

November 30, 1978

UNITED STATES
NUCLEAR REGULATORY COMMISSION SECY-78-163A

POLICY SESSION ITEM

FOR: The Commissioners

FROM: Robert B. Minogue, Director, Office of Standards
Development

THRU: *f* Executive Director for Operations *W. J. Jones*

SUBJECT: SECY-78-163 - REVISION OF SECY-77-433, POLICY STATEMENT
ON ALTERNATIVE SITE EVALUATIONS UNDER NEPA FOR NUCLEAR
GENERATING STATIONS

DISCUSSION

A. Introduction

The memorandum dated August 15, 1978, from Chilk to Gossick requested that the subject policy statement in Enclosure A to SECY-78-163 be reviewed in light of the Commission's Seabrook decision of June 30, 1978, and be amplified to provide more specific guidance on the following four issues; as a minimum:

- "1. When a site is 'obviously superior' (or when a criterion stated differently but serving a similar function is met).
2. How many candidate sites to consider, with particular attention to acceptable methods for narrowing comparison studies to a relatively few sites.
3. Areas to include in alternative site investigations, notably in relation to applicants' or lead applicants' service areas and state boundaries, and the bearing of distances, population levels, applicants' total power capacities, total state and regional power demands, and power-pool arrangements.
4. The nature and extent of data and analyses required about alternative sites, including the extent to which any site-dependent plant features need to be worked out."

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The staff, after discussion with the Office of Policy Evaluation, is responding to the Commission's request in two parts that the Commission should consider at the same time. First, Section C of this memorandum recommends revising (as necessary) SECY-78-163 to conform to the Commission's Seabrook decision of June 30, 1978, and the Court of Appeals ruling of August 22, 1978. Second, an information paper, "Issues of Significance Relating to Review of Alternative Sites for Nuclear Power Facilities," (hereinafter referred to as the "information paper") addresses the Commission's four particular issues, as well as other issues associated with implementing the policy statement in Enclosure A to SECY-78-163.

B. Information Paper on Issues of Significance Relating to Review of Alternative Site for Nuclear Power Facilities

The information paper discusses issues of importance to the alternative site subject. The reason that these issues are being addressed in the information paper, separate from this memorandum is that the staff believes that these issues go beyond the Commission's holdings in the prior licensing decisions and could prove to be highly controversial. The staff believes that the answers to the questions should be developed through rulemaking to provide opportunity for public participation. This was the point of the staff's recommendation to the Commission (SECY-78-485)* to consider the question of alternative sites as one of ten issues for potential rulemaking.

The intent of the information paper is to focus on the issues associated with implementing the policy statement; to suggest a range of options for the resolution of those issues; and to seek the Commission's guidance regarding which options should be pursued and developed further. Thus, the information paper should be regarded as a preliminary paper prior to a possible rulemaking proceeding, that would result in more detailed guidance for implementing the policy statement.

Among the issues discussed in the information paper are certain topics that bear on the content of the proposed policy statement. It should be recognized that the results of discussions with the Commission regarding these topics could warrant some changes to the proposed policy statement. These topics include: (1) further discussion of the rationale for the "no obviously superior" standard; (2) whether the "obviously superior" standard should focus on "real and measurable" advantages or focus on substantial advantages; (3) whether the NRC should review the applicant's site selection process, if the proposed site has no "obviously inferior" qualities; (4) the question

*Reference Issue Number 4, Enclosure D of SECY-78-485.

of whether, after CP issuance, the standard for reopening the alternative site question should be one of site suitability or some other standard; (5) the role of NRC - developed NEPA decision standards in the applicant's site selection process; and (6) the use of reconnaissance level data in the NRC alternate site review.

C. Analysis of Seabrook Decisions and Discussion of Policy Statement

In addition to reviewing the Commission's June 30, 1978, Seabrook decision, OELD reviewed the decision of the U.S. Court of Appeals for the First Circuit in Seabrook for its impact on the subject policy statement. The Commission has already been provided with an analysis of the First Circuit's Seabrook decision (see Memorandum for the Commission from Stephen F. Eilperin, Solicitor, dated August 25, 1978). That decision generally supports the "no obviously superior" standard for rejecting alternative sites and the treatment to be accorded sunk costs* in the alternative site evaluation set forth in the policy statement in Enclosure A of SECY-78-163. Only a few aspects of the decision deserve special mention. First, a critical underpinning to the Court's approval of the "no obviously superior" standard is the Court's belief that the standard "says nothing about whether or how the required studies [of alternative sites] will be performed. Rather, it goes to what the Commission will do with findings that the studies will generate." It is important that the "no obviously superior" standard be segregated from questions regarding the scope of alternative site review and the depth of information required for the review.

