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DENTON,H. Office of Nuclear Reactor Regulation, Director

SUBJECT: Responds to NRC 811117 ltr re intervenor Carstens objection to OL issuance unless NRC & until comply w/Coastal Zone Mgt Act. "Grandfather clause" does not exist in consistency review provision, Section 307(c)(3)(A).

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ROGER BEERS
KATHRYN BURKETT DICKSON

December 3, 1981

Mr. Harold Denton
Director of Nuclear Reactor Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Denton:

On November 12, 1981, we wrote you to express the objection of August S. Carstens, an intervenor in the licensing proceedings for San Onofre Units 2 and 3, to the issuance of any low power testing license for these units, unless and until Southern California Edison and the NRC have complied with the "consistency" certification procedures of the Coastal Zone Management Act. We have since received a copy of your letter of November 17, 1981 to William Matuszeski on this subject, and wish to respond to what we believe is a significant error in your legal interpretation of the provisions of the Act.

Contrary to the implication in your letter, there is no "grandfather clause" in the consistency review provision, Section 307(c)(3)(A) of the Coastal Zone Management Act, 16 U.S.C. §1456(c)(3)(A). Rather, Section 307(c)(3)(A) simply defines an effective date for the application of the consistency review process--that is, the "final approval by the Secretary [of Commerce] of a state's management program..."--and provides, as you correctly state, that consistency review applies to all applications for a federal license or permit filed after that final approval.

In this case, Edison applied for a low power testing license, after California's management program was finally approved. However one may characterize this license, the signal fact for present purposes is that it is a "Federal license or permit" as defined in 15 C.F.R. §930.51(a)--indeed, you agree in your letter that it is a "listed" activity--and it would not be issued but for Edison's recent application. By its literal terms, Section 307(c)(3)(A) requires consistency review of this license.

You note in your letter that the application for an operating license for San Onofre Units 2 and 3 was filed prior to approval of the state's management program; that

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the application for the low power testing license was made by motion "as part of the full power operating license application proceeding"; and that the latter is not "an application for a new or different activity" than those activities which would be embraced by a full power license. It is, however, a different license than a full power license, and it was applied for after the approval of the state's management program. In our view, your statements, as above quoted, would support an exemption of this license from the consistency review, only if you were correct in implying that there is a grandfather clause in Section 307(c)(3)(A) of the Coastal Zone Management Act.

Statutory grandfather clauses are distinct from those provisions like Section 307(c)(3)(A) which simply define what prospective events come within the statute's coverage. A grandfather clause bestows regulatory exemptions (or benefits) for future activities that would otherwise fall within the statute's coverage, based on a party's status on a past date certain. See, e.g., Valley Bank v. State, 115 N.H. 151, 335 A.2d 652, 653 (N.H. 1975)("That provision of a statute which establishes different treatment of parties based on a date certain has become historically known as a 'grandfather clause.'"). See also, Nelson, Inc. v. United States, 355 U.S. 554 (1958); Tyler v. United States, 600 F.2d 786 (Ct. of Claims 1979).

There is no such provision in Section 307(c)(3)(A). In short, nothing in that section exempts or "grandfathers" from consistency review any federal license which is applied for after approval of a state's management program, based on some past action or status of the license applicant. It is worth noting that other environmental review procedures created by statute, which are like the CZMA consistency review procedure, have been held applicable to projects which had commenced, or for which license applications had been filed, prior to the effective date of the statute. For example, numerous cases have required that environmental impact statements be prepared under the National Environmental Policy Act, 42 U.S.C. §4321 et seq., in these circumstances. See, e.g., Environmental Defense Fund v. Tennessee Valley Authority, 2 ELR 20726, 20731 (6th Cir. 1972); Greene County v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972).

As set forth at pages 4-7 of our letter to you of November 12, 1981, application of consistency review in this instance is not a mere technicality. The NRC's issuance of a low power testing license to Edison for San Onofre Units 2 and 3 would authorize activities which (1) would be in direct conflict with California's approved coastal zone management program (as well as Article X, §4 of the California

Constitution), and (2) would constitute a direct violation of the conditions of the permit issued to Edison for San Onofre Units 2 and 3 by the California Coastal Commission. The latter fact was brought to the attention of the NRC as early as 1976 (as set forth at page 7 of our letter to you), prior to final adoption of the exclusion area plan which produces this conflict, but the NRC has chosen so far to ignore this issue in the licensing proceedings for San Onofre Units 2 and 3.

Under any state of the law, it would seem incumbent on a federal agency to take cognizance of the fact that its licensing conditions for a particular project will authorize activities which directly violate state laws and permits, which in turn are based on important considerations of state public policy. Fortunately, the Coastal Zone Management Act disables the NRC from issuing a low power testing license until the consistency of this license with such state laws and permits is assured.

Finally, it is appropriate to stress that it is the NRC--not the California Coastal Commission--which must endeavor to resolve this conflict in the first instance. For your information, we are enclosing a copy of a letter, dated December 2, 1981, to the California Coastal Commission, on this subject.

