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BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of LONG ISLAND POWER AUTHORITY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322 - DCOM ("Long Island Lighting Co., Consideration of an Order Authorizing Decommissioning a Facility and Opportunity for Hearing," 56 Fed. Reg. 66459 (December 23, 1991))

JOINT OPPOSITION TO THE NRC STAFF'S RECOMMENDATION FOR ISSUANCE OF A DECOMMISSIONING ORDER PRIOR TO HEARING AND CONTINGENT MOTION FOR STAY

April 29, 1992

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The Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy, Inc. ("SE2"), petitioners in the above-captioned proceeding, hereby oppose the NRC Staff's recommendation set forth in Policy Paper (Notation Vote) SECY-92-140 Subject: Shoreham Nuclear Power Station Decommissioning Order (April 17, 1992) ("SECY-92-140"), and urge the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") to direct the NRC Staff not to issue a Decommissioning Order ("DO") for the Shoreham Nuclear Power Station, Unit 1 ("Shoreham") prior to the completion of the above-captioned proceeding. If the Commission decides to authorize the NRC Staff to issue the DO for Shoreham prior to completion of the above-captioned proceeding, the School District and SE2 urge the Commission to issue an administrative stay of

the effectiveness of any DO issued pursuant thereto for ten (10) working days after publication of the DO in the Federal Register to allow the School District and SE2 to file a petition for review of those orders in an appropriate U.S. Court of Appeals and, if the School District and SE2 file such a petition for review and a motion for further judicial stay within that period of time, to provide for the automatic extension of the initial administrative stay for an additional ten (10) working days to allow for the Court's orderly consideration of the motion for judicial stay. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-02 at 18, __ NRC ____ (February 6, 1992).

THE NRC STAFF'S POSITION

In SECY-92-140, the NRC Staff first provides a characterization of the background[1/] for its analysis and recommendation and then analyzes a decommissioning order in two mutually inconsistent alternatives: First, describing it as "agency action" subject to a hearing in accordance with the first sentence of Atomic Energy Act ("AEA") § 189.a(1) but not "an operating license or an amendment of the outstanding possession-only license" and not requiring a pre-effectiveness hearing relying on the Commission's decision in Long Island Lighting Co.

1/ It seems more than strange for the NRC Staff to say that "[n]o comments on the proposed [DO] were received . . . ." when (1) the proposed DO has not been published or otherwise make available for comment and (2) when the NRC Staff acknowledges, in the following sentence, receipt of two petitions to intervene. SECY-92-140 at 2.

(Shoreham Nuclear Power Station, Unit 1), CLI-92-04, __ NRC ___ (February 26, 1992); and,second, describing it as "another type of license amendment, issuance of which should be in accordance with the 'Sholly' process including the associated No Significant Hazard Consideration [NSHC] determination." SECY-92-140 at 4-5.

In discussing the second alternative, the Staff refers to the existence of a NSHC determination, a Safety Evaluation Report ("SER"), an Environmental Assessment ("EA") and a Finding of No Significant Environmental Impact ("FONSI"). Id. at 6. In the last paragraph of its discussion, the NRC Staff states that it "proposes" to treat the Order as an "agency action" not requiring a pre-effectiveness hearing and to issue that order with a SER, EA, and, without soliciting public comment, a NSHC determination. However, its formal "Recommendation" is merely that "the Commission approve issuance by the staff of the order approving LIPA's decommissioning plan including a No Significant Hazard Consideration determination," leaving open the questions of the rationale and other documentation for such an approval. Id.

ARGUMENT

I. THE NRC MAY NOT EMPLOY SHOLLY PROCEDURES

A. The Sholly Procedures Are Not Available For a DO

While it is clear that a DO is not subject to the mandatory hearing provisions of the second sentence of AEA § 189a because it is not a construction permit, it is equally clear that (1) the third sentence of AEA § 189a.1 is not applicable because a hearing has been requested by persons whose interest may be affected and (2) the fourth sentence of AEA § 189a.(1) and all of AEA § 189a.(2) are inapplicable to the DO because the current Shoreham license is a "possession only license" (not a "construction permit" or an "operating license") and, additionally,[2] because issuance of a "DO" is the granting of a separate license, not an "amendment" to a license.

