IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

24,871

CALVERT CLIFFS' COORDINATING COMMITTEE, INC.,
NATIONAL WILDLIFE FEDERATION, and
THE SIERRA CLUB,

Petitioners,

v.

U.S. ATOMIC ENERGY COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

# REPLY BRIEF FOR PETITIONERS

Section 102 of the National Environmental Policy Act requires the Atomic Energy Commission to consider environmental values in all decisions to issue construction permits or operating licenses for nuclear power plants.

> Agencies such as the Atomic Energy Commission which now contend that they have no legislative authority to consider environmental values [see New Hampshire v. AEC, 406 F.2d 170 (CA 1st, 1969) cert denied 395 US 962] will be given the authority, the responsibility

and a directive do do so.[1] (Brackets added)

> Statement by Senator Jackson (115 Cong. Rec. (daily ed.) S 12114, October 8, 1970)

That decision was made by Congress with the knowledge that the Nation faced not only a growing demand for electric power but also a growing environmental crisis. S. Rep. 91-269, supra, pp. 4-6, 8-10, 12-17 (14A-16A, 18A-20A, 22A-27A). Nowhere in NEPA or its relevant legislative history is there a basis for the propositon that the AEC may independently reevaluate the national need for electric power[2]

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1/ The Senate Committee on Interior and Insular Affairs summarized this thought in S. Rep. No. 91-296 (91st Cong. 1st Sess) p. 14 (24A) (references are to the Addendum bound with Petitioners main brief):

> S. 1075, as reported by the Committee, would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular Federal agencies.

The final version of NEPA differed from S. 1075 but, as indicated subsequently, only in ways which strengthen Petitionrs argument here.

2/ The AEC does not consider that the plant could be denied a permit or license on the basis of health and safety considerations, that the plant could be subject to substantial periods when it is not in operation due to technical problems, that the plant might operate at a cost which would be prohibitive to the public which needs the power and similar relevant factors. Even this reason given to justify Appendix D, if valid, is not sufficiently substantiated on this record to establish that AEC has not acted arbitrarily and capriciously.

and use that re-evaluation as a basis for failing to adhere to the procedural requirements of Section 102 of NEPA.[3/] Yet it is clear from reading the AEC's rationale for adopting Appendix D (Jt. App. (Vol. I) 1-8) and its brief that an inordinate and illegal emphasis upon what the AEC has concluded is a national electric power crisis has infected its judgment and thus invalidated its actions.[4/]

In Section 102 of NEPA Congress required that the procedures for consideration of environmental values must be followed "to the fullest extent possible". This latter phrase requires compliance

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3/ In Udall v. FPC, 387 U.S. 428, 450 the Court responded to the Federal Power Commission's narrow emphasis on power needs in approving andhydro-electric power project:

> Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadronous fish for commercial and recreational purposes and the protection of wildlife.

4/ One Amici suggests (Indiana and Michigan Electric Company, et al., brief p. 49) that a statement by AEC Commissioner Ramey that Appendix D was "generally approved" by the Council on Environmental Quality was the equivalent of an administrative approval. Without exploring the possible unspoken problems which might attend a "general approval" nor questioning the validity of claim without more supporting data, we do feel constrained to indicate that the Council has refused to assume responsibility for policing the compliance of federal agencies with NEPA. See Hearings on Administration of the National Environmental Policy Act, before the House Subcommittee on Fisheries and Wildlife Conservation, Committee on Merchant Marine and Fisheries (1970) Part I, pp. 8, 12-13, 54.

with Section 102 unless "the existing law applicable to such agency's operations expressly prohibit or makes full compliance with one of the directives impossible." H. Conf. Rep. No. 91-765 (91st Cong., 1st Sess.) (115 Cong. Rec. H 12633, 12635) (59A,61A).[5/] The AEC places reliance upon Section 101(b) (Resp. brief, p. 15) which indicates that federal agencies "shall use all practicable means, consistent with other essential considerations of national policy" to meet the national objectives specified in that section. It does not, as the AEC argues, permit a deviation from the procedures in Section 102 which require consideration of environmental values in agency decisions. Instead it gives the agency guidance in reaching its decision once environmental values are fully considered.