In light of the above, the staff has concluded that the proposed policy statement in Enclosure A to SECY-78-163 should be revised as follows (a copy of the proposed policy statement in Enclosure A showing the recommended changes in comparative text is attached):

- a. At line 24 on page 6, place an asterisk after "... comparable severity and importance." At the bottom of page 6 add the following as a footnote:

"The focus of the Commission's discussion of the "obviously superior" standard in Seabrook is directed to the potential that the appearance of slight superiority at an alternative site may be a function of the uncertainty of comparative analyses and/or incompleteness of information rather than a real difference between the sites. In other words, only if all the salient features of the various sites (both alternatives and proposed

* Sunk Costs: Those costs committed to the preferred site that tend to reduce the remaining cost of completing a facility at that site.

sites) were completely understood, and if precise comparisons of these features could be made would a measurably small difference between the two warrant preferring the alternate site. The "obviously superior" concept is designed to take account of the uncertainty which is involved in the comparison. Consequently, "obviously superior" alternatives are those which are actually superior; i.e., the differences are real and not merely a function of either the limited quantity and quality of information available at the alternative site(s) as compared to that available at the proposed site or of the limitations of cost-benefit analysis. This notion of the question of confidence that differences are real is highlighted in the recent First Circuit decision in Seabrook: 'The [obviously superior] standard is designed to guarantee that a proposed site will not be rejected in favor of a substitute unless, on the basis of appropriate study, the Commission can be confident that such action is called for.' (Slip Opinion at 13, emphasis added). In light of these considerations, the NRC staff should consider adequacy of information and seek refined cost-benefit analytical techniques that can be applied to specific cases where reasonable, to minimize these inherent uncertainties. Only after the uncertainty is reduced to the reasonable minimum should the Staff be concerned with whether the remaining differences render the alternative site(s) obviously superior."

- b. At line 4 on page 7, add, "Even when the proposed site is not found by the staff to contain any 'obviously inferior' quality a reasonable range of alternative sites will be evaluated by the staff to determine whether there is any 'obviously superior' alternative. The purpose of the 'obviously inferior' criterion is to determine the depth to which the staff needs to examine the applicant's site selection process."
- c. At line 3 on page 8, replace that paragraph with, "Under these decision standards it is not necessary that all types of information be treated equally; much more detail will be needed for critical factors (e.g., geology, seismology, hydrology, population) than for others (e.g., noise impacts). In addition, the type of data used in identifying candidate sites may vary and may differ from that needed to select a proposed site."

The Commission should be aware that analysis of alternative sites performed solely by the use of reconnaissance level information (defined in Enclosure A, page 8, as data obtained from "readily available sources and from a short field investigation of a site") as contemplated by this policy statement, was not addressed by the Court.

The decision leaves the door open on the question previously raised by OELD in SECY-78-163 whether the "no obviously superior" standard may be applied by the applicant in its site selection process. The language in the decision that the Court cannot "interject itself within the area of

discretion of the executive as to the choice of the action to be taken," does indicate that the selection of the standard is for the agency to make and that any standard that is consistent with the agency's duty to take a "hard look" will be upheld.

The policy statement would have an applicant apply the "no obviously superior" criterion once he has selected a proposed site from a set of candidate sites. This relative threshold criterion for comparing the proposed site with a set of alternative sites prevents the applicant from selecting a poor, though licensable, site from a set but does not require that the applicant attempt to determine which site is best. It is important to include this concept of selecting the proposed site from among the best but not requiring showing of "best" in the policy statement. This use of the "no obviously superior" criterion goes beyond the First Circuit's Seabrook decision which upheld the Commission's adoption of the "no obviously superior" criterion in its NEPA review process. One reason for the Commission's adoption of the "no obviously superior" criterion for use in its NEPA review process was the probability that at the time of the Commission's NEPA review more adverse information had been developed for the applicant's proposed site than for alternative sites. Although this situation is not likely to occur at the earlier point in time when the applicant selects a proposed site using more or less equal information about each site, the situation would exist in most cases by the time the applicant files an application for the proposed site. The "no obviously superior" criterion is relevant to the applicant's situation at that time.