B. The NRC Cannot Make an NSHC Determination for the DO

1. The Commission cannot determine that the proposed decommissioning order "would not: . . . (2) create the possibility of a new or different kind of accident from any accident previously evaluated"

Pursuant to the Sholly Amendment and the Commission's regulations, the Commission must also be able to make a

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2/ This additional disqualifying circumstance is not necessary to exclude the application from the Sholly Procedures.

determination that the DO "would not: . . . (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; . . . ." 10 C.F.R. § 50.92(c)(2) (1991). However, the Shoreham Decommissioning Plan discusses not one, but ten new and different kinds of accidents which have not been previously evaluated and which pertain to activities to be authorized by the DO. Decommissioning Plan at 3.4.

In its revised analysis of No Significant Hazards Consideration, LILCO states that: "the Decommissioning Plan contains accident analyses which will have been reviewed by the NRC." U.S.N.R.C. Docket No. 50-322, LSNRC-1899 at App. 1 at 2 (January 22, 1992) (emphasis added) ("LIPA Analysis). This is a clear concession that the accident analyses submitted in support of the Decommissioning Order address "new or different kind[s] of accident[s] from any accident previously evaluated" in prior NRC licensing actions. See 10 C.F.R. § 50.92(c)(2) (1991). The concept of "previously evaluated" means evaluated in connection with licensing actions approved by the NRC prior to the application currently under review where the public would have had an opportunity for hearing. As the Courts have held "we believe Congress vested in the public, as well as the NRC Staff, a role in assuring safe operation of nuclear power plants." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984). Since LIPA concedes that the only possible review of the Decommissioning Plan accident analyses will be by the Staff in the instant proceeding without participation by the public,

the Commission cannot make the determination required by Section 50.92(c)(2) (1991).

In the context of the "reracking" of Diablo Canyon Units 1 and 2, the U.S. Court of Appeals explicitly rejected the NRC's attempt to support a No Significant Hazards Consideration determination by a technical analysis of the proposed amendment where the NRC conceded "that the specific kinds of accidents petitioners identified . . . were not analyzed in connection with the original licenses." San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268, 1270-71 (9th Cir. 1986) (emphasis added). Similarly in this case, where LIPA has identified not one but ten separate, new kinds of accidents which have not been analyzed in connection with any previous license or license amendment, a No Significant Hazards Consideration determination would violate 10 C.F.R. § 50.92(c)(2).

Note that the court in San Luis Obispo also rejected the Staff's reliance on a finding that the possibility of a nuclear reaction occurring in the spent fuel pools with the new racks was within the envelope of the accident risks assessed with respect to the original racks. 799 F.2d at 1271. Thus, the NRC may not rely on a finding that the consequences of any of these 10 accidents will not be greater than the consequences of a distinct accident which has been previously evaluated.

2. <u>The issuance of the DO will involve a significant increase in the probability of accidents</u>

In its amended No Significant Hazards Consideration analysis, LIPA addresses the issue of whether the DO would involve a significant increase in the <u>consequences</u>[3/] of an accident previously evaluated but does not address the issue of whether the <u>probability</u> of previously evaluated accidents would be significantly increased, except for a bare unsupported denial. <u>Id</u>. at App. 1. In fact, since the DO would allow a significant reduction in the safety procedures at Shoreham, the probability of an accident is <u>per se</u> increased significantly. Therefore, issuance of a no significant hazards consideration determination would also violate § 50.92(c)(1)(1991).

Moreover, LIPA's argument that <u>ten</u> decommissioning plan unique accident scenarios should be "considered to be subsets of accidents previously evaluated" is premised totally upon a conclusory judgment of the <u>consequences</u> of the new accidents, and not either on the <u>probability</u> of their occurrence, or any previous analysis of these newly specified accidents. <u>Id</u>. at

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3/ Even if LIPA could have reference to its alleged "highly conservative [analysis of the] worst-case fuel damage accident" (Decommissioning Report at 3-17), a recent NRC Information Notice indicates that there may be errors in the spent fuel pool reactivity calculation which is a premise for the accident calculation. <u>See</u> NRC Information Notice 92-21: Spent Fuel Pool Reactivity Calculations (March 24, 1992). This issue needs to be resolved by the NRC Staff's consideration of a report on this possible anomaly from LIPA with the opportunity for the School District and SE2 to comment thereon.