I.

Petitioner's first argument challenges the validity of Paragraph 13 of Appendix D. (Jt. App. (Vol. I) 10). Under the Atomic Energy Act of 1954 following the review of an application for a construction permit or an operating license by the Regulatory Staff

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5/ One Amici suggests (Indiana and Michigan Electric Company, et al., brief pp. 47-48) that the phrase "to the fullest extent possible" indicates that Section 102 is really discretionary and cites Ely v. Velde, ____ F. Supp. ____ (E.D., Va., January 27, 1971) (2 E.R.C. 1185). However in that case the Court found a clear conflict between the language of the Safe Streets Act, under which the grant in question was to be made, and the language in NEPA. It was of course for just such a clear conflict which prohibited compliance with NEPA that Congress adopted the language "to the fullest extent possible". H. Conf., Rep. 91-765, supra (61A). It is only in that sense that Section 102 of NEPA is discretionary. No such statutory impediment exists in the instant case to prevent the AEC from complying with NEPA. See p. 3, fn. 4 supra.

of the AEC, the AEC will order a hearing to determine whether the permit or license should be issued. 42 USC Sec. 2239(a)[6/] This hearing is conducted by a single hearing officer or an Atomic Safety and Licensing Board and in either event represents an independent review of the AEC's Regulatory Staff conclusion that a permit should issue.

In paragraph 13 the AEC states that in these hearings no evidence will be introduced and there will be no consideration of the environmental consequences of the action unless an environmental issue is raised by a party. But Sec. 102(2)(c) of NEPA requires tha the detailed environmental statement "accompany the proposal through the existing agency review processes." There cannot be any doubt that the hearing is a part of the agency review process and is in fact the critical place at which an independent review of the regulatory staff's proposed issuance of a permit or license occurs.[7/]

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6/ Where an operating license is involved the AEC must order a hearing if requested by any party or an intervenor and may order a hearing even if no request is received.

7/ See Resp. brief, p. 43, fn. 31.

The AEC cannot lawfully exclude environmental considerations from this review process merely because no member of the public has lodged a protest. The provisions of Sec. 102 are, in the words of the S. Rep. No. 91-296, supra, p. 9 (19A), "action-forcing" on Federal agencies and do not require implementation by public intervention. 8/

In its response, 9/ the AEC relies upon the belief that the AEC staff will raise any environmental issue at a hearing if it is warranted. (Resp. brief, p. 43). But the purpose of the uncontested hearing is to review the work of the staff and the applicant. The Board cannot fully exercise its independent review of the staff

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8/ As the Court in Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608, 621 (CA 2nd, 1965) held the federal agency acting in the public interest has an affirmative obligation:

> In this case as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

See also Office of Comm. of United Church of Christ v. FCC, 138 U.S. App. D.C. 112, 115-116, 425 F.2d 543, 546-547 (1969); Environmental Defense Fund, Inc. v. United States Department of Health, Education and Welfare, 138 U.S. App. D.C. 381, 390 428 F.2d 1083, 1092 (1970); Power Reactor Development Corporation v. IUEW, 367 U.S. 396, 404 (1961).

