The staff has addressed all pertinent issues associated with the proposed fuel transfer, as applicable to the loading and transport from the SNPS to the LGS, and the unloading, storage, and use of the fuel assemblies and the fuel channels at the LGS. The specific issues addressed by the staff in this

evaluation include the determination of the applicability of the Price-Anderson Rule; the evaluation of the criticality aspects of receiving, storing, and using the slightly irradiated fuel; the radiological assessment; and the handling of the heavy loads and cooling of the subject fuel and components.

2.1 Price-Anderson

There are no unresolved financial protection issues involved in the use of Shoreham spent fuel at Limerick. Price-Anderson coverage would cover the fuel from the SNPS to the LGS and would also extend to the fuel while it is being used at the LGS and to the natural uranium fuel assemblies that would be used to test for damage. See Section 170 of the Atomic Energy Act of 1954, as amended.

2.2 Storage and Use of the Irradiated Fuel

Storage of Irradiated Fuel

The criticality analysis for the LGS spent fuel pool, as described in the Updated Final Safety Analysis Report (UFSAR) Section 9.1.2.3.1, assumed fuel assemblies with a uniform 3.5 w/o U-235 enrichment. The analysis also assumed the presence of zircaloy channels. The resulting worst case k_{eff} was 0.933, which meets the NRC limiting criterion of k_{eff} no greater than 0.95. The highest average assembly enrichment of the SNPS fuel is 2.19 w/o U-235 and the maximum planar enrichment is 2.33 w/o U-235. Based on the lower enrichment, the reactivity of the storage array of the SNPS fuel in the LGS storage pool will result in a lower value of k_{eff} than was calculated for the LGS fuel.

The SNPS fuel will be packaged for transportation to the LGS with polyethylene spacers and a protective stainless steel channel. GE, therefore, evaluated the effect of these spacers and channels on the spent fuel storage pool k_{eff}. The stainless steel channels were found to lower the reactivity of the spent fuel pool k_{eff} in all cases. However, the increased neutron moderation due to the hydrogen in the polyethylene spacers tends to cause a reactivity increase. GE has determined that the lower enrichment of the SNPS fuel, compared to the enrichment used in the LGS criticality analysis, causes a much greater negative reactivity effect than the positive reactivity addition caused by the polyethylene spacers. Therefore, the storage of the SNPS fuel in the LGS spent fuel pool is acceptable since it results in a k_{eff} of less than 0.933, thus meeting the NRC limit of no greater than 0.95.

Use of the SNPS Fuel in the LGS Core

A detailed inspection of two of the irradiated SNPS fuel assemblies was performed by GE in August 1990. This inspection, which included eddy current testing of individual fuel and water rods as well as a visual inspection of the entire fuel assembly, verified that the SNPS fuel was suitable for future use. In addition, an evaluation of the water chemistry history of both the SNPS reactor and spent fuel pool determined that the fuel has not been exposed to an adverse environment that would preclude its future use.

PECo will ensure that the SNPS fuel assemblies arrive in a condition suitable for future use by inspecting a dummy test assembly after it has been subjected to accelerations and loadings at least as great as those expected during shipping and handling. The acceptance criteria will be the same as applied to the shipment of new fuel, as specified in NEDE-23542-P, "Fuel Assembly Evaluation of Shipping and Handling Loads," dated March 1977. In addition to disassembling and inspecting at least one fuel assembly from the first shipment, all assemblies shipped from the SNPS to the LGS will be visually inspected before and after packaging as well as upon arrival at LGS. Any assembly that does not meet the acceptance criteria used for the receipt inspection of new fuel will be excluded from future use in the LGS cores unless it is appropriately repaired. The staff finds the acceptance criteria as well as the tests and inspections used to determine the suitability of the SNPS fuel for future use at the LGS acceptable.