App. 1 at 3-4. Also, while LIPA seems to have constant reference to the bounding nature of prior evaluations of potential offsite consequences, it totally ignores the very important issue of the consequences of accidents in the dismantlement (for example, in segmenting the reactor vessel) of the facility to the onsite personnel conducting those activities.[4]

In postulating ten separate onsite accidents in submitting its decommissioning plan, LIPA did not, at the time, even try to make the specious argument that they are "subset of events th... were previously evaluated." *See* Decommissioning Plan at 3.4.1. And there is no support offered in the Decommissioning Plan for the adequacy of the meteorological or other parameters used, the inconsistent assumptions of sometimes taking credit for the HEPA filters and sometimes not taking credit for them, or for the adequacy of the cases used to considered various accident mechanisms.

However, the clear message is that none of these accident scenarios can occur before the Decommissioning Order is issued and, therefore, th... have not been previously considered in other NRC licensing actions.

4/ While the Decommissioning Plan states (at 3.4.1.1): "Worker doses during recovery from postulated accidents had been considered in separate calculations not reflected herein," no such calculation was found in the Decommissioning Plan. And the accident scenarios assert that they pose "no serious risks to plant personnel" without any definition of "serious." *E.g.*, Decommissioning Plan at 3.4.1.1-10. Further, in adopting its final Sholly Rule, the NRC explicitly eschewed reliance on such a threshold. 51 Fed. Reg. 7744, 7748 cols. 2-3 (March 6, 1986).

C. The NRC Cannot Issue an NSHC Determination for the DO Without Prior Opportunity for Comment

The NRC may not exercise its AEA § 189a(2)(C) authority to dispense with prior notice and reasonable opportunity for public comment on a proposed NSHC determination with respect to a DO for a nuclear power plant with a POL because the exercise of such authority is limited to "emergency situations" where it is necessary to prevent the shutdown or derating of a plant, or there is need to start-up or go to a higher power level and[5/] (b) "exigent circumstances" can be demonstrated by the fact that a net increase in safety or reliability or a significant environmental benefit or a net safety benefit would otherwise be lost. See 42 U.S.C. § 2239(a)(2)(C)(ii); 10 C.F.R. § 50.91(a)(5)&(6) (1991).

Here Shoreham is already shutdown and derated to zero power, and issuance of a DO will not prevent shutdown or derating or allow Shoreham to start-up or go to a higher power level. Therefore, the Commission cannot find that a "emergency situation" exists. 10 C.F.R. § 50.91(a)(5) (1991).

Further, even if the Commission could find that an emergency situation exists, it could not find that "exigent circumstances" exist since there will be no net increase in

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5/ While the Commission's regulations treat "emergency situations" and "exigent circumstances" as separate bases for dispensing with prior notice, the statutory scheme make "exigency of the need" part of the criteria for dispensing with prior notice in "emergency situations." 42 U.S.C. § 2239(a)(2)(C)(ii).

safety or reliability or a significant environmental benefit from issuance of a DO. Rather as the NRC Staff admits, issuance of that order prior to hearing "could affect [i.e., foreclose] the ability to select another decommissioning alternative" after hearing thus causing environmental harm. SECY-92-140 at 5.

The Sholly Amendment authorizes the Commission to establish "criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; . . . ." 42 U.S.C. § 2239(a)(2)(C)(ii) (1988) (emphasis added).

In addressing the statutory concept of "emergency situations" in its final Sholly rule,[6] the Commission recognized that the Congressional Conference Report

> described 'emergency situations' as encompassing those cases in which immediate action is necessary to prevent the shutdown or derating of a plant. There may be situations where the need to prevent shutdown or derating can be equivalent in terms of impact to the need to start up or go to a higher power level. The Commission believes that expanding the definition of 'emergency situation' to include these situations is not

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6/ The Commission's regulations also recognize a second type of emergency, namely, a "safety-related emergency" where the Commission may issue an immediately effective license amendment without prior notice and prior hearing to protect against "imminent danger to the health and safety of the public." 10 C.F.R. § 50.91(a)(7); 51 Fed. Reg. at 7756 col. 2. However, there is no suggestion that Shoreham poses such a danger in its current state.

> inconsistent with Congress' intent. Thus the Commission has decided to adopt the thrust of these comments and has changed § 50.91(a)(5) accordingly.

51 Fed. Reg. 7744, 7756 col. 1 (March 6, 1986). And the Commission s/

> Where an immediately effective license amendment is needed, for instance, only to prevent the shutdown but not to protect the public health and safety, the Commission may issue such an immediately effective amendment only if the amendment involve no significant hazards considerations. If the amendment does involve a significant hazards consideration, the Commission is required by law to provide 30 days notice and an opportunity for prior hearing.