9/ The AEC response also indicates that the notice of Hearing, although regulations governing it have not been amended, will in fact advise the public that environmental issues can be raised. (Resp. brief, p. 42). Petitioners are gratified that the AEC has adopted this suggestion but hope that it will be codified in existin regulations prescribing the content of hearing notices. See 10 CFR Part 2 Sections 2.104 and 2.703.

analysis unless it is free to consider environmental issues not raised by the Staff. The AEC also acknowledges, as they must, that Office of Comm. of United Church of Christ v. FCC, supra, Environmental Defense Fund, Inc. v. United States Department of Health, Education and Welfare, supra, and Power Reactor Development Corporation v. IUEW, supra, stand for the proposition that "an agency has responsibilities, apart from resolving the adversary contentions of the parties to its proceeding, for compiling an adequate record in support of its licensing actions." (Resp. brief, p. 46, fn. 34). If a hearing board decides to issue a permit or license that decision must be made in light of all relevant factors including those in Sec. 102 of NEPA. That decision of the Board is obviously without any support if part of the data upon which it is based (the detailed enviornmental statement and the studies and reports supporting it) is not before the board or even if the data is before the Board but the board is precluded from investigating it or making an independent judgment upon its adequacy. Udall v. FPC, supra.

II.

In paragraph 11(a) of Appendix D (Jt. App. (Vol. I) 10) the AEC prohibits any party from raising at a hearing any issues related to the non-radiological environmental consequences of the construction or operation of a nuclear power plant where the notice of the hearing

appeared in the Federal Register before March 4, 1971.[10/] The effect of this prohibition is to prevent consideration at AEC public hearings of the non-radiological environment consequences associated with the construction or operation of the 15 plants[11/] for which construction permits or operating licenses have been or may be issued after January 1, 1970 (the effective date of NEPA) but notices of hearing for which were published before December 4, 1970. Of these plants, 5 have either not begun hearings or are still involved in hearings and in either event no initial decision has been issued by the hearing board.[12/]

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10/ In fact, between December 4, 1970 (when Appendix D was published in the Federal Register) and March 4, 1971, a notice of hearing was published for only one plant and that notice, published on February 27, 1971, ignored the March 4, 1971 cutoff date. 36 F.R. 3837.

11/ See 1A-5A.

12/ The pending cases are In the Matter of Consolidated Edison Company (Indian Point, Unit 2); In the Matter of Consumers Power Company (Palisades, Unit 1); In the Matter of Consumers Power Company (Midlands, Units 1 and 2); In the Matter of Toledo Edison Company (Davis-Besse, Unit 1); and In the Matter of Long Island Lighting Company (Shoreham, Unit 1).

With respect to every one of these nuclear power plants, whether hearings have been concluded or not, the major federal action, issuance of the permit or license, occurred or will occur after January 1, 1970. Every Court which has faced the issue has held that where major federal action occurs after January 1, 1970, the requirements of Sec. 102 must be met, i.e., consideration of the environmental consequences of the action must occur as a part of the agency decision on whether to take the action. Wilderness Society v. Hickel, _____ F. Supp. _____ (1 ELR 20042) (D. D.C., 1970); Sierra Club v. Laird, _____ F. Supp. _____ (1 ELR 20085) (D. Ariz., 1970); Environmenta Defense Fund v. Corps of Engineers, 2 ERC 1260 (E.D., Ark., 1971); Environmental Defense Fund v. Corps of Engineers, 2 ERC 1173 (D. D.C., 1971).[13/]

The AEC contends that under NEPA it had the flexibility to comply with the requirements of Sec. 102 on a gradual basis, and that it did not have to consider the environmental consequences of the actions at all public hearings held after January 1, 1970. (Resp. Brief, p. 49). The AEC justifies this decision on the basis of its conclusion that there is a national power crisis the solution to which will be delayed by consideration of non-radiological environmental

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13/ The citation by Amici to Brooks v. Volpe, 319 F. Supp. 90 (W.O., Wash., 1970); Investment Syndicates v. Richmond, 1 E.R.C. 1713 (D. Ore., 1970); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp., 238 (M.D., Pa., 1970), is irrelevant here because in those cases the court found that the major federal action occurred prior to January 1, 1970. The AEC acknowledges in Appendix D, Paragraphs 1 and 2 (Jt. App. (Vol. I) 9) that the issuance of construction permits and operating licenses is major federal action. Equally irrelevant is the suggestion by one Amicus that NEPA should not be applied to any plants which were substantially constructed before January 1, 1970. (Consumers Power, brief, pp. 11-19). The major federal action is the issuance of the license and not the construction of the plant. The extent of construction will effect the feasibility of alternatives but can not prevent application of NEPA.