We would appreciate your consideration of the matters set forth in this letter, and would be pleased to discuss these matters further with you, if you would find that useful.

Sincerely,

Roger Beers

Roger Beers

cc: August Carstens
Richard Wharton
Charles Kocher, Southern California Edison Company
Michael Dudley, San Diego Gas & Electric Company
William Matuszeski, Acting Assistant Administrator, Office of Coastal Zone Management
Tom Crandall, Director, San Diego District Office, California Coastal Commission
Lawrence Chandler, Nuclear Regulatory Commission
Michael Fischer, Executive Director, California Coastal Commission
Mary Hudson, California Coastal Commission

RB/ja

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ROGER BEERS
KATHRYN BURKETT DICKSON

December 2, 1981

Mr. Michael L. Fischer
Executive Director
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 94105

Dear Mike:

As you may recall, we are attorneys for August Carstens, an intervenor in the licensing proceedings for Southern California Edison's proposed San Onofre Units 2 and 3, pending before the Nuclear Regulatory Commission. Together with Richard Wharton, we have been asked to represent Mr. Carsten's concerns that the beach access requirements in the Coastal Commission's development permit (No. 183-73) to Edison for San Onofre Units 2 and 3 be fully enforced. We write to record Mr. Carsten's opposition to any action which may be taken by the Coastal Commission to delete the beach access requirement from the permit's terms and conditions. We understand from your staff that these are matters currently under discussion with Edison. In our opinion, the Coastal Commission cannot legally take any action of this character.

At the outset, we wish to emphasize our support for the firm stand you have taken in the past that Edison cannot simply walk away from these conditions, as it would apparently prefer to do. You have consistently taken the position that the beach access conditions were an essential ingredient of the original permit and that they would be fully enforced, through litigation if necessary. Most recently, your staff advised the Nuclear Regulatory Commission that Edison's compliance with the "consistency" certification procedures of the Coastal Zone Management Act was a necessary predicate to the issuance of any NRC license for the operation of San Onofre Units 2 and 3.

The consistency review required by the CZMA appears to be an ideal vehicle for resolution of the particular conflict between the Coastal Commission's beach access condition and the NRC's exclusion area plan. As a first order of business, it would appear incumbent upon the NRC to consider whether these two requirements can be harmonized in any way. As my

letter to the NRC of November 12, 1981 (copy enclosed) pointed out (page 7), the NRC sidestepped the question in 1976, when this issue first surfaced. So far as the record discloses, the NRC has never taken into account the patent inconsistency between its exclusion area plan and the antecedent beach access requirements of the Coastal Commission's permit (and indeed Article X, §4 of the California Constitution). Now that the Commission has given Edison notice of its intent to enforce the access condition, it would appear timely for the NRC finally to address this question.

Unfortunately, the Commission staff and Edison are apparently now exploring ways to sidestep this consistency review process, through discussion of the possibility of an amendment to the permit that would delete the access condition in return for some kind of off-site "mitigation." In our view, this turns the consistency review procedure on its head. When a state agency has given notice--as the Coastal Commission has--that a proposed federal license is subject to consistency review, that means the federal license can issue only if consistent with the state's approved coastal management program. In other words, it is the federal agency which must tailor its action to assure consistency with the state's management program--not the other way around. Accordingly, we urge you to allow the consistency review process--which you have invoked--to run its course, and to utilize this process to determine whether the NRC and Coastal Commission's conditions can be reconciled in some way, or barring that, how this matter can be dealt with by both of these agencies with jurisdiction over this project.

Moreover, we submit that the Coastal Commission cannot legally amend the Edison permit to delete the beach access requirement, for a number of reasons. First, one may question how the Coastal Commission could decide in 1981 or 1982 that beach access is no longer necessary for a facility when such access was considered essential to the granting of the facility's construction permit in 1974. Your letter to Edison of April 10, 1978, emphasizes that continued provision of beach access by Edison was "a major consideration" in the granting of the permit under the 1972 Coastal Act. Certainly, the coastal access requirements of the 1976 Coastal Act are no less stringent than those in the 1972 Act.

In addition, this beach access is in fact required by Article X, §4 of the California Constitution. Since the Coastal Commission has implemented this constitutional requirement (as contemplated by Section 30210 of the Coastal Act of 1976) by the imposition of conditions on the

construction of San Onofre Units 2 and 3, the Commission is thereafter disabled from taking any action which would have the effect of restricting or withdrawing this constitutionally mandated access. For example, in Lane v. City of Redondo Beach, 49 Cal.App.3d 251 (1975), the court held that while a municipality ordinarily has the power to vacate a municipal street, it has no power to vacate such a street if that would destroy or impair the public's right of access to tidelands or navigable waters. In People ex. rel. Younger v. County of El Dorado, 96 Cal.App.3d 403 (1979), the court invalidated a county ban on boating and rafting on the American River. The opinion states that, "Courts are especially sensitive to infringements upon constitutional rights...," and that the public's constitutional right of access to navigable waters is a right deserving of protection by the courts. Id. at 406.