51 Fed. Reg. at 7756 cols. 2 & 3.

The Commission responded to a commenter by finding that "exigent circumstances" are "circumstances where a net safety benefit might be lost if an amendment were not issued in a timely manner [including] those circumstances where there is a net increase safety or reliability or a significant environmental benefit [and includes those circumstances] which may involve start-up of a shutdown plant [including] 'start-up' and 'increase in power levels'." 51 Fed. Reg. at 7756 col. 3.

This limited response was to the commenter's recommendation that "exigent circumstances" should be defined to include any demonstration "that avoiding delay in issuance will provide a significant safety, environmental, reliability, _economic, or other benefit_" implicitly excludes the commenter's

recommendation to consider a demonstration of "economic, or other benefit." Id (emphasis added). Thus, the Commission is debarred from considering LIPA's bare assertion[7/] that issuance of the Order after the first week of May 1992 (now May 15) "could" cause delay costs "as high as $320,000 per day." SECY-92-140, Enclosure. Not only is that assertion bare of support, it is also incredible in the light of cost assertions made by affidavit earlier in this proceeding[8/] unless, of course, LIPA alleges

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7/ The economic significance of the delay of issuance of the Shoreham DO at the March 23, 1992 meeting with the NRC Staff was not supported by any detailed explanation of the amount of those costs. And the Affidavit of Leslie M. Hill dated and submitted on April 28, 1992 ("Aff.") does nothing to dispel the vagueness of the claim since it states that "additional costs could reach as high as $320,000 per day." Aff. at ¶ 3(a) (emphasis added). It also states the "general site worker population at Shoreham will reach approximately 1000 people" but doesn't offer a hint of when. Aff. at ¶ 3(e). And the affiant states that these personnel costs can be avoided. Aff. at ¶ 3(e). The assertion that "much of this population is needed under the station license" is ludicrous in view of the fact that LILCO was allowed to reduce its workforce to a few hundred people when it had a full power operating license. Moreover, the fulcrum of this argument is the need to dispose of waste offsite. This "need" would disappear and there would be significant savings in radiological, environmental, and economic costs if the DECON alternative is rejected and the SAFSTOR alternative is adopted after a hearing.

8/ LILCO has previously said that delaying decommissioning would cost $146 million per year or $400,000 per day, including $78 million a year in local property taxes. Affidavit of John D. Leonard, Jr. (July 12, 1991). D.C. Cir. Docket Nos. 91-1301 & 91-1140. Thus, net of taxes those delay costs were previously alleged to be $68 million per year or $186,301.37 per day. Now that LILCO and LIPA have been relieved of a substantial amount of the personnel and surveillance requirements for Shoreham and local property taxes are no longer an issue (due to the transfer of the plant to LIPA), it is an insult to the Commission's intelligence for LIPA to baldly allege that the delay costs (net of taxes) have almost doubled.

costs from the delay in the performance of contracts which it is not authorized to perform without a DO. In that event, even if the "emergency situation" determination were otherwise available (which the School District and SE2 contend is not the case), the "emergency" would have been created by LIPA by entering into those contracts and the Commission must "decline to dispense with notice and comment on the determination of no significant hazards consideration . . . ." 10 C.F.R. § 50.91(a)(5) (1991).

Not even LIPA, which has uniformly taken aggressive positions urging very relax standards of NRC review, asked the Commission to issue an NSHC determination without publication in the Federal Register until Mr. Kessel's belated letter of April 28, 1992. Both of the LIPA requests for issuance of the Decommissioning Order pursuant to Sholly Procedures describe that Order as a "conforming amendment" to its license, and asked that the NSHC determination "be processed as expeditiously as possible and noticed promptly in the Federal Register, to avoid further delay in decommissioning." Docket No. 50-322, LSNRC-1883 at 3 (January 13, 1992) and LSNRC-1899 at 2 (January 22, 1992). For all these reasons, the NSHC determination may not be issued without prior notice and opportunity for comment.

II. THE DO IS A LICENSE REQUIRING A PRIOR HEARING UNDER THE APA

A. The DO is a License Subject to a Hearing Under the AEA and the APA

The AEA declares that the APA "shall apply to all agency action taken under this Act, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act [APA]: . . . ." 42 U.S.C. § 2231 (1988) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added)).

And AEA § 189a.(1) states: "In any proceeding under this Act, for the granting . . . or amending of any license . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1) (1988).