issues at the AEC hearings.[14] The AEC has focused on one consideration, a need for power, and in the name of that consideration has refused in its public hearings to examine the full range of environmental consequences of the issuance of construction permits and operating licenses for nuclear power plants.[15] But NEPA was enacted to prevent any further federal actions being taken on such narrow grounds without consideration of the environmental consequences of the actions.

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14/ The AEC still does not explain how including environmental issues in all of its hearings conducted after January 1, 1970, would unnecessarily delay issuance of the permit or license. In part the hearing board could presumably set a time limit on consideration of these issues if evidence were introduced that showed the plant was an important and reliable component in meeting an unavoidable power need. See in particular 10 CFR Part 2, Section 2.718(e) and (l) which specify the broad powers of the hearing board in this area. Furthermore, the AEC has not explained why it was necessary to wait until December 4, 1970, to develop procedures for including environmental issues in its hearing. By April 2, 1970, it had developed procedures for preparation of detailed environmental statements, a far more complex process inasmuch as it could not be included in an already existing procedure as is the case with hearings. The staff and applicant will of course be ready for the hearing inasmuch as they will have completed preparation of the applicants environmental report and the detailed environmental statement as required even in the April 2, 1970, Appendix D. Nothing in the December 4, 1970 Appendix D related to hearings involves any detailed procedures for which months of effort would be required. In short, on this record the AEC, even if the need for power taken alone were a relevant consideration, has not established how consideration of environmental issues at hearings on or after January 1, 1970, would have prevented an equally prompt response to that need.

15/ The AEC refers to the fact that it will require applicants to comply with non-radiological environmental standards imposed on the plant by state and federal authorities (which compliance, of course, is already required by the state or federal authority) as evidence that it is adequately protecting the environment. (Resp. brief, pp. 53- 55) But what the AEC ignores is that the purpose of NEPA is to require investigation of the environmental consequences (consequences which may occur even though standards are met) of proposed agency action, and include consideration of those consequences in the agency's decision making processes.

Amici suggest another excuse which the AEC might have offered for their refusal to consider at these public hearings the environmental consequences of the issuance of permits and licenses based upon a novel reading of Sec. 103 of NEPA. (Indiana and Michigan Electric Company, et al., brief, pp. 25-26; Consolidated Edison, brief, pp. 14-18; Duke Power Company, et al., brief, pp. 6-7). Of course, the reasonableness of the AEC decision may not be decided on the basis of reasons offered by counsel for the AEC, National Air Carrier Assoc. v. CAB, ___ U. S. App. D. C. ____ 436, F.2d 185, 195 (1970); Public Serv. Comm. of State of New York v. FPC, ____ U.S. App. D.C. ____, 436 F. 2d 904, 906 (1970), or by counsel for the Amici. It is clear why the AEC did not rely upon Sec. 103. That section allows an agency until July 1, 1971, to recommend statutory changes to the President if its existing statute or statement of purposes are inconsistent with NEPA. The Conference Committee Report on NEPA described the purpose of Sec. 103 as follows: (H. Conf. Rep. No. 91-765, supra (61A)):

> Section 103 thereby provides a mechanism which shall be utilized by all Federal agencies (1) to ascertain whether there is any provision of their statutory authority which clearly precludes full compliance with the bill and (2) if such is found, to recommend changes in their statutory authority which will enable full compliance with the bill. In conducting the review noted above, it is the understanding of the conferees that an agency shall not construe its existing authority in an unduly narrow manner. Rather, the intent of the conferees is that all Federal agencies shall comply with the provisions of section 102 "to the fullest extent possible," unless, of course, there is found to be a clear conflict between its existing statutory authority and the bill.
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> (Emphasis added)

