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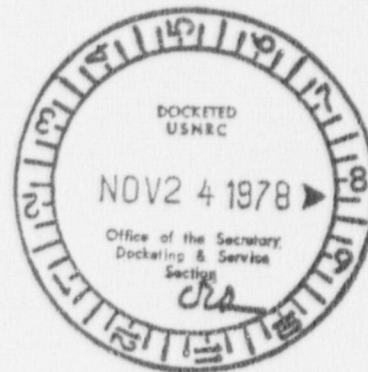
PETITION RULE PRM-51-4

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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N. W.
WASHINGTON, D. C. 20006

43 FR 9542

NRC PUBLIC DOCUMENT ROOM



Mr. Lee V. Gossick
Executive Director for Operations
Rm. 6715, U.S. Nuclear Regulatory Commission
Maryland Natonal Bank Building
7735 Old Georgetown Rd.
Bethesda, MD

Re: Petition for Rulemaking,
Docket No. PRM-51-4

Dear Mr. Gossick:

The Council on Environmental Quality has reviewed the above petition proposing amendments to the Commission's regulation "Licensing and Regulatory Policy and Procedures for Environmental Protection," 10 C.F.R. Part 51. 43 Fed. Reg. 9542 (March 8, 1978). For the reasons set forth below, the Council strongly recommends that the petition be denied.

Petitioners request that 10 C.F.R. §§ 51.21 and 51.23(e) be amended to specifically exclude from the operating license stage environmental report and environmental impact statement "such considerations as need for the plant or need for power, alternate sites and alternate energy sources, since such matters are considered and resolved at the construction permit stage." Petitioners contend that such analysis is duplicative of that contained in the EIS at the construction permit stage, and that consideration of such alternatives at the operating license stage is "unreasonable" under NEPA and the case law construing NEPA. It is the Council's opinion that the Commission's existing regulations are sufficient to prevent duplicative analysis and consideration of unreasonable alternatives.

The Commission's environmental review procedures track and are an integral part of its two stage proceedings under the Atomic Energy Act of 1954, 42 U.S.C.A. § 2011 et seq. (1975). See 10 C.F.R. Part 51. That both the construction permit stage and the operating license stage of Commission approvals for nuclear facilities are distinct and significant

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decisions for purposes of NEPA, does not appear to be contested by petitioners. The grant of an operating license is not an automatic requirement upon the issuance of a construction permit by the Commission. See, Power Reactor Development Company v. International Union of Electrical Radio and Machine Workers, 367 U.S. 396 (1961).

The Commission's regulations concerning environmental review at the operating license stage provide:

Each applicant for a license to operate a production or utilization facility covered by § 51.5(a) shall submit with its application the number of copies, as specified in § 51.40, of a separate document to be entitled "Applicant's Environmental Report - Operating License Stage," which discussed the same matters described in § 51.20 but only to the extent that they differ from those discussed or reflected new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the Construction permit. The "Applicant's Environmental Report - Operating License Stage" may incorporate by reference any information contained in the Applicant's Environmental Report or final environmental impact statement previously prepared in connection with the construction permit..."

... A draft environmental impact statement prepared in connection with the issuance of an operating license will cover only matters which differ from, or which reflect new information in addition to, those matters discussed in the final environmental impact statement prepared in connection with the issuance of the construction permit...[emphasis added]

10 C.F.R. §§ 51.21, 51.23(e). Thus only additional information is to be discussed in the operating license stage EIS; where no new information is brought forth which is significant enough to alter the discussion of the alternatives considered in the construction permit EIS, then it need not be covered in the later EIS.

The regulations also further the objectives of CEQ's proposed rules concerning the implementation of NEPA. 43 Fed. Reg. 25230 (June 9, 1978). These proposed rules emphasize the elimination of duplication (§ 1502.20) by such methods

as incorporation by reference (§ 1502.21) and tiering of impact statements (§§ 1502.20, 1508.26). Only "reasonable" alternatives need be considered with respect to a proposed action (§ 1502.14).

The Council agrees with petitioners that a "rule of reason" is applied by the courts with respect to an agency's compliance with NEPA. See NRDC V. Morton, 458 F.2d 827 (D.C. Cir. 1972), and cases following. However, the Council strongly disagrees with petitioner's conclusion that the alternatives which petitioner would exclude from consideration at the operating license stage will always be unreasonable at that stage. Certainly in the majority of cases the extensive consideration of the alternatives of need for power, and site and fuel alternatives at the construction permit stage will likely be sufficient, without the need for additional consideration in the operating license EIS. However there may be cases where new information brought to light during the construction of a facility is of such significance that these alternatives must be considered in the context of this information in deciding whether to grant an operating license despite the substantial investment in the facility at that stage.

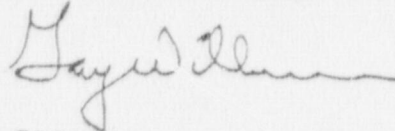
While this may be a rare case, NEPA requires that to the "fullest extent possible" alternatives to a proposed action with significant impact on the environment be considered by the decisionmaker. An adequate analysis of all reasonable alternatives to a proposed action is the "linchpin" of an EIS. Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697-98 (2d Cir. 1972). To absolutely preclude this consideration by rule, rather than to continue the flexibility which the Commission's regulations now provide, would conflict with this strong NEPA mandate. See Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 109 (D.C. Cir. 1977).

The Commission's existing regulations discourage duplicative analysis while retaining the flexibility required under NEPA to consider alternatives in light of significant new information bearing upon a proposed action. In the course of the Commission's approval process for nuclear facilities, the issuance of an operating license is a very significant point where alternatives to operation of a facility may need to be

considered in some cases. The Council firmly believes that consideration of these alternatives should not be specifically excluded by rule from consideration in all operating license EISSs. We urge that the petition be denied.

Sincerely,

NICHOLAS C. YOST
General Counsel

A handwritten signature in dark ink, appearing to read "Gary Wilburn", written in a cursive style.

GARY WILBURN
Counsel