Finally, even apart from these considerations, we submit that the Coastal Commission has no authority to entertain any amendment to this permit which would delete any significant terms or conditions therein. Indeed, the provisions of the Coastal Act appear on their face to bar any such amendment. For example, Section 30626 generally allows the Commission to establish regulations providing "for the reconsideration of the terms and conditions of any coastal development permit" but "solely for the purpose of correcting any information contained in such terms and conditions." (emphasis added). Even more explicitly, Section 30609 deals with the modification of conditions in permits issued under the 1972 Act--as was the instant permit--and expressly provides that "[u]nless modified or deleted pursuant to this section, any condition imposed on a permit issued pursuant to the former California Coastal Zone Conservation Act of 1972 (commencing with Section 27000) shall remain in full force and effect. (emphasis added). The only modifications allowed "pursuant to [that] section" are those relating to "recorded terms and conditions that are not dedications of land..." when the permit holder applies for modification or elimination thereof. Clearly the beach access requirements of the Commission's permit to Edison do not fall within this description--a fact confirmed in your letter to Richard Wharton of February 10, 1981 (p. 3). Thus, the only circumstance acknowledged in the 1976 Act under which the holder of a permit issued under the 1972 Act may apply for an amendment to that permit does not exist here.

Section 13166(c) of your regulations (Title 13, California Administrative Code) does purport to establish procedures for other kinds of amendments to permits issued under the 1972 Act, but that regulation cannot, of course, extend the Coastal Commission's authority beyond that allowed by the Coastal

Act of 1976. The unusual statements in that regulation--which suggest the contrary--appear to have been written in anticipation of this problem, but no authority from the Coastal Act dealing with this question is cited therein.

Moreover, the Attorney General has issued an opinion that the Coastal Commission "may not, on the basis of subsequently received significant information, revoke or modify a permit previously issued or reconsider the previous denial of a permit." 59 Ops. Atty. Gen. 123 (March 11, 1976) (emphasis added). The narrow exceptions to this flat prohibition, as discussed in this opinion, have no application to the present case.

Even if the Coastal Commission did have authority to entertain an amendment of this permit pursuant to Section 13166 of its regulations, that provision makes clear that the appropriate scope of Commission review would be the entire proposed development and not simply the isolated permit condition sought to be amended. Section 13166(a)(4) provides that the Commission, reviewing such a proposed amendment, "shall determine by a majority vote of the membership present whether the proposed development with the proposed amendment is consistent with the requirements of the California Coastal Act of 1976." (Emphasis added). Moreover, Section 13166(a)(4) provides that the decision shall be accompanied by findings in accordance with section 13096, which in turn requires the Commission to make specific findings of fact that "the development" or "permitted development" complies with various provisions of the Coastal Act.

The sense of this regulation is clear, and has obvious application to the present matter: if the permit condition was imposed in the context of a review of the entire development and was considered essential to the granting of the permit for that overall development, then it cannot be deleted by looking at anything less than the entire development.

Finally, if you are nevertheless going to continue discussions with Edison, directed to finding some sort of off-site "mitigation" as a supposed substitute for the beach access permit condition, we believe it is appropriate that all interested parties be allowed to participate in those discussions. You are, of course, free to formulate whatever staff position on the matter which you believe is appropriate and in conformity with the Coastal Act and Article X, §4 of the California Constitution. But the staff position on a matter of this importance should be based on imput from all who are concerned, including representatives of Bill Carstens who have followed the progress of this

question from its inception and have written to you on the subject numerous times over the years. As matters now stand, your staff has advised me that the subject of the discussions with Edison is "too delicate" even to report outside the closed meetings with Edison.

We realize that Edison may believe that this matter has reached the "eleventh hour," but that is clearly and uniquely Edison's responsibility. It failed to advise the NRC that the exclusion area plan violated the terms of the Coastal Commission permit back in 1975, and indeed apparently claimed that it did not (as the portion of the Appeal Board's decision, quoted at page 7 of our enclosed letter, seems to indicate).

Moreover, although it was first requested by the Commission to seek an amendment to its permit in order to bring this issue on for hearing in early 1978, it has refused to do so in the intervening years. These circumstances suggest that Edison has no standing to claim that anything less than a full-scale, open review of this matter be conducted by the Coastal Commission's staff and members.

We respectfully request your early attention to the concerns expressed in this letter.

Sincerely,

Roger Beers

Roger Beers

cc: August S. Carstens
Richard Wharton
Charles R. Kocher, Southern California Edison Company
Michael Dudley, San Diego Gas & Electric Company
William Matuszeski, Acting Assistant Administrator, Office Coastal Zone Management
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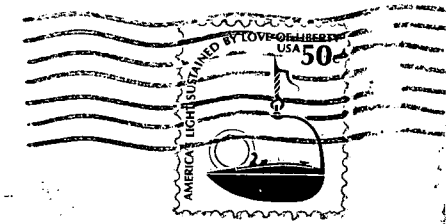

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