

thereby circumvent the requirement to consider relevant alternatives. See *Citizens Against Burlington*, 938 F.2d at 196, *City of New York v. Department of Transportation*, 715 F.2d 732, 743 (1983). The Commission believes that this principle should also apply where a sponsoring entity or applicant seeks the NRC's approval. There may well be circumstances where an entity seeking a CP or COL may be able to establish, consistent with NEPA and current judicial precedents, a narrow statement of purpose and need for the project sufficient to justify excluding from the EIS a consideration of non-nuclear alternative energy sources.

The NRC's current policy is to consider alternative energy sources at the CP stage because alternatives to the construction of a nuclear power plant must be considered before the environmental impacts of construction are realized. The Commission's practice was acknowledged in the statement of consideration for the final rule amending 10 CFR part 51 to bar the consideration of alternative energy source issues in operating license proceedings for nuclear power plants (47 FR 12940; March 26, 1982). The Commission stated that "in accordance with the Commission's NEPA responsibilities, the need for power and alternative energy sources are resolved in the construction permit proceeding." The Commission added that "[a]lternative energy source issues receive and will continue to receive extensive consideration at the CP stage" (emphasis added). Thus, the Commission has committed itself to consider alternative energy sources and continues to believe that it should do so to fulfill its NEPA responsibilities. Under 10 CFR part 52, alternative energy sources may be considered at the ESP stage or deferred until the COL stage.

The Commission's position on consideration of alternative energy sources is consistent with other Federal agencies' practices, which have consistently included alternative energy sources when preparing an EIS for a new power generation project. In addition, the NRC's position is consistent with case law. There are many cases involving the adequacy of an agency's alternative energy source review. See, e.g., *Association of Public Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158, 1187 (9th Cir. 1997); *Swinomish Tribal Community v. FERC*, 627 F.2d 499, 514-16 (D.C. Cir. 1980); *Hawaii County Green Party v. Clinton*, 980 F. Supp. 1160, 1167 (D. Haw. 1997). The petitioner did not cite, and the NRC is

not aware of, any judicial decision concluding that it is unnecessary for a Federal agency to consider alternative energy sources in licensing a new power generation project.

The petitioner argued, as it did with respect to the need for power, that future "merchant generators" will not build and operate a nuclear power plant if there is a superior source of energy. However, the petitioner failed to cite any recent judicial decisions interpreting NEPA which hold that a Federal agency, acting on a project proposal presented by a private sponsor or applicant, need not conduct an independent review of alternatives but may limit its discussion to alternatives that the sponsor or applicant deems reasonable.

The petitioner stated that it is not reasonable to assume that the NRC will be able to identify an alternative energy source that is both feasible and preferable to the choices made by the applicant, but provides no apparent basis for this assertion. The Commission does not agree with the petitioner's assertion. The NRC has extensive experience in identifying and evaluating the feasibility of alternative energy sources in a manner that is sufficient to meet the requirements of NEPA. Indeed, the NRC currently performs such analyses in connection with renewals of nuclear power plant operating licenses (including renewals for plants operated by non-utility entities).

Finally, the petitioner argued that the NRC need not consider alternative energy sources because "the NRC lacks the authority to compel the applicant to use the alternative * * * [energy] source." Petition, at 7. The Commission agrees with the petitioner that the NRC does not have the authority to require the applicant to use an alternative energy source even if there is an alternative with potentially fewer environmental impacts than those associated with operation of the proposed nuclear power plant. However, if the alternative energy source is a reasonable alternative, it should be identified and evaluated. See *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286-87 (1st Cir. 1996), citing *Roosevelt Campobello Int'l Park Committee v. United States EPA*, 684 F.2d 1041 (1st Cir. 1982).

In summary, the petitioner has not shown that it is no longer a necessary part of the Commission's NEPA obligations for the NRC to consider alternative energy sources in rendering decisions regarding reactor licensing.⁶

⁶ As previously discussed in footnote [4], it is the Commission's view that § 52.17(a)(2) currently

Conclusion

The petitioner has not shown any change in other Federal agencies' practices, judicial consideration of the NEPA obligations of Federal regulatory agencies responsible for licensing privately proposed actions, or other factors underlying the Commission's current policies for considering the need for power or alternative energy sources that would lead the Commission to conclude that consideration of these issues is no longer a necessary part of the Commission's NEPA obligations for reactor licensing decisions. For applications that could result in the commencement of construction (*i.e.*, CP and COL applications), the NRC continues to believe that the agency should address alternative energy sources in the related EIS (unless, the CP or COL application references an ESP that considered alternative energy sources). The NRC also continues to believe that, for such construction approval applications, the agency should address the benefits assessment (*e.g.*, need for power) in the related EIS.

For the reasons cited in this document, the NRC denies the petition.

Dated at Rockville, Maryland, this 23rd day of September, 2003.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2003-15876; Airspace
Docket No. 03-AGL-14]

Proposed Modification of Class E Airspace; Zanesville, OH

AGENCY: Federal Aviation
Administration (FAA), DOT.

allows the ESP applicant the flexibility to choose to defer consideration of benefits (for example, need for power) of the proposed facility to the time (if ever) that the ESP is referenced by a COL or CP application. In this same context, the ESP applicant need not include an assessment or discussion of alternative energy sources in its environmental report supporting an ESP application. Rather, the applicant may choose to defer consideration of alternative energy sources to the COL or CP application. The Commission's proposed revision to 10 CFR part 52 includes a provision to amend § 52.17(a)(2) to clarify that an ESP applicant has the flexibility of either addressing the matter of alternative energy sources in the environmental report supporting its ESP application or deferring the consideration of alternative energy sources to the time that the ESP is referenced in a licensing proceeding (68 FR 40028, July 3, 2003).