Before operation with the SNPS fuel, a cycle-specific core nuclear analysis will be performed based on the latest NRC-approved version of NEDE-24011-P-A, "General Electric Standard Application for Reactor Fuel GESTAR II." The effect of the SNPS fuel on the thermo-hydraulic stability of the core will also be evaluated based on NRC Generic Letter 88-07, Supplement 1, "Power Oscillations in Boiling Water Reactors (BWR)." These are the same evaluations performed for all the LGS reload cores and are acceptable. In addition, an evaluation was performed to determine if any analysis changes are required to account for the prior operating history, handling, and transportation of the SNPS fuel. The SNPS fuel was found to meet all the licensing bases documented in NEDE-24011-P-A and, therefore, no exceptions to GESTAR II will be needed when the SNPS fuel is analyzed for use in the LGS cores.

PECo has stated that only a limited number of the SNPS fuel assemblies will be used each cycle. These assemblies will only be placed in low duty core locations. The staff finds this limited use in low power locations acceptable.

Conclusion of Storage and Use of the SNPS Fuel

The staff has reviewed the criticality aspects of storage of the irradiated SNPS Fuel in the LGS spent fuel pools and the suitability of this fuel for future use in the LGS cores. The impact of the SNPS fuel and its packaging material on the LGS spent fuel pool criticality was found to be bounded by the fuel pool criticality analysis presented in Section 9.1.2.3.1 of the LGS UFSAR. In addition, before the SNPS fuel is used in an LGS core, a cycle-specific analysis, which will include the effect on the thermal-hydraulic stability, will be performed in accordance with NRC-approved methods to determine its acceptability.

2.3 Radiological Assessment

In the submittal from PECo, it was stated that SNPS fuel had been irradiated to a core average exposure of approximately 48-Megawatt-days-per-metric-ton and that the fuel had been removed from the reactor and placed in the SNPS spent fuel pool in August 1989. The submittal indicated that the slightly irradiated fuel contains 0.02% of the source term assumed in the design basis loss of coolant accident described in the LGS UFSAR. PECo also stated that the radiological consequences of a dropped fuel assembly involving the SNPS fuel are bounded by the fuel handling accident involving highly irradiated spent fuel described in the LGS UFSAR Section 15.7.4, "Fuel Handling Accident." They stated further that while handling the IF-300 cask, which weighs 85 tons including the basket, 17 fuel assemblies, and a redundant cask-lifting yoke, the requirements of NUREG-0554, "Single-Failure-Proof Cranes for Nuclear Power Plants" and NUREG-0612, "Control of Heavy Loads at Nuclear Power Plants," would be met by the use of a single-failure-proof redundant yoke and by restricting the critical load of the reactor enclosure main hoist to 110 tons. PECo also stated that restricting the reactor enclosure main hoist critical load to 110 tons and the use of single-failure-proof equipment precludes a cask drop due to single-failure. Therefore, an analysis of the spent fuel cask drop is not required.

The staff has assessed the consequences of a fuel handling accident involving the SNPS fuel. The staff is in agreement with PECo that existing analysis for fuel handling accident involving highly irradiated fuel at the LGS, which is described in the LGS UFSAR Section 15.7.4, bounds any potential fuel handling accident associated with the SNPS fuel. In addition, such a postulated accident is also bounded by the staff's analysis of the consequences of a fuel handling accident, which was presented in NUREG 0991, "Safety Evaluation Report Related to the Operation for the Limerick Generating Station, Units 1 and 2." The staff has also concluded that, as a result of the steps PECo is taking to meet the requirements of NUREG-0554 and NUREG-0612, an analysis of a spent fuel cask drop accident is not required for this licensing action.

2.4 Fuel Handling and Cooling

The licensee plans to move the fuel from the SNPS via barge to a PECo site along the Delaware River and then to the LGS by rail. The shipping container will be the GE IF-300 series spent fuel cask with a basket design that can hold 17 fuel assemblies. The railcar will be moved into the reactor building under the refueling hoist-way. The reactor enclosure crane will lift the cask from the railcar through the open hoist-way via the yoke designed for lifting the IF-300 cask. The cask will then be moved to the cask pool, located between the Unit 1 and Unit 2 spent fuel pools. The cask top will then be removed and individual fuel assemblies will be moved from the cask to the spent fuel pool for Unit 1 or Unit 2 through open slot B in either pool.

