510

DOCKETED
USNRC

'84 JUN -6 A11:53

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal

SERVED JUN 6 1984

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

Docket No. 50-322 OL

MEMORANDUM AND ORDER
(CLI-84-9)

The Atomic Safety and Licensing Appeal Board for this proceeding has certified two issues to the Commission:

> I. The relative scope of the terms "important to safety" and "safety-related" for the purposes of evaluating the acceptability of quality assurance programs established under 10 C.F.R. Part 50; and
>
> II. The conditions under which the National Environmental Policy Act (NEPA) would require the Commission to prepare a separate environmental impact statement for low-power operation. ALAB-769, 19 NRC ____ (1984).

These questions raise significant issues of law and policy. However, for the reasons discussed below, the Commission declines to reach any final decision on the first issue finding that it would be more suitably addressed by rulemaking and need not be finally resolved for the purposes of this proceeding.

8406070146 840605
PDR ADOCK 05000322
G PDR

DS02

Because the NEPA issue has been briefed and argued below, the Commission finds no need to request yet another round of briefs or argument.

I.

The Appeal Board certified the following questions regarding the Commission regulations on quality assurance:

> 1. Are the terms "important to safety" and "safety-related" to be deemed synonymous for the purpose of establishing an acceptable quality assurance program in accordance with GDC 1 of Appendix A and Appendix B to 10 C.F.R. Part 50?
>
> 2. How should the outcome of Question 1 be applied to the operating license application proceeding before us?

The material already in the record of this proceeding shows that the issue presented by Question 1 requires further consideration in a forum broad enough to encompass the far-reaching ramifications of any decision on this issue. As the Appeal Board found, the history of the use of the terms "important to safety" and "safety-related" is tortuous and somewhat inconsistent. A comprehensive analysis of this history will be more accurate if it has the benefit of the institutional memories of as many individuals as possible. The application of such an analysis could result in a decision having significant consequences for the NRC's regulatory program. This potential for significant decision warrants broad public participation. Accordingly, the Commission will initiate a rulemaking proceeding on this issue.

In the interim, the Boards are to continue to proceed on a case-by-case basis in accordance with current precedent. _Cf. Metropolitan_

Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814 (1983).

The Commission understands current precedent to hold that the term "important to safety" applies to a larger class of equipment than the term "safety-related." However, this does not mean that there is a pre-defined class of equipment at every plant whose functions have been determined by rule to be "important to safety" although the equipment is not "safety-related." Rather, whether any piece of equipment has a function "important to safety" is to be determined on the basis of a particularized showing of clearly identified safety concerns for the specific equipment, and the requirements of General Design Criterion 1 (GDC 1) must be tailored to the identified safety concerns.

II.

The Appeal Board certified the following question regarding the Commission's compliance with NEPA:

> Is some form of environmental evaluation under NEPA required as a precondition to issuance of a license for low power operation in this proceeding if such issuance is otherwise warranted?

For the reasons discussed below, the Commission finds that NEPA does not require the Commission to prepare an Environmental Impact Statement (EIS) or any other form of environmental evaluation on a proposal to issue a low-power license for the Shoreham facility.

NEPA requires the NRC to prepare an environmental impact statement for every proposed major Federal action which would significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Commission's regulations implementing NEPA do not explicitly require the

preparation of an EIS for a proposal to issue a low-power operating license. 10 C.F.R. 51.20(b).

The Commission's regulations also recognize that some proposed Federal actions either may not be major or may not have significant impacts on the human environment. 10 C.F.R. 51.21. For such other proposals, the Commission determines on a case-by-case basis whether to prepare an EIS or some other appropriate environmental documentation, _i.e._, either an environmental impact appraisal and negative declaration or no statement at all. 10 C.F.R. 51.25. Part 51 does not explicitly address a proposal to issue a license to operate a power reactor at less than full power or at less than the design capacity.

The Commission has determined that in the usual case NEPA does not require any separate environmental analysis of the proposal to issue a low-power operating license. _Pacific Gas and Electric Company_ (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 793-795 (1983), _aff'd_, CLI-83-32, 18 NRC 1309 (1983). This is because the low-power license is simply a small component of or intermediate step to the full-power license and the environmental evaluation for low-power operation is subsumed within the environmental impact statement for full-power operation. Low-power operation presents no environmental impacts different in kind from those considered in an EIS for full-power. Any environmental impacts of low-power operation are a small subset of the set of impacts from full-power operation and, thus, are intrinsically considered in the full-power EIS. It is well-established NEPA law that separate environmental statements are not

required for such intermediate, implementing steps where an EIS has been prepared for the entire proposed action. Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1377 (and cases cited therein) (1980).

Low-power operation is also not an alternative to full-power operation. Accordingly, low-power operation is not a reasonably foreseeable alternative requiring separate environmental analysis on this basis.