Enclosure A of SECY-78-163 does not try to describe how the various standards recommended for the applicant's site selection process will be implemented by the Commission. These standards go beyond the First Circuit's and the Commission's Seabrook decisions, since these decisions focus only on the Commission's alternative site review process. Implementation options, including the option of early Commission involvement in the applicant's site selection process, is discussed in Enclosure B of the Commission information paper.

In addition to the Commission's and the First Circuit's decisions regarding Seabrook and the "obviously superior" criterion, the Appeals Board has also given consideration to the "obviously superior" criterion in Rochester Gas & Electric Corporation, et al., (Sterling Power Project, Nuclear Unit No. 1), ALAB-502 (October 10, 1978). The language in Enclosure A of SECY-78-163 defines "obviously superior" in somewhat different words from the Appeals Board recent treatment of the same terms in that decision. This matter will be more fully addressed in the information paper.

The Court's approval of the Commission's treatment of sunk costs was tentative. The Court was particularly troubled by the fact that construction might reach a stage where sunk costs controlled the alternative site evaluation. The policy statement in Enclosure A does not attempt to address the distinction between the kinds of preliminary costs that go into preparation of the license application and the commitments that go into actual construction after issuance of an LWA or CP.

Staff believes that some consideration needs to be given by the Commission to qualifying the discussion of sunk costs on pages 7-8 of the proposed policy statement in Enclosure A to SECY-78-163, depending upon the anticipated scope of the Commission's study of the "immediate effectiveness" of a construction permit. The discussion of sunk costs on pages 7-8 is legally correct but does not seem to convey the same sense of concern about this matter that the Commission conveyed in its various Seabrook opinions. The Commission may wish to have the study of the "immediate effectiveness" of the construction permit give particular attention to the consideration of sunk costs.

In addition to the above recommended changes, the staff recommends the following editorial changes to correct some ambiguities discovered in reviewing the policy statement:

At the bottom of page 4, add the following sentences:

"The policy statement set forth below is an announcement to the public of the policy which this agency hopes to implement in future rulemakings or adjudications on NEPA. It is not intended to establish a standard of conduct which has the force of law."

At line 19 on page 5, replace the first two sentences of that paragraph with the following:

"The staff's review of the applicant's process for identifying candidate sites and selecting the proposed site, should show that the applicant has employed a practicable process. The review should reveal that the applicant has identified candidate sites that are among the best that could reasonably have been found for a nuclear generating station of a given size and character."

At line 11, page 8, continuing on page 9, replace that paragraph with the following:

"Information used to identify candidate sites and to select the proposed site from a set of candidate sites is normally not as detailed as the baseline data used to evaluate the proposed site alone during Construction Permit review or a complete Early Review of Site Suitability Issues. The assessment of the relative merit of a set of a candidate

sites and the selection of the proposed site can ordinarily be accomplished with less than baseline data for each site. For these assessments, baseline data, which is difficult and expensive to collect, does not ordinarily provide a significant advantage over reconnaissance level information, which may be defined as information obtained from readily available sources and from a short field investigation of a site. Moreover, even if applicants did submit exhaustive analyses of several candidate sites along with the evaluation of the proposed site, additional alternatives raised by the staff or by the intervenors would have to be considered in granting a Construction Permit. It could be very expensive to generate information on each of those sites which would allow an equivalent comparison between them and the proposed site. The identification of candidate sites and the selection of the proposed site from a set of candidate sites will not ordinarily be based, therefore, on the detailed baseline data presently required to judge the suitability of the applicant's proposed site."