The licensee plans to inspect the shipped fuel sometime after it arrives once the cask is in the LGS cask pool. Note that this safety evaluation is only concerned with the movement of the fuel handling cask within the reactor building and cooling of the SNPS fuel after removal from the transfer cask.

This evaluation addresses two aspects considered in the licensee's submittal and does not address the transfer process from Shoreham to Limerick. The two issues considered in this evaluation are: (1) Heavy loads handling which involves the movement of cask containing the SNPS fuel within the confines of the LGS reactor building, and (2) The capability of the LGS spent fuel storage pool cooling system as regards cooling the SNPS fuel assemblies stored in the spent fuel pool.

Heavy Load Handling

The reactor enclosure crane, with which the licensee plans to move the IF-300 series cask, has been found acceptable for use as a single-failure-proof crane. The specified maximum critical crane load is 110 tons, while the IF-300-type cask with basket, 17 assemblies and yokes, weigh about 85 tons. The crane bridge and trolley have travel limit switches to prevent movement of the crane over spent fuel.

The special lifting device, or yoke, has 2 independent components; the standard lifting yoke and a redundant yoke. The standard yoke engages the cask trannions with the standard yoke's J-hooks; the yoke cross-members hold cables which are used to remove the cask head. The redundant yoke has a cradle into which the cask is lowered before moving. Each yoke is designed in accordance with the criteria of ANSI 14.6-1977; each is designed with a safety factor of 3 to minimum component yield stress and 5 to minimum component ultimate stress, thus complying with the criteria of a single-failure-proof lifting device.

The licensee will follow the same load path that would be encountered in moving highly irradiated fuel from the plant except in reverse, i.e., movement will be from hoist-way to cask pool instead of reverse.

The head of the cask containing the Shoreham fuel will not be removed until the cask is in the cask pit, under water. After the head is removed, the SNPS fuel may be moved into either the LGS, Units 1 or 2 spent fuel pool or may be removed for examination, at the licensee's discretion. Removal and subsequent examination is to be conducted in accordance with applicable safety requirements.

The load path from the hatch-way to the cask storage pit has been determined to be a safe load path, i.e., a path which avoids spent fuel and redundant safety shutdown equipment in the unlikely event of a load drop.

Cooling of the Fuel Assemblies

There are no thermal/hydraulic concerns because of the extremely low heat generation rate for the irradiated core, 900 BTU/HR. This value may be contrasted to the capability of one of the Limerick fuel pool cooling systems.

Each unit has 3 pumps and 3 heat exchangers. With 2 pumps and 2 heat exchangers operating and a pool filled with spent fuel assemblies generating up to 16,320,000 BTU/HR, the fuel pool water is maintained below 140°F.

Conclusion for Fuel Handling and Cooling

The staff finds that movemen of the series IF-300 cask from its entrance into the reactor building to the cask pool to present no handling problems since the reactor enclosure crane and yoke constitute a single-failure-proof handling system, in accordance with the provisions of Section 5.1.6 of NUREG-0612, "Control of Heavy Loads." Such compliance assumes the possibility of a load drop to be negligibly low. In addition, the path of the cask, from entrance into the fuel handling building to the cask pool bypasses irradiated fuel and dual or redundant safe shutdown systems so that the cask, even were a load drop to occur, would have no effect upon spent fuel or the capability of the plant to shut down safely.

The movement of individual fuel elements into either spent fuel pool from the cask also presents no problem beyond that normally encountered, and provided for, when moving irradiated fuel from either pool into a cask when such fuel has been irradiated as part of an operational core.

As noted above, in Section 2.2, there are no thermal/hydraulic concerns because the Shoreham fuel elements are generating very little heat as compared to the capability of the spent fuel pool cooling system.

Therefore, the staff finds the movement of the Shoreham fuel inside the LGS and subsequent storage in the spent fuel storage pools to be acceptable in that such movement and storage will be in accordance with applicable criteria, from a heavy loads and fuel handling aspect and from a thermal/hydraulic aspect. All other concerns, including that of spent fuel pool storage criticality and movement of fuel from the SNPS to the LGS are addressed elsewhere.

3.0 STATE CONSULTATION

In accordance with the Commission's regulations, the Pennsylvania State official was notified of the proposed issuance of the amendments. The State official had no comments.