Not only has the AEC certified that there are in fact no inconsistencies in its statute which prevent compliance with Sec. 102 of NEPA[16/] but in fact because the AEC already had detailed regulations for the conduct of hearings on health, safety and radiological environmental matters (AEC Rules of Practice, 10 CFR Part 2) it was a simple matter to permit evidence to be introduced in the hearing on non-radiological environmental issues. Section 103, as noted above, provided an agency with a means to suggest modifications in its statute if a review of its statutes, regulations and policies indicated that a change was required. Absent any statutory impediment Section 102 requires immediate compliance with NEPA. The AEC correctly refused to place reliance upon this section.

In Environmental Defense Fund v. Corps of Engineers, 2 E.R.C. 1260 (E.D., Ark., 1971) dam construction was halted for failure to comply with NEPA. The Corps had proposed a "detailed environmental statement" which the Court rejected as inadequate. The Court's

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16/ The President in Paragraph 2(d) of Executive Order 11514 (53A-64A) required that the report be received by September 1, 1970. On October 2, 1970 the AEC advised the Council on Environmental Quality that it had completed the Section 103 analysis and had no amendments to recommend to its statute. Hearings before the House Subcommittee on Fisheries and Wildlife Conservation Committee on Merchant Marine and Fishers, "Administration of the National Environmental Policy Act", December 8, 1970, p. 207.

opinion represents an excellent application of the thesis which we urge - namely that factors such as the need for power, the delay which could be caused by a full study of the environmental consequences of a project, etc. must be considered within the procedures specified in Section 102 on a case by case basis and not as isolated factors which excuse compliance with Section 102.

The following quotations from the Court opinion are particularly instructive on this point:

> The Court is of the opinion that the defendants may approach the problem of the ongoing project differently from a new project, but the end product should be essentially the same in both cases. For instance, the evidence indicates that the defendants will require, by their own regulations and policies, elaborate hearings spaced out over a long period of time (indeed, several years) with respect to the environmental impact of new projects. NEPA would not require the same approach with respect to ongoing projects. Any reasonable procedure would be adequate so long as the "detailed statement" requirements of the Act, along with the other applicable provisions of § 102, are complied with. 2 ERC, p. 1265.

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> The Court is not here stating that an environmental impact statement, as required by §102(2)(C), would be inadequate simply because the defendants and the Council on Environmental Quality had not identified and developed the methods and procedures to quantify such values. The NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had an environmental impact while awaiting compliance with §102(2)(B). It would suffice if the statement pointed out this deficiency. The decisionmakers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria. 2 ERC, p. 1267.

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At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then existing decisionmaking responsibilities or to take away any then existing freedom of decisionmaking, but it certainly intended to make such decisionmaking more responsive and more responsible.

The "detailed statement" required by §102(2)(C) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed the Congress, to all known possible environmental consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the §102 statement should set forth these contentions and opinions, even if the responsible agency finds no merit in them whatsoever. Of course, the §102 statement can and should also contain the opinion of the responsible agency with respect to all such viewpoints. The record should be complete. Then, if the decisionmakers choose to ignore such factors, they will be doing so with their eyes wide open. 2 ERC , p. 1267.

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The Court is not here stating that such a collection or study would be required in order to comply with NEPA. But the opinions of such qualified professionals as Dr. Hubbs and Dr. Emlen should be made a part of the impact statement. The decisionmakers can then determine whether to proceed without such a study or to postpone the project while such study is being undertaken. 2 ERC, p. 1269.

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But again, the NEPA attempts to establish a procedure which will insure that that decisionmaker is aware of all known alternatives and possible consequences at the time the decision is made. 2 ERC, p. 1271.