At line 24 page 9 continuing on page 10, change the remainder of that paragraph to read,

"... not both, unless significant new information that substantially affects the earlier conclusions is found to exist. Also, staff reevaluation of alternative sites should not occur in the Operating License review absent new information which, taking into account the commitment already made to the proposed site at that stage of the proceeding as compared with the cost of building the facility at an alternative site, indicates that the alternative site is obviously superior to the proposed site. In practical terms this means that after the facility is essentially built, the likelihood that the cost-benefit analysis would so favor an alternative as to result in rejection of the proposed site is vanishingly small. Of course, alternative sites would be reevaluated if there is substantive new information that demonstrates that the proposed site is unsuitable with respect to safety or the environment, since the proposed site would be rejected and a new site would need to be selected."

Recommendation

That the Commission approve issuance for public comment of the Policy Statement on the Evaluation of Alternative Sites with the recommended changes, subject to consideration of those certain topics in the information paper which are outlined in Section B of this memorandum.

Previously the staff recommended issuance of the Policy Statement. The reasons for changing the previous recommendation are:

1. The proposed policy statement goes beyond the Seabrook holdings and could be controversial, therefore public comment would be appropriate and useful.
2. SECY-78-485, which was recently affirmed by the Commission, includes publishing for comment ten issues that the Commission is considering for rulemaking - one of these issues is Alternative Sites. It does not seem appropriate to issue a final policy statement on an issue for which the Commission is currently requesting public comment.

Coordination

The Director of the Office of Nuclear Reactor Regulation concurs. The Office of the Executive Legal Director prepared the legal discussion contained in this memorandum and has no legal objections to the proposed policy statement. The Office of the Executive Legal Director's comments on the recommendation are included as Enclosure B. OGC, OELD, and OPE have reviewed the paper and believe it to be sufficient to serve as a basis for further discussion.

Robert B. Minogue
Robert B. Minogue, Director
Office of Standards Development

Enclosures:

- A. Policy Statement on the
Evaluation of Alternative
Sites, Enclosure "A" to
SECY-78-163 in Comparative
Text
- B. OELD Comments

This paper is tentatively scheduled for consideration at an open meeting during the Week of December 4, 1978. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ENCLOSURE "A"

PROPOSED POLICY STATEMENT ON THE EVALUATION OF ALTERNATIVE SITES

NOTE: This enclosure is a modification of Enclosure "A" of SECY-78-163. The changes are shown in comparative text. Portions deleted are shown by dashes, portions added are shown by underlining.

NUCLEAR REGULATORY COMMISSION STATEMENT OF POLICY:
THE EVALUATION OF ALTERNATIVE SITES FOR NUCLEAR GENERATING
STATIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Background

Since the enactment of the National Environmental Policy Act (NEPA) of 1969, the review of alternatives to any major Federal action which would significantly affect the quality of the human environment has become an integral part of the planning and decision making processes of Federal Agencies. In 1973, the Atomic Energy Commission promulgated Part 51 of 10 CFR, which established its licensing and regulatory policy and procedures under NEPA. Part 51 requires that each applicant for a permit to construct a nuclear generating station discuss in an Environmental Report "appropriate alternatives" to the proposed facility. Using information contained in this report and information obtained from other sources, the Nuclear Regulatory Commission (NRC) staff prepares a draft environmental statement. This statement includes a preliminary benefit cost analysis which balances the environmental and other effects (a) of the facility and (b) of the alternatives available for reducing or avoiding adverse environmental and other effects. Among the primary alternatives to be considered once the need for a facility has been established are alternative sites for the facility. All subsequent considerations of alternatives deal with design options or structure locations; these are normally alterations to mitigate impacts on the chosen site. The draft environmental statement is

circulated for public comment and interagency review and after comments are received a final environmental statement is prepared, which contains a final benefit cost analysis and a final staff conclusion as to whether or not to issue a permit to construct a nuclear generating station.

The consideration and evaluation of alternative sites for a proposed generating station is a complex, difficult task for both the applicant and the NRC staff. As a practical matter, the best site in any given region for a nuclear generating station of a given size and power cannot usually be identified. The costs of the needed facilities are usually so high that seeking a best site cannot be justified on a benefit cost basis. Also, effects and site attributes measured quantitatively, but not necessarily in the same units, and those measured qualitatively cannot, in most instances, be combined to yield a rigorous formal measure of relative merit for use in comparing alternatives. Uncertainty about the precise character of any site also complicates the analysis. However, even if uncertainty were not present, any given site could only be judged superior or best if each of its characteristics could be shown to be equivalent to or better than the corresponding characteristic of each alternative, with at least one characteristic being judged better than the corresponding characteristic for each alternative.

