

Before the
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the matter of)

CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)
(Indian Point Unit No. 2))

) Docket No. 50-247

MEMORANDUM IN SUPPORT OF MOTION
OF ENVIRONMENTAL DEFENSE FUND, INC.
FOR DETERMINATION OF ENVIRONMENTAL ISSUES

The motion now before the Board seeks a decision by the Board that the environmental impact of this plant may be fully explored in this proceeding as required by the National Environmental Policy Act. At issue is the legal validity of those portions of Appendix D of 10 CFR, Part 50 which exclude environmental issues from this hearing and even if such issues were before the Board, exclude examination of certain facts and evidence relevant to those issues.

The question for decision by this Board are:

- 1) Does the Board have the authority to review the validity of Appendix D of 10 CFR, Part 50?
- 2) If so, what parts if any of Appendix D are invalid?

The answer to the first question depends upon the meaning of the AEC's Memorandum in the Matter of Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2) (hereinafter Calvert Cliffs

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Memorandum, a copy of which is attached) where the Commission set forth the scope of review of an AEC regulation by an Atomic Safety and Licensing Board. The answer to the second question depends upon an analysis of the requirements of the National Environmental Policy Act as applied to the AEC. The relevant arguments have been presented in the brief for Petitioners in the case of Calvert Cliffs Coordinating Committee v. AEC (CA D.C. No. 24,871) now pending before the United States Court of Appeals for the District of Columbia Circuit.^{1/} Rather than reiterate those arguments here a copy of that brief is attached to this memorandum and incorporated herein by reference.

Turning then to the first question and the Calvert Cliffs Memorandum it appears quite clear that the Board has the power to review Appendix D on the grounds raised here. The Calvert Cliffs Memorandum arose as the result of a statement contained in the Initial Decision for issuance of a construction permit. In that statement the Board remarked that where evidence is produced at a hearing which draws into question the validity of Part 20, the board "might not be able to rely upon [that Part] as establishing the outer limit of acceptable risk."

^{1/} The pendency of that case should not inhibit this Board's decision. The decision of the Court of Appeals will of course control this, as well as all other AEC proceedings concluded on or after January 1, 1970 (when the National Environmental Policy Act became effective). But this Board can avoid the delay inherent in waiting for that decision by reaching its own judgment and allowing the parties here to proceed to act on that judgment.

The Commission responded by indicating that the Part 20 standards are general rules and not subject to amendment on a case by case basis based upon the evidence produced at a hearing.

(Calvert Cliffs Memorandum, p. 3) In short, the Board was not free to substitute its judgment for that of the AEC on the factual question of the adequacy of Part 20 safety standards.^{2/}

However, the AEC specifically acknowledged that the Board does have the authority to challenge the validity of a Commission regulation on (Calvert Cliffs Memorandum, p. 3):

"... limited grounds, if the contested regulation relates to an issue in the proceeding. By limited grounds we mean, whether the regulation was within the Commission's authority; whether it was promulgated in accordance with applicable procedural requirements; and, as respects the Commission's radiological safety standards, whether the standards established are a reasonable exercise of the broad discretion given to the Commission by the Atomic Energy Act for implementation of the statute's radiological safety objectives."

This standard of review clearly includes the challenge to Appendix D now before the Board. The essence of that challenge is that the National Environmental Policy Act,¹⁾ requires the AEC to include consideration of environmental issues in all of its hearings where the initial decision (i.e. the major federal action) does not occur until

^{2/} The precise scope of this limitation is not at issue here but it would appear to acknowledge that where, as a general matter, substantial evidence does not exist to sustain the Part 20 standards then the Board may set aside those standards and apply more stringent standards.

after January 1, 1970, and 2) requires the AEC to permit evidence to be introduced at those hearings on all possible adverse environmental effects of the plant regardless of what state, regional or federal environmental standards are met by the plant. In short the AEC was without authority to require in Appendix D that consideration of environmental issues not occur at any hearing noticed before March 4, 1971 and that even after March 4, 1971, an Atomic Safety and Licensing Board is prohibited from receiving evidence on any adverse environmental impact if the adverse impact relates to an impact of the plant which has been certified as coming within any applicable state, regional or federal environmental standard or requirement.

