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MEMORANDUM FOR: Chairman Ahearne

THRU: William J. Dircks, Executive Director for Operations

FROM: Victor Stello, Jr., Director, Office of Inspection and Enforcement

SUBJECT: POSSIBLE NEED FOR ADDITIONAL ENFORCEMENT ACTION IN MIDLAND

In response to your memorandum dated January 14, 1981, the following background information is provided. Mr. Keppler reported in the enclosed memorandum to me dated August 14, 1980 that on July 30-August 1, 1980 Mr. Gibbon, Legal Assistant to Commissioner Bradford, visited the Region III Office. He accompanied Region III inspectors on an inspection at the Perry site and met with Mr. Keppler and other members of the Region III principal staff to discuss a number of issues confronting NRC and Region III.

One of the subjects brought up by Mr. Gibbon was the NRC Construction Inspection Program. Mr. Gibbon's interest in construction inspection was directed toward the role the Commissioners might play to improve NRC enforcement capabilities that would result in better licensee performance in the construction of nuclear power plants. The potential ex parte contact that was recently brought to the attention of the Midland ASLB and involved parties represented only a few minutes in the overall discussions with Mr. Gibbon, which lasted the better part of the morning.

The recommendation that was discussed with Mr. Gibbon, which resulted in the mention of Midland, was that NRC should consider stopping a specific construction activity in a timely manner, as a matter of policy, when a significant safety-related problem has been identified and when NRC is unable to support the licensee's proposed corrective actions. The focus of this recommendation was aimed at NRC policy for future cases, not at reopening the Midland issue. Mr. Keppler has stated that the reasoning behind this recommendation was obviously based on NRC experiences at Midland. In March 1979, Region III notified Headquarters in writing of the initial concerns on the need to resolve this issue. Specifically, Region III questioned continuation of construction activities when the cause of the settlement problem had not been determined and suggested consideration of an NRR directive or show cause order which would expedite evaluations of the safety significance of the problem. It was Headquarters view, at that time, that a more appropriate action was for NRR to issue a 10 CFR 50.54(f) letter. Subsequently, NRR issued a 10 CFR 50.54(f) letter to the licensee to resolve the issue, but it was not until November 1979 that NRC attention was again focused on the adequacy of the basic design as affected by "random fill" soil. At that time

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Region III recommended that enforcement action in the form of a civil penalty be taken to resolve that concern. I considered such action to be inadequate and, upon my personal initiative, an Order was issued jointly by the Directors of IE and NRR requiring the licensee to show cause why it should not be required to seek an Amendment regarding remedial actions associated with the soils foundation problem or stop further safety-related work in this area. Since the Order was not made immediately effective, the licensee challenged the Order, the Order was stayed, and the licensee has continued to work. Even today, the staff is still not in a position to agree or disagree with the licensee.

The personal view of Mr. Keppler on this subject is that, although construction problems rarely pose a safety-related concern requiring immediate cessation of work, it is not in the best interest of NRC or the licensee to allow questionable work to continue for a long period of time. I differ with this view. I believe that it may be in the best interests of the NRC, the licensee, and the public, especially the ratepayer, to allow construction to continue when, as in the Midland case, the NRC staff most expert in the technical disciplines involved are of the opinion that continued construction will not prohibit an acceptable level of safety being achieved prior to operation. Mr. Keppler also believes that, from a practical standpoint, the degree of construction completion is seemingly bound to influence regulatory action in that reduced, yet acceptable, safety margins may be approved by the staff. My view in this matter is that a lesser margin of safety shown to exist by more rigorous and detailed analytical analysis than that used to justify a larger numerical margin, is often more conservative and is routinely used in the licensing process to assure adherence to requirements.

There are some legal constraints on the Commission's authority to summarily suspend activities under a construction permit. Immediately effective suspensions are lawful only in cases of willfulness or those in which the public health, interest, or safety require such action. In an appropriate case a valid finding to support an immediately effective suspension of work during construction can be made. See, for example, the order to show cause issued to Consumers Power Company immediately suspending Cadwelding activities at the company's Midland construction site. However, language in the United States Supreme Court's PRDC decision should be carefully considered in determining whether a particular circumstance warrants an immediately effective suspension at the construction permit stage. There, noting that the licensee, PRDC, had "been on notice long since that it proceeds with construction at its own risk, and that all its funds may go for naught", the Court rejected the notion that "the Commission cannot be counted on, when the time comes [at the OL stage] to make a definitive safety finding, wholly to exclude the consideration that PRDC will have made an enormous investment". 367 U.S. at 415. It is my position that required regulatory actions will be taken as necessary at the operating license stage.

Within the context of the above, your specific questions are addressed as follows:

Question 1 - What is your position concerning the need to stop construction at Midland effective immediately?

Response - I do not believe there is a need to stop construction at Midland effective immediately. This was my view at the time the show cause Order was issued jointly with NRR in November 1979, and remains my position at this time. Furthermore, NRR was and is the lead Office for evaluation of design acceptability, and I have been informed by NRR that it was in November 1979, and currently is, of the opinion that construction at the Midland site need not be halted.

Question 2 - What are Mr. Keppler's concerns and how have they been addressed?

Response - Mr. Keppler has stated that his fundamental concern is that permitting construction to continue may result in safety-related problems associated with subsequently installed systems and equipment (e.g., excessive pipe stresses and questionable seismic response). In addition, he believes that permitting construction to continue after a major unanswered safety question is identified may lead to the natural tendency to "engineer away" expensive modifications by accepting reduced, yet acceptable, safety margins. His concerns will be addressed in the staff analyses and testimony being prepared for the forthcoming hearing.

Question 3 - If you now believe construction should be stopped effective immediately, what steps are you taking to do so and what is the bases for your change in position?

Response - As stated in the response to question 1, it is my position that construction need not be stopped effective immediately.

I hope that these responses are sufficient for your inquiry. Please let me know if I may be of further assistance.

Original Signed by  
V. Stello

Victor Stello, Jr.  
Director  
Office of Inspection  
and Enforcement

Enclosure:  
Memo, Keppler to Stello  
dated 8/14/80

cc: Commissioner Gilinsky  
Commissioner Hendrie  
Commissioner Bradford  
OGC  
SECY  
PE