To date, a case-by-case approach has been taken by the NRC staff to the review of an applicant's selection and evaluation of alternative sites. Some guidance to the applicant for the site selection process and for the evaluation of alternatives is provided in Regulatory Guide 4.2 and in Regulatory Guide 4.7.

In its review, the NRC staff uses information supplied by the applicant along with information from other sources to develop an independent evaluation and its own conclusions about the relative merits of the site preferred by the applicant. In the past, the NRC staff has frequently requested both additional information on the sites an applicant has evaluated and additional alternative site evaluations. Some requests for additional information have been made when a parameter (e.g., population) assumes special significance but more often a lack of data or inadequate data has been the basis for such requests. The additional data requested from the applicant are used to supplement other sources of information, including reports from State and other agencies, scientific journals, technical conferences and personal knowledge. Some additional information is obtained by personal visits by NRC staff to the sites and from NRC staff discussions with local agencies and citizens. These sources provide the basis for judging the adequacy of the applicant's information. Requests for the consideration of additional sites have usually been made when the NRC staff concludes that realistic alternative sites were not identified and evaluated or when the sites presented did not offer real alternatives for the utilization of the resources of a region.

Currently, the number of alternative sites evaluated is not specified and varies from case-to-case. The usual approach is to identify a set of potential sites and to rank these sites in order to define a set of candidate sites. The scheme for ranking varies with applicants and, at present, explicit criteria for judging the adequacy of the ranking process do not exist. No matter how the set of potential sites is ranked, those that are

unacceptable are rejected and those remaining are evaluated on the basis of environmental and other effects to determine the proposed site. Regulatory Guide 4.2 suggests that a cost effectiveness analysis, covering both environmental and economic costs, be used to demonstrate why the proposed site-plant combination is preferred over all other realistic alternatives.

Once a site has been selected, the applicant conducts a detailed local study of the environs, including surveys of the biota, collection of physico-chemical data and other information from which estimates of potential environmental impacts of construction, operation, and decommissioning of the proposed nuclear power plant are made. The detailed estimate of environmental impacts is reviewed and analyzed by the NRC staff to assure

acceptability of the proposed site. No local detailed studies are made on the alternative candidate sites. The staff's assessment of the acceptability of a site is made from a determination that existing environmental and safety standards are met and by a final benefit cost analysis which demonstrates why the aggregate benefits outweigh the aggregate costs of the proposed station. If the staff's assessment is favorable, an Atomic Safety and Licensing Board reviews the application and, if this board concurs with the staff assessment, a construction permit is issued by the Commission. The licensing board's determination is in turn subject to review by an Atomic Safety and Licensing Appeal Board.

The policy statement set forth below is an announcement to the public of the policy which this agency hopes to implement in future rulemakings or adjudications on NEPA. It is not intended to establish a standard of conduct which has the force of law.

POLICY CONCERNS

As part of its current review of reactor site evaluation policy and practice, the Commission seeks to retain the flexibility of the case-by-case approach now used by the NRC staff and yet develop a more standardized approach by applicants to the treatment of alternative sites under NEPA. From a technical or analytical viewpoint, the evaluation of alternative sites can be broken into three general stages: (1) identification of candidate sites, all of which should be judged potentially licensable, (2) selection of the proposed site from the set of candidate sites, and (3) after selection of the proposed site, evaluation of it using detailed baseline information at a Construction Permit review or Early Review of Site Suitability Issues. In the licensing process for nuclear generating stations, the first two stages are undertaken by the applicant and his analyses and results for each stage are reviewed by the NRC staff in its Construction Permit review. The third stage, which is based on more extensive or detailed data than the first two, occurs in the Construction Permit review and will occur in a complete Early Review of Site Suitability Issues.