III

In Paragraphs 11(a) and 11(b) of Appendix D (Jt. App. (Vol. I) 10) the AEC prohibits the hearing board from considering a wide range of environmental consequences which occur from the construction and operation of nuclear power plants. First, no consideration can be given to environmental consequences associated with water quality covered by Section 21(b) of the Federal Water Pollution Control Act (33 USC Section 1171(b)). Second, if any state, regional or federal non-radiological environmental standard or requirement has been established then so long as the applicant is able to meet the standard or requirement, it will be conclusively presumed that there are no adverse environmental consequences with respect to matters covered by those standards. 17/

However, no provision in the Federal Water Pollution Control Act (33 USC Section 1151 et seq.) nor in any of the state standards or requirements referred to in this proceeding provide that compliance with the standard will mean that there will be no environmental consequences of the project, nor does the Federal Water Pollution Control Act or other state standards involve the exhaustive

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17/ Not only are the comments of federal and state agencies precluded from the hearing but the board is not permitted to receive any evidence adduced by or consider any contentions raised by the public intervenors. This clearly conflicts with the spirit of this court's decisions in Medical Committee for Human Rights v. S.E.C., ____ U.S. App. D.C. ____, 432 F 2d 659, 673-674 (1970), and Office of Communications of the United Church of Christ v. FCC, with Executive Order 11514 (63A) and with the legislative history of NEPA. S. Rep. No. 91-296, supra, p. 8 (18A). Thus, by prohibiting

case by case review and balancing of factors required by NEPA. All of these standards, unlike NEPA, involve the establishment of general requirements which cannot consider the myriad of factors associated with a specific case.[18/] NEPA deals with specific

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the public from raising environmental issues in hearings noticed before March 4, 1971 and from raising any issue with respect to the environmental consequences of those aspects of the plant covered by state or federal standards, the AEC is in effect denying the public standing in its proceedings. We had hoped that in Scenic Hudson Preservation Conference v. FPC, supra and Office of Communication of the United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 354 F. 2d 994 (1966) the standing of public intervenors to raise public interest issues in administrative proceedings had been favorably resolved.

18/ Respondent's brief contains an excellent example of why 33 USC Section 1171(b) does not supercede pro tanto the requirements of Section 102 of NEPA. On page 37 (fn. 27) of their brief, Respondents correctly observe that Section 21(c) of the Water Quality Improvement Act of 1970 (33 USC Section 1171(c)) provides that the Act is not intended to limit any other provision of law relating to water quality, such as the Fish and Wildlife Coordination Act (16 USC 661 et seq.). Sections 662(a) and (b) of that Act specifically require that the United States Fish and Wildlife Service fully investigate and report upon the environmental consequences to fish and wildlife of any project to be federally licensed which will involve the control or modification of any stream or body of water. Obviously that report will be concerned with environmental consequences related to water quality. The existence of a water quality certificate does not prevent the Fish and Wildlife Service from considering the environmental consequences of the water quality. The Army Corps of Engineers includes in its proposed permit program (Paragraphs 209.131(d)(5), (g) and (j)) consideration of environmental consequences related to water quality, even where a water quality certificate exists. 35 F.R. 20005, 20006, and 20008. In fact the Corps has apparently always considered the environmental consequences of proposed permits even where the state authority certifies that there has been compliance with the state water quality standards. See Arkansas Power and Light, brief, pp. 18-19.

cases and in each case environmental consequences must be weighed with other factors to decide if the federal action should be taken. [19] NEPA was enacted because Congress realized that despite the multitude of federal and state environmental standards, there was no comprehensive program for consideration of environmental consequences on a case by case basis where such consideration would allow the decision maker to fully understand the price that was being paid for the action being taken. S. Rep. No. 91-296, supra, pp. 12-17, 20 (22A-27A, 30A). [20]

Section 102(2)(c) of NEPA describes the role which other federal and state agencies will play in the decision making processes of an agency which contemplates major federal action significantly affecting the environment:

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19/ Petitioners do not suggest that AEC review the adequacy of any federal or state standard any more than they suggest that setting the standard involved a NEPA type consideration of the environmental consequences of the particular project or of the balancing of factors required by Sections 101 and 102 of NEPA.