An "order" is defined to including "licensing" under the APA. 5 U.S.C. § 551(6) (1988). And a "'license' includes the whole or a part of an agency permit, . . . , approval, . . . or other form of permission." 5 U.S.C. § 551(8) (emphasis added). The APA defines "licensing" to include the "agency process respecting the gra[illegible] . . . , denial, . . . , amendment, . . . or conditioning of a license . . . ." 5 U.S.C. § 551(9) (1988) (emphasis added).

Thus, it is clear that a DO is a license under the APA and AEA § 189.a(1).

B. AEC Licensing is Subject to the APA Requirement for a Prior Formal Hearing

Having established that the issuance of the Order is the "granting . . . or amending of [a] license" subject to an NRC hearing "upon the request of any person whose interest may be affected by the proceeding . . . .," the next question is whether the AEA requires a hearing prior to issuance of the Order in accordance with the formal adjudication procedures of the APA. See 5 U.S.C. §§ 554, 556, 557, & 558.

Issuance of an "order" is a "adjudication" under the APA since the APA defines "adjudication" as the "agency process for the formulation of an order" (5 U.S.C. § 551(7)) and,in turn, defines "order" as "the whole or a part of a final disposition . . . in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6).

The Federal Courts have generally viewed the question of whether AEA § 189a.(1) hearings are subject to 5 U.S.C. §§ 554, 556, 557 & 558 as being "unsettled" because they have not been able to find the words "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" in Atomic Energy Act itself.

See 5 U.S.C. § 554(a) (1988); Union of Concerned Scientists v. N.R.C., 920 F.2d 50 (D.C. Cir. 1990).[9/]

While recognizing that that magic phrase is not necessary for a court to determine that the APA's formal procedures (including a hearing prior to issuance of a license), the Courts have determined that there must be some clear indication that Congress intended to trigger those formal procedures which the courts have as yet not found. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir.), cert. denied sub nom., Public Serv. Co. v. Seacoast Anti-Pollution League, 439 U.S. 824, 99 S.Ct. 94, 53 L.Ed.2d 117 (1978); Attorney General's Manual on the Administrative Procedure Act at 41 (Wm. W. Gaunt & Sons Inc. Reprint 1979) ("such a requirement is clearly implied").

The problem is that the courts considering this issue have focused only on AEA §§ 181 & 189.

The "clear implication" that AEA § 189 licensing hearings are subject to the formal adjudicatory requirements of the APA is found in the 1962 Amendments to the AEA, including the addition of AEA § 191, and the legislative history of those 1962 Amendments. Pub. L. 87-615, 76 Stat. 409 (approved August 29,

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9/ Also see, e.g., Quivira Mining Co. v. N.R.C., 866 F.2d 1246, 1261 n.19 (10th Cir. 1989); In re Three Mile Island Alert Inc., 77[illegible] F.2d 720, 730 n.14 (3rd Cir. 1985); Union of Concerned Scientists v. N.R.C., 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984); Philadelphia Newspapers Inc. v. N.R.C., 727 F.2d 1195, 1202-03 & n.5 (D.C. Cir. 1984); City of West Chicago v. N.R.C., 701 F.2d [illegible]32, 64 (7th Cir. 1983) (finding that APA on the record "hearing is not required for materials licenses").

1962); S. Rep. No. 1677, 87th Cong. 2d Sess. (1962), 1962 U.S. Code Cong. & Admin. News 2207 (1962) ("1962 USC&AN").

BACKGROUND: A brief overview of the licensing related provisions of the original 1954 AEA and the 1957 Amendments will set the stage for understanding the 1962 Amendments.

In enacting the AEA in 1954, Congress adopted AEA § 181 as it exists to this day, and it enacted, as AEA § 189, what today consists of the first sentence of AEA § 189a.(1).

Later, a furor arose over the fact that the Atomic Energy Commission ("AEC") was not providing the opportunity for prior hearings on reactor license applications in all cases. As a result, the Congress included, among its 1957 Amendments to the AEA, a second sentence to be added to AEA § 189a. making hearings on all reactor licenses mandatory:

> The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under § 103 or 104b. for a license for a facility, and on any application under Section 104c. for a license for a testing facility.

Pub. L. 85-255, 71 Stat. 575, § 7 (approved September 2, 1957).