~~[In-identifying-candidate-sites-and-selecting-a-preferred-site;-an applicant-should-employ-a-practicable-process--The-applicant's-objective should-be-to-identify-candidate-sites-that-are-among-the-best-that-could reasonably-have-been-found-for-a-nuclear-generating-station-of-a-given size-and-character]~~ The staff's review of the applicant's process for identifying candidate sites and selecting the proposed site, should show that the applicant has employed a practicable process. The review should

reveal that the applicant has identified candidate sites that are among the best that could reasonably have been found for a nuclear generating station of a given size and character. Such a decision standard identifies candidate sites all of which should be licensable. From this set of candidate sites the applicant should select the proposed site. Because the candidate sites should be very similar in quality, because the analysis upon which site selection is based requires the comparison of diverse environmental and economic factors, and because uncertainty is inherent in site selection, the proposed site cannot, within the bounds of reasonableness, be shown to be the best. Some criterion is required to assure that it is similar in quality to the other candidate sites. Only if no other candidate site appears to be obviously superior to a given site should that site be proposed or accepted as the location of a nuclear generating station. This relative threshold criterion for ~~[the-selection]~~ comparison of a proposed site ~~[from]~~ with a set of candidate sites prevents the applicant from selecting a poor, though licensable, site from a set but does not require that the applicant attempt to determine which site is best.

In the implementation of the "obviously superior" criterion for the selection of the proposed site from a set of candidate sites, the NRC will employ all reasonable means to make its views on the applicant's site evaluations known early. However, the NRC, in doing this, should not be placed in the position of specifically identifying a site or sites that are obviously superior. The function of the NRC is not to select sites, but only to approve or reject the site proposed by the applicant. The NRC will reject an applicant's proposed site (a) if one or more features of

the proposed site are shown to be obviously inferior (although marginally licensable) and (b) if other sites (whether among the applicant's candidate sites or not) are shown to exist that would likely not have these or some other infirmities of comparable severity and importance.* In other words, the obviously superior standard will dictate the rejection of the site an applicant selects from a set of candidate sites if this site is shown to suffer from substantial infirmities in important site characteristics and that some other site likely exists which does not have these or other comparable significant infirmities. Even when the proposed site is not found by the staff to contain any 'obviously inferior' quality a reasonable range of alternative sites will be evaluated by the staff to determine

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The focus of the Commission's discussion of the "obviously superior" standard in Seabrook is directed to the potential that the appearance of slight superiority at an alternative site may be a function of the uncertainty of comparative analyses and/or incompleteness of information rather than a real difference between the sites. In other words, only if all the salient features of the various sites (both alternatives and proposed sites) were completely understood, and if precise comparisons of these features could be made would a measurably small difference between the two warrant preferring the alternate site. The "obviously superior" concept is designed to take account of the uncertainty which is involved in the comparison. Consequently, "obviously superior" alternatives are those which are actually superior; i.e., the differences are real and not merely a function of either the limited quantity and quality of information available at the alternative site(s) as compared to that available at the proposed site or of the limitations of cost-benefit analysis. This notion of the question of confidence that differences are real is highlighted in the recent First Circuit decision in Seabrook: 'The [obviously superior] standard is designed to guarantee that a proposed site will not be rejected in favor of a substitute unless, on the basis of appropriate study, the Commission can be confident that such action is called for.' (Slip Opinion at 13, emphasis added). In light of these considerations, the NRC staff should consider adequacy of information and seek refined cost-benefit analytical techniques that can be applied to specific cases where reasonable, to minimize these inherent uncertainties. Only after the uncertainty is reduced to the reasonable minimum should the Staff be concerned with whether the remaining differences render the alternative site(s) obviously superior.

whether there is any "obviously superior" alternative. The purpose of the "obviously inferior" criterion is to determine the depth to which the staff needs to examine the applicant's site selection process.

Once the proposed site has been selected and detailed baseline studies have been completed, more is known about the proposed site than any alternative to it. A substantial commitment, which deepens as time passes, has also been made in terms of time and financial resources spent in evaluating the characteristics of the proposed site. The passage of time may bring the clarification of uncertainties and either confirmation of the correctness of the original decision or the assessment that sites better than the applicant's proposed site may exist. The characteristics and qualities of these other sites will not be known, however, in the detail or with the surety that those of the proposed site are known. Thus, uncertainty of the type and nature confronting the initial evaluation of alternative sites will be present in any comparative evaluation of the proposed site with respect to other sites during the Construction Permit review, during a full Early Review of Site Suitability Issues, after issuance of a Limited Work Authorization, or after issuance of a Construction Permit. For this reason and because the evaluation of alternatives must be practicable and reasonable, the proposed site should not be rejected in such a review (a) unless an obviously superior alternative exists and (b) only after comparison of the actual (environmental and economic) costs of completing construction of a nuclear generating station at the proposed site with the costs of construction at any alternative site.