4.0 ENVIRONMENTAL CONSIDERATION

Pursuant to 10 CFR 51.21, 51.32, and 51.35, an environmental assessment and finding of no significant impact have been prepared and published (58 FR 29010) in the Federal Register on May 18, 1993. Accordingly, based upon the environmental assessment, the Commission has determined that the issuance of this amendment will not have a significant effect on the quality of the human environment.

5.0 CONCLUSION

The Commission has concluded, based on the considerations discussed above, that: (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

Principal Contributors: F. Rinaldi
L. Kopp
J. Hayes
N. Wagner
I. Dinitz

Date: June 23, 1993

Long
Island
Power
Authority

200 Garden City Plaza
Garden City, NY 11530
(516) 742-2200

Richard P. Bonnifield
General Counsel

August 31, 1993

Carol Grelecki, Esq.
Richard J. Hughes Justice Complex
Box CN 093
Trenton, NJ 08625

Dear Ms. Grelecki:

As you requested, I am enclosing a copy of the Marine Operations Plan, including the route map (Enclosure 5.6).

Please let me know if you have any questions.

Sincerely,

Richard P. Bonnifield

Enclosure

U.S. Department of Transportation
United States Coast Guard

Captain of the Port
Long Island Sound

120 Woodward Ave.
New Haven, CT 06512
(203) 468-4464

16465

Mr. L. M. Hill
Shoreham Nuclear Power Station
P.O. Box 628
North Country Road
Wading River, NY 11792

JUL 27 1993

Dear Mr. Hill:

I have reviewed your Long Island Power Authority (LIPA) Transportation Plan for the shipment of Nuclear Fuel from the Shoreham Nuclear Power Station to Philadelphia Electric Company's (PECO) Limerick Generating Station in Pennsylvania. Your plan's final approval is contingent on satisfactory internal structural inspections of the Loveland barges to be used for the fuel shipments. These inspections shall be coordinated with Marine Safety Office, Philadelphia, Pa. Your point of contact for inspections is LT Pat McLaughlin at 215-271-4852.

In your plan, you identified the route and waypoints that the vessel will be using during its voyage to Eddystone, Pennsylvania. Should the towing vessel find cause to deviate from this route, immediate notification shall be made to my Port Operations Department at (203) 468-4464. They can also be reached on CH 16 VHF-FM by calling Coast Guard Group Long Island Sound.

While transiting the Captain of the Port Long Island Sound zone, the towing vessel for the barge shall make position reports to Coast Guard Group Long Island Sound on CH 16 VHF-FM at the following positions:

1. Leaving Shoreham Nuclear Power Station;
2. Clearing Plum Gut;
3. Clearing Montauk Pt. Passage;
4. When due south of Fire Island Inlet; and
5. If there is any unusual circumstance or difficulty encountered.

While I cannot dictate reporting requirements for other Captain of the Port zones, I strongly suggest you contact these offices to determine if they have any specific requirements. Enclosure (1) is a list of the COTP zones and their telephone numbers through which you will be transiting.

JUL 27 1993

If an emergency arises during the barge transit, all Coast Guard operation centers can be reached on VHF-FM channel 16 for assistance. Should the towing vessel and the barge have to seek safe harbor for any of the emergencies described in paragraph 3.5 of your transportation plan, the towing vessel captain should obtain clearance from the applicable Captain of the Port prior to entering the harbor.

Members of my staff will perform a final onsite inspection of each shipment including the primary and escort towing vessels prior to departure from the Shoreham facility. Please contact LCDR Tim Skuby or LTJG Dan Schroder of my staff if you have questions regarding this matter.

Sincerely,

H. BRUCE DICKEY
Captain, U.S. Coast Guard
Captain of the Port,
Long Island Sound

Encl: (1) COTP Contact numbers

CAPTAIN OF THE PORT OFFICES AND CONTACT NUMBERS

Captain of the Port Long Island Sound	(203) 468-4464
Captain of the Port New York	(212) 668-7910
Marine Safety Office Philadelphia	(215) 271-4800

ENCLOSURE (1)