As the AEC and the Joint Committee on Atomic Energy ("JCAE") gained additional experience in the reactor licensing process, various concerns arose: (1) Did it make sense to have a mandatory hearing on every reactor license application even though no party to proceeding and no potential intervenor requested such a hearing? (2) Was the then current licensing

procedure demanding too much of the Commissioners' time and therefore distracting from their other responsibilities? (3) Could the effectiveness of licensing proceedings be improved by the establishment of a panel including technical experts instead of the then current procedure of utilizing hearing examiners, skilled in the law, but more than likely ignorant of the technical issues? (4) Could the use of such a panel insulate the Commissioners to an acceptable degree against charges of conflict of interest with their promotional responsibilities? (5) What would be the appropriate degree of formality for licensing proceedings? and (6) Should there be some adjustment in the role of the Advisory Committee on Reactor Safeguards in licensing proceedings? See, e.g., Jt. Comm. on Atomic Energy, "Improving the AEC Regulatory Process," 87th Cong., 1st Sess. 48-49 (Comm. print March 1961).

The 1962 Licensing Amendments: After thousands of pages of public hearings and studies, these licensing reform issues came into sharp focus in the context of a hearing on a bill introduced by Congressman Holifield. The first three sections of that bill addressed the issues identified above by proposing the authorization of atomic safety and licensing boards in Section 1, deleting the 1957 Amendment to AEA § 189 and substituting three new sentences in Section 2, and adjusting the

role of the Advisory Committee on Reactor Safeguards in Section 3.[10/]

Section 1 read in relevant part:

> Notwithstanding the provisions of Sections 7(a) and 8 of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and Licensing Boards, each composed of three members, two of whom shall be technically qualified and one of whom shall be qualified in the conduct of administrative proceedings to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, or any other provision of law, or any regulation of the Commission issued thereunder.

In that hearing, Professor David F. Cavers testified and later submitted a memorandum at the request of the Committee urging "a departure from close adherence to trial-type procedure . . . ." Jt. Comm. on Atomic Energy, "Hearing on AEC Regulatory Problems" 87th Cong., 2d Sess. 50 (April 17, 1962) ("April 17 Hearing"). In response, AEC Commissioner L. K. Olsen wrote to the Chairman of the Joint Committee's Subcommittee on Legislation opposing Professor Cavers' proposal vigorously: "considerable chaos could result from their proposal should a real contest

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10/ The role of the Advisory Committee on Reactor Safeguards is not relevant to the issue here and will not be discussed further.

arise after the 'informal procedure' had been commenced." April 17 Hearing at 58. And Commissioner Olson concluded:

> I disagree strongly with the suggestion that the Holifield-Pastore bill should be amended to provide that the requirement of a hearing in section 189(a) of the Atomic Energy Act shall not be deemed to require a determination on the record after opportunity for agency hearing, within the meaning of section 5 of the Administrative Procedure Act. I think it quite clear that section 189(a) does require a hearing on the record within the meaning of section 5 of the Administrative Procedure Act, and I believe that a 'hearing' in a reactor licensing proceeding which is not on the record might as well not be held at all.

Id. at 60 (emphasis added).

Later in the hearing, Raoul Berger appeared as Chairman of the Section of Administrative Law of the American Bar Association. Id. at 64. There ensued a colloquy among Mr. Berger, Chairman Pastore, and Mr. Toll (a JCAE staff member).

Mr. Berger focused on the introductory phrase to Section 1 of the bill, "Notwithstanding the provisions of 7(a) and 8" of the Administrative Procedure Act, saying that that language "would exempt both contested and uncontested cases from the Administrative Procedure Act" and, adding that he hoped that was "inadvertent." Id. at 65.

Mr. Berger noted that Sections 7 and 8 of the APA "are the vital procedural sections respecting the procedures of adjudication in contested cases." Id. Mr. Toll asked whether Mr. Berger "would feel better about this limited exception if it

were limited to 7(a) and 8(a) rather than all of section 8." Id. at 66.

After further discussion, Mr. Toll asked whether Mr. Berger's "unhappiness would be dispelled if the Committee Report could spell out" that the exception to 7(a) was solely to allow a three person panel rather than a single hearing officer to hear the cases and that the exception to 8(a) was to allow the Commission to delegate the authority to render a final decision as well as an intermediate decision. Id. at 67. Mr. Berger responded that: "In any event you would want to make that utterly clear in your report." Id. at 68.

The recommended change was made in H.R. 12336 which was introduced by Congressman Holifield on June 27, 1962 and became law as the 1962 Amendments. Id. at 112.

In identical Senate and House reports on the identical bills S. 3491 and H.R. 12336, the Joint Committee summarized the list of hearings and committee prints which form the background of the regulatory amendments. S. Rep. No. 1677, 87th Cong., 2d Sess. (July 5, 1962), U.S. Code Cong. & Admin. News, Vol. 1 at 2207, 2208-09 (1962) ("1962 USC&AN").