[These decision standards contain implications for the information and analytical techniques used by an applicant in identifying candidate sites and in selecting a preferred site. -- Not all types of information need be treated equally; much more detail will be needed for critical factors (e.g., geology, seismology, hydrology, population) than for others (e.g., noise impacts). -- In addition, the type of data used in identifying candidate sites may vary and may differ from that needed to select a preferred site.]

Under these decision standards it is not necessary that all types of information be treated equally; much more detail will be needed for critical factors (e.g., geology, seismology, hydrology, population) than for others (e.g., noise impacts). In addition, the type of data used in identifying candidate sites may vary and may differ from that needed to select a proposed site.

Information used to identify candidate sites and to select the proposed site from a set of candidate sites [~~should be less~~] is normally not as detailed [than] as the baseline data used to evaluate the proposed site alone during Construction Permit review or a complete Early Review of Site Suitability Issues. The assessment of the relative merit of a set of candidate sites and the selection of the proposed site can ordinarily be [~~readily~~] accomplished with less than baseline data for each site. For these assessments, baseline data, which is difficult and expensive to collect, does not ordinarily provide a significant advantage over reconnaissance level information, which may be defined as information obtained from readily available sources and from a short field investigation of a site. Moreover, even if

applicants did submit exhaustive analyses of several candidate sites along with the evaluation of the proposed site, additional alternatives raised by the staff or by the intervenors would have to be considered in granting a Construction Permit. It could be very expensive to generate information on each of those sites which would allow an equivalent comparison between them and the proposed site. The identification of candidate sites and the selection of the proposed site from a set of candidate sites [~~cannot~~] will not ordinarily be based, therefore, on the detailed baseline data presently required to judge the suitability of the applicant's proposed site.

In some instances available detailed information on the proposed site will identify impacts which would likely not have been identified based on review of reconnaissance level information. In giving weight to these impacts (i.e., in determining whether these are substantial infirmities of the proposed site) NRC would consider whether:

- (a) these types of impacts are likely to occur at other sites, where only reconnaissance level information exists; or
- (b) these impacts can be reasonably mitigated by appropriate design of the plant (i.e., mitigation can reasonably be achieved with available technology at a cost that is not excessive).

The relationship of Early Review of Site Suitability Issues, Construction Permit, and Operating License reviews of the evaluation of alternative sites is also of concern. The decision criteria and procedures used in a complete Early Review of Site Suitability Issue should be the duplicate of those used in the Construction Permit review. As the recently enacted regulation for Early Review of Site Suitability Issues

provides, the review of the evaluation of alternative sites should occur at either the Early Review or the Construction Permit review stage, but not both, unless significant new information that substantially affects the earlier conclusions is found to exist. Also, staff reevaluation of alternative sites should not occur in the Operating License review absent new information which, taking into account the commitment already made to the proposed site at that stage of the proceeding as compared with the cost of building the facility at an alternative site, indicates that the alternative site is obviously superior to the proposed site. In practical terms this means that after the facility is essentially built, the likelihood that the cost-benefit analysis would so favor an alternative as to result in rejection of the proposed site is vanishingly small. Of course alternative sites would be reevaluated if there is substantive new information that demonstrates that the proposed site is unsuitable with respect to safety and the environment, since the proposed site would be rejected and a new site would need to be selected.

[Because it accomplishes very little, staff reevaluation of alternative sites should not occur in the operating license review absent new information which, taking into account the commitment already made to the proposed site at that stage of the proceeding as compared with the cost of building the facility at an alternative site, shows that the alternative site is obviously superior to the proposed. In practical

terms-this-means-that-a-site-can-only-be-rejected-at-the-operating-license
stage-if-new-information-indicates-that-the-site-is-unsuitable]

Dated:

Samuel J. Chilk,
Secretary to the Commission

ENCLOSURE B

Enclosure B

OELD COMMENTS

While OELD has no legal objections to the proposed general policy statement, it does not believe that publication of the statement at this time would serve any significantly useful purpose. This is so because the statement will have no binding effect on staff, ASLB, ASLAB, and Commission licensing reviews, and because the statement leaves several key and controversial issues unaddressed and unresolved. These two points are discussed below.