Suffolk County (County) contends that the proposed low-power operating license for Shoreham presents an unusual case because it believes that an off-site emergency plan cannot be developed for this plant. This circumstance, in the County's view, makes low-power operation without subsequent full-power operation a reasonably foreseeable alternative for the purposes of NEPA. Accordingly, the County believes that a separate EIS or environmental evaluation is necessary for the proposed low-power license for Shoreham.

Suffolk County's position is based on its speculation on the outcome of the adjudication of off-site emergency planning issues. The appropriateness of such speculation in this proceeding has already been addressed by the Commission in response to an earlier certified question by the Licensing Board. In LBP-83-21, 17 NRC 559 (1983), the Licensing Board suggested that a low-power license should not be issued where there is no reasonable assurance that a full-power license will ever be issued.

The Commission rejected this suggestion. The Commission found that 10 C.F.R. 50.47(d) established unqualified authorization to issue a

low-power license without the need for a predictive finding of reasonable assurance that a full-power license will eventually issue. CLI-83-17, 17 NRC 1032, 1034 (1983). Accordingly, the Commission declined to speculate on whether off-site emergency planning issues would be resolved satisfactorily for the purposes of a full-power license.

The Commission's earlier decision did not explicitly address Suffolk County's NEPA argument. However, that decision does implicitly suggest that uncertainty about the ultimate disposition of contested off-site emergency planning issues is too speculative to be cognizable as a changed circumstance for the purposes of finding that a supplementary environmental evaluation is required by NEPA. Uncertainty over offsite emergency planning is not a changed circumstance. In any contested full-power proceeding there is uncertainty over the outcome of full-power licensing issues. Controversy over offsite planning is not some new, recent development in this case or, for that matter, distinguishable from controversy over other contested full-power issues. Accordingly, the Commission finds that the pendency of a contested issue related to full-power operation may not be considered as changed circumstances for the purposes of NEPA.

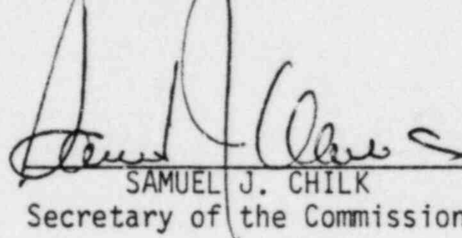
For these reasons, the Commission finds that where an EIS for full-power operation of a nuclear power plant has been prepared and adjudicated, the pendency of an adjudication on the emergency planning issue material to full-power operation does not constitute a basis for an additional NEPA obligation to prepare a separate environmental evaluation of a proposal to issue a low-power operating license to that

plant. Therefore, the Commission finds that NEPA does not require a separate environmental evaluation or separate EIS for the proposed low-power operation of Shoreham.

The separate views of Commissioners Gilinsky and Asselstine are attached. They dissent in part from this decision.

It is so ORDERED.

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 5th day of June, 1984.

6/5/84

SEPARATE VIEWS OF COMMISSIONER GILINSKY
(SHOREHAM - CERTIFIED QUESTION REGARDING NEPA)

I agree with the views expressed by Commissioner Asselstine. In the particular circumstances of this case, where there is a substantial question about whether commercial operation of the reactor will ever be allowed, it is irresponsible to permit the plant to become irradiated without evaluating the costs and benefits of the low power testing program.

Separate Views of Commissioner Asselstine

I have voted to disapprove that portion of the Commission's order dealing with whether the Commission must perform on environmental evaluation before it can issue a low power (5%) license to the owners of Shoreham. Normally the Commission need not consider the environmental effects of, or do a cost benefit balance for, the issuance of a 5% license. The environmental effects of the issuance of a low power license are subsumed in the consideration of the full power license, and a separate or supplemental EIS is not required for each component action - i.e. each step leading to a full power license. Environmental Defense Fund v. Andrus, 619 F.2d 1368 (9th Cir. 1982). However, if circumstances change subsequent to the issuance of the EIS sufficiently to suggest that the EIS does not adequately discuss a specific component action or its alternatives and if the component action viewed alone constitutes a major federal action, NEPA requires the preparation of an environmental evaluation. 619 F.2d at 1377; Save Our Sycamore v. MARTA, 576 F.2d 573, 576 (5th Cir. 1978).

In this case there is a reasonable likelihood, which is much more likely than when the EIS was completed, that Shoreham might never receive a full power license because the state and local governments have refused to participate fully in emergency preparedness. Given this change in circumstances, the Commission should perform an environmental

evaluation, including a cost-benefit balance, of the issuance of only a low power license. The Commission should at least weigh the costs of contaminating a plant which would never go above 5% power against whatever benefits the 5% license would produce. By refusing to do so, the Commission is, in effect, saying that no evaluation is necessary because there is no reasonable possibility that Shoreham will not get its full power license.