And the Joint Committee addressed the significance of the "notwithstanding" clause introducing AEA § 191:

> Out of an abundance of caution, and at the suggestion of the Commission, the Committee has referred to the Administrative Procedure Act in the language which initiates Section 1 [AEA § 191] of the Bill. <u>To make the limited applicability of this language</u>

> <u>even more clear, the reference to Section 8</u> of the Administrative Procedure Act, contained in H.R. 8708 and S. 2419 <u>has been changed so as to specify Section 8(a) of the Act, concerning intermediate and final decisions</u>.
>
> <u>The great bulk of the provisions of the Administrative Procedure Act will remain applicable</u> pursuant to Section 181 of this Act, and <u>the only exceptions authorized by these amendments are to permit the board to preside at hearings in lieu of a hearing examiner, and to permit the board to render final as well as intermediate decisions</u>.

1962 USC&AN at 2213.

The inescapable conclusion is that the JCAE and the AEC both considered it clear that Commission licensing proceedings are subject to 5 U.S.C. § 554, 556, 557 & 558 and that, in enacting AEA § 191, the Congress provided for an extraordinarily limited exceptions to the provisions of APA §§ 7 & 8.

The School District and SE2 contend that the 1962 Amendments to the AEA and their legislative history including, most particularly, the introduction to AEA § 191 provide the necessary "clear implication" that Congress intended NRC licensing proceedings to be adjudications "required by statute to be determined on the record after opportunity for an agency hearing."

Thus, the School District and SE2 have a right to a <u>prior</u> hearing protected by the APA and the AEA which the NRC Staff proposes to violate. <u>See</u> 5 U.S.C. § 558 (1988).

III. THE NRC IS ESTOPPED FROM DENYING A PRIOR HEARING IN THIS CASE

Even if the NRC deems that it otherwise would have discretion to grant either a prior or post-effectiveness hearing with respect to the DO, the Commission is estopped from denying the School District and SE2 a prior hearing in this matter because the agency has previously committed itself to offer a prior hearing on the DO.

Former Chairman Carr in a letter to the U.S. Secretary of Energy dated September 15, 1989, said:

> Finally, as you correctly noted in your letter, the Commission's rules require that we offer an opportunity for public hearing . . . before NRC approval of decommissioning may be granted.

(emphasis added). Having made this commitment, the NRC is now estopped from denying the opportunity for a prior hearing. See Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 389, 52 S.Ct. 183, 186 (1932).

IV. THE COMMISSION'S AUTHORIZATION OF THE DO WITHOUT REVIEW OF THE PROPOSED DO AND THE PURPORTED SER, EA, FONSI, AND NSHC DETERMINATION WOULD VIOLATE THE APA

In requesting the Commission's approval to issue "the order approving LIPA's decommissioning plan," the Staff fails to provide the Commission with a copy of that draft order, and therefore, the Commission is totally unable to make the required determinations whether the plan "demonstrates that the

decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, [and whether that order contains "appropriate and necessary"] conditions and limitations." See 10 C.F.R. § 50.82(e) (1991).

Also, since the Staff's recommendations are premised in significant part upon the adequacy of an SER, EA, FONSI and NSHC determination which are said to exist but are not available to the Commission for review or to Petitioners for comment, approval of the Staff recommendation would be arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence in a case subject to 5 U.S.C. §§ 556 & 557, and otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A), (D) & (E) (1988); UCS v. NRC, 735 F.2d at 1447.

The School District and SE2 also note that even if the Commission decides that it has discretion in this case to grant a prior or post-effectiveness hearing pursuant to its decision in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-04, __ NRC ___ (February 26, 1992) it would be an abuse of that discretion to make a decision without having reviewed the alleged proposed DO and the supporting EA, FONSI, SER and NSHC determination. And approval of the Staff's proposal without giving the School District and SE2 the right to review and comment on those documents would also violate the APA. See, Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986).

V. THE EA AND FONSI VIOLATE NEPA

A. The EA is Inadequate

The Staff states an EA exists but there has been no public participation in its development.

Issuance of such an EA would be a total violation of the NRC's obligations as to the content and procedure for issuance of an EA under NEPA and the CEQ and NRC regulations issued pursuant thereto. E.g., Sierra Club v. Hodel, 848 F.2d 1068, 1092-97 (10th Cir. 1988).