(1) The Role of a General Policy Statement

The U.S. Court of Appeals of the District of Columbia Circuit has defined a general statement of policy as "neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications."^{1/} The Court distinguished policy statements from rules on the basis of their legal effect. A rule establishes a standard of conduct which has the force of law; a policy statement does not establish a binding norm. When an agency applies a policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.^{2/} This is

^{1/} Pacific Gas & Electric Co. v. FPC, 506, F.2d 33, 38 (D.C. Cir. 1974).

^{2/} Ibid. See also Airport Commission v. CAB, 300 F.2d 185 (4th Cir. 1962).

lead to NEPA rulemaking that could prove to be far more useful than issuance of the policy statement proposed here.

Of course, the staff is here following the direction of the Commission itself to prepare a "policy statement." We believe that the matter deserves reconsideration by the Commission and that consideration should be given to rulemaking rather than publication of a policy statement.

(2) Unaddressed Issues

- (a) The policy statement imposes a decision standard for staff review of the applicants' site selection processes. In particular, according to the statement, candidate sites are to be "among the best that could reasonably have been found." (pages 5, 6). The policy statement does not address how this standard will be implemented by the Commission. This is a particularly difficult issue because NEPA does not itself require any review of applicants' site selection processes. Rather NEPA requires a review of alternative sites, and the law is reasonably clear that a review of an applicant's site selection process may not serve as a substitute for the agency's own review of actual alternative sites.^{5/} But if the Commission may not dispense with a review of alternative sites solely because the applicant's site selection process is acceptable (for example, in the selection of candidate sites,

^{5/} See Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972); cert. denied, 409 U.S. 849 (1972); Steubing Brinnegar, 511 F.2d 489 (2d Cir. 1975).

why general statements of policy may be issued without prior public comment under the Administrative Procedure Act (APA) while, with some exceptions, the APA requires prior public comment before issuance of substantive rules.^{3/} Of course something that is labeled a "general statement of policy" may in fact be intended by the agency as a binding rule and, in such cases, the policy statement may be given binding effect provided that the APA procedures for agency rulemaking have been followed.^{4/}

Here the proposed text of the policy statement is quite clear that no binding norm is being established. However, this will be of limited, if any, use to the staff in the conduct of its licensing reviews or to parties or decisionmakers in Commission licensing proceedings. While the staff itself will feel compelled to follow the statement as some sort of Commission "guidance," the staff must be prepared to defend the positions espoused in the statement in adjudicatory proceedings just as if the Commission had never spoken on the subject. What is needed is not a policy statement but some binding Commission determinations that will resolve (subject to judicial review) some of the thorny NEPA issues that are involved in the alternative site matter. Commission consideration of the NRR information paper may

^{3/}APA section 4, 5 USC §553.

^{4/}Even here the issuance of a binding norm by policy statement is bad administrative practice because, unlike rules, policy statements never get codified and published as part of the agency's regulations. Therefore, affected members of the public are less likely to be aware of policy statements than substantive rules.

the applicant used the proper criterion that the sites be among the best that could reasonably have been found), then what role do the Commission review of an applicant's site selection process and the Commission standards governing it play? This critical issue is unaddressed, and the legal validity of staff reviews may depend upon how the matter is dealt with in actual practice. OELD believes that the Commission should address this matter, rather than leave the matter unresolved.

- (b) The policy statement at several points (pages 6-7 and 8) urges that the initial focus of Commission alternative site reviews should be on the question whether the proposed site has any "obviously inferior" qualities. However, the statement goes on to note that a reasonable range of alternative sites will be examined by the Commission even if the proposed site is not found to possess any "obviously inferior" qualities. The statement does not address the role the "obviously inferior" determination is to play in the Commission's review process. An examination of the applicant's proposed site for "inferior" qualities cannot legally substitute for an examination of actual alternative sites.^{6/} However, if this is the case, then what is the role of a "not obviously inferior" determination in the Commission's NEPA alternative site review? This matter should be addressed in the statement, not left dangling.

^{6/} EDF v. Corps of Engineers, 492 F.2d, 1123, 1135 (5th Cir. 1974).