The concept that the Board can hold invalid a Commission regulation which exceeds the Commission's authority (as expressed in the Calvert Cliffs Memorandum) is comparable to the usual standard of review applied by the Courts in determining whether federal agency action is valid. See for instance Sections 10(e)(2)(A) and (C) of the Administrative Procedure Act (5 U.S.C. Sections 706(2)(A) and (C)) which require a reviewing court to hold unlawful and set aside agency action found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * *

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

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The early cases on judicial review have applied the same standard. In SEC v. Chenery Corp. 318 U.S. 80, 94 (1943) the Court observes that while factual decision of agencies are subject to great deference, an agency decision based upon an erroneous legal theory must be reversed. See also Kovac v. Immigration and Naturalization Service, 407 F. 2d 102, 104 (CA 9th, 1969); Ramapo Bank v. Camp, 425 F. 2d 333, 347-348 (CA 3rd, 1970); In Re Hooper's Estate, 359 F. 2d 569, 575 (CA 3rd, 1966). In the latter case the Court, in language particularly relevant here, defined the standard of review (359 F. 2d at 575 fn. 7):

Administrative Action is arbitrary if it is taken without any authority of law or upon a misconstruction of the statutory authority under which it purports to be taken.

It is our contention that Appendix D violates the National Environmental Policy Act and that the AEC, therefore, exceeded its authority by attempting to postpone the statutorily mandated effective date of the National Environmental Policy Act and by attempting to

3/ Where the action taken is on a record with public hearings (such as issuance of a construction permit or operating license for a nuclear plant) the standard for review is whether there is substantial evidence to support the decision. 5 U.S.C., Section 706(2)(e). That standard and its applicability to the Board's review of AEC regulations is not at issue here.

narrow the statutorily mandated broad inquiry into environmental issues. That challenge falls squarely within the scope of permissible review of AEC regulations by this Board as promulgated in the Calvert Cliffs Memorandum.^{4/}

Early in this proceeding the Staff attempted to introduce into evidence the Detailed Environmental Statement for the limited purpose of proving compliance with Section 102(2)(C) of NEPA. At that time we opposed its introduction as premature and the Board agreed. Regardless of the disposition of this Motion, we feel that the Staff has properly acknowledged that one issue which is before this Board is whether the Staff has complied with Section 102(2)(C) of NEPA by preparing a sufficiently thorough and scientifically and technically adequate Detailed Environmental Statement. If this Motion is not granted the Board will not be able to resolve substantive non-radiological environmental issues. But it will and must be able to decide whether these non-radiological environmental issues have been adequately examined by the Staff or whether instead the Detailed Environmental Statement is a cursory and conclusory document which fails to fully investigate all environmental issues and thus is an inadequate justification for the decisions made by the Staff with respect to environmental protection.

^{4/} Appendix D could also be challenged by this Board under the standard that it is not a "reasonable exercise of the broad discretion given to the Commission" because any regulation which violates a statute (here the National Environmental Policy Act) is unreasonable and an abuse of discretion. See for instance Moss v. CAB, _____ F. 2d _____ (C.A. D.C., 1970); Citizens Committee for the Hudson Valley v. Volpe, 425 F. 2d 97 (C.A. 2nd, 1970); Wilderness Society v. Hickel, _____ F. Supp. _____ (D. D.C., 1970); Environmental Defense Fund v. Finch, 428 F. 2d 1083.

This inquiry into the legality of the Detailed Environmental Statement is similar to the inquiry permitted under the Calvert Cliffs Memorandum related to AEC regulations. If the Detailed Environmental Statement does not reflect sufficient examination of the relevant environmental considerations then the conclusions reached by the Staff on the basis of that Statement are arbitrary and capricious and beyond the Staff's authority. Environmental Defense Fund, Inc. v. Ruckelshaus, ___ U.S. App. D.C. ___, ___ F. 2d ___ (C.A. D.C., decided January 7, 1971); Greater Boston Television Corp. v. FCC (decided November 13, 1970) (C.A. D.C., No. 17,785 slip op. at 15-22); Medical Com. for Human Rts. v. SEC, ___ U.S. App. D.C. ___, 432 F. 2d 659, 673-676 (C.A. D.C., 1970); Moss v. CAB, ___ U.S. App. D.C. ___, 430 F. 2d 891 (C.A. D.C., 1970); Wellford v. Ruckelshaus, ___ U.S. App. D.C. ___, ___ F. 2d ___ (decided January 7, 1971) (C.A. D.C., No. 24,434). The measure of the legality of the Statement depends upon Section 102(2)(C) of NEPA.

Thus regardless of the disposition of this motion, the Board can and should set a date for a conference type hearing at which EDF can set forth the issues to be raised with respect to the legality of the Detailed Environmental Statement and also to outline the issues related to the radiological environmental

impact of the plant.

Respectfully submitted

Berlin, Roisman and Kessler
Counsel for Intervenor
Environmental Defense Fund

By *Anthony Z. Roisman*
Anthony Z. Roisman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of Environmental Defense Fund, Inc. for Determination of Environmental Issues; and Memorandum in Support of that Motion were mailed, postage prepaid, this 26th day of February, 1971, to the following:

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