Both the CEQ and NRC regulations recognize that the EA must contain a "list of agencies and persons consulted." 40 C.F.R. § 1508.9(b) (CEQ); 10 C.F.R. § 51.30(a)(2)(1991) (NRC). This is recognition of the obligation to consult which is stated clearly in the CEQ regulations: "The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments . . . ." 40 C.F.R. § 1501.4(b) (emphasis added); see also 40 C.F.R. §§ 1506.2 & 1506.6; Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985) ("Before preparing an EA [the agency] must consult with other federal agencies." (emphasis added)).

The absence of such consultation makes the EA invalid as a matter of law. Further analysis of possible defects can only be offered after the EA is available for review.

B. The Failure to Issue a Draft FONSI Violates NEPA

The FONSI described appears to be a final FONSI without the preparation of a draft FONSI and opportunity for comment required pursuant to the NRC and CEQ regulations in these circumstances. 10 C.F.R. §§ 51.33 & 51.34; 40 C.F.R. § 1501.4(e)(2). The CEQ has defined the circumstances requiring a draft FONSI as being not only when the "nature of the proposed action is one without precedent," but also where the "proposal is a borderline case" or "unusual case," "a new kind of action," or "precedent setting case" or "when their is either scientific or public controversy over the proposal." Forty Questions, 46 Fed. Reg. at 18037 col. 3. The proposal in question here meets not only one but at least six of those seven standards, each of which independently requires a draft FONSI and an opportunity for public comment, pursuant to both NRC and CEQ regulations.

The NRC staff appears to propose violation of this unambiguous requirement. In short, the School District and SE2 are being denied their right to comment which they have made clear to the NRC they would use. The School District and SE2 are clearly "parties aggrieved" by this illegal proposal of denial of the right to comment.

C. The NRC is Estopped From Denying the Need for an EIS

The NRC has made a prior quasi-judicial determination in this proceeding that "the decommissioning of a facility requires a license amendment necessitating the preparation of an EIS." U.S.N.R.C. Docket No. 50-322, Preliminary Decision on the School District's Section 2.206 Request of July 14, 1989, by the Director of the NRC Office of Nuclear Reactor Regulation (July 20, 1989).

The principle in that quasi-judicial determination was later referred to the full Commission in Policy Issue (Notation Vote) Paper SECY-89-247 at 6, Subject: Shoreham Status and Developments where the NRC Staff said: "Before approving decommissioning the NRC would offer an opportunity for hearing and would prepare a[n] EIS." By Staff Requirements Memorandum of August 25, 1989, the NRC Secretary notified the Acting Executive Director for Operations that the Commission had approved that proposed action without any modification.

These are determinations for the need for an Environmental Impact Statement ("EIS") before approval of a DO in this proceeding which are binding on the NRC and estop the NRC from denying that an EIS is required. See Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 389, 52 S.Ct. 183, 186 (1932).

Until a record of decision is issued subsequent to publication of a final EIS and completion of the hearing

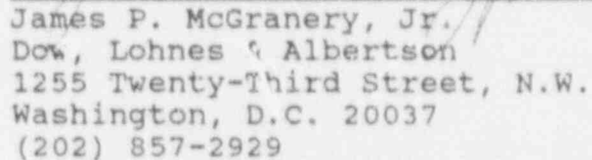
proceedings thereon, the NRC is barred by its own regulations from issuing the DO. See 10 C.F.R. § 51.100(a) (1991).

CONCLUSION

WHEREFORE, the School District and SE2 respectfully urge the Commission to reject the NRC Staff's proposal in SECY-92-140 for the reasons given above. If the Commission decides to approve that proposal, the School District and SE2 respectfully urge the Commission to require the administrative stay(s) of the effectiveness of any DO issued as requested at 1-2 above.

Respectfully submitted,

April 29, 1992



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BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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Forrest J. Remick
E. Gail de Planque

In the Matter of LONG ISLAND POWER AUTHORITY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322 ("Long Island Lighting Co., Consideration of an Order Authorizing Decommissioning a Facility and Opportunity for Hearing," 56 Fed. Reg 66459 (December 23, 1991))

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioners' Opposition to the NRC Staff's Recommendation for Issuance of a Decommissioning Order Prior to Hearing and Contingent Motion for Stay in the above-captioned proceeding have been served on the following by hand, telecopy, or first-class mail, postage prepaid (as indicated below) on this 29th day of April, 1992:

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