20/ Appendix D does not attempt to differentiate in any way between state, regional or federal standards. It is irrelevant to the AEC how these standards were set, what participation the public had in the process, what factors were considered, etc. In our view where another agency has become obligated to conduct what is in effect a NEPA review of the project, as would be the case with the Corps of Engineers if it were to comply with NEPA rather than its proposed and probably illegal permit program (35 Fed. Reg. 20005), it is appropriate and desirable for the agencies to work out a coordinated program to avoid duplication. By the same token the requirements of Section 102(2)(A) of NEPA clearly contemplate that the AEC should avoid conducting duplicative studies where a responsible federal or state agency has the necessary data available. But this is obviously quite different than the Appendix D approach which, instead of using the data of state and federal agencies, actually excludes it from the

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies...shall accompany the proposal through the existing agency review processes;...

Thus the views and comments of agencies with special expertise are to be solicited and considered by the agency in reaching its decision. There is nothing in the statute to indicate that because the federal or state agency with special expertise sets environmental standards it is relieved of the obligation to comment upon the environmental impact of the proposed action [21] nor that the recipient agency is relieved of the obligation to include the comments in its review process and consider them in reaching its decisions.

The AEC and several Amici argue that it is significant that Section 102(2)(c) in an earlier draft contained the requirement that "findings" be made by federal agencies with respect to the criteria in subsections (i)-(v) of 102(2)(c)

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decision making process and accepts the existence of a standard as a conclusion that no adverse environmental consequences will occur.

21/ In H. Cong. Rep. 91-765, supra (61A) reference is made to the fact that the state agencies from which comments are to be obtained are to be those agencies which are "primarily responsible for development and enforcement of environmental standards".

and that as finally adopted the word "findings" was replaced by the phrase "detailed statement" and the obligation to solicit comments from federal and state agencies was added. As the AEC recognizes (Resp. brief, p. 24-25) the clearest explanation of this change was given by Senator Muskie who said in pertinent part (115 Cong. Red. (daily ed.) S12111, October 8, 1970):

> [t]he proposed compromise language developed for section 102(c) [NEPA] clearly indicates the extent to which the polluter is involved in determining environmental effects. This language eliminated the requirement that a "finding" be made but provides that environmental impact be discussed as a part of any report on legislation, or any decision to commence a major activity. The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be.

That statement reinforces our view that the agency with special expertise is expected to comment on the environmental impact of proposed action regardless of compliance with an environmental standard and that the AEC is obligated to consider those comments in its decision making processes.[22/] It is not the AEC responsibility to decide alone what is the environmental impact of the proposed action but to consult with agencies which have special expertise and to solicit and consider the views of

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22/ The material on pages 33-37 of Respondent's brief relating to the question of whether a federal agency must prepare a detailed statement with respect to water quality matters is not really at issue here. The detailed statement must have attached to it the comments of the state and federal

the public. 23/

The AEC also places reliance on Section 104 of NEPA. But that section is no more and no less than a statement that while each agency complies with Section 102 of NEPA it shall not authorize any project which does not meet, as a minimum,

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fn. 22 cont'd.

water quality agencies and those comments must be included in the agency review processes and be considered in the agency decisions. The AEC must still do the balancing of factors required by Sections 101 and 102 of NEPA on a case by case basis. Apparently the AEC has confused the obligation to prepare a detailed statement with the obligation to consider all relevant factors (including those contained in the detailed statement and comments attached to it) in its decision making process.

23/ In Pennsylvania Environmental Council, Inc. v. Bartlett, supra pp. 248-249, the Court in dicta finds that Section 23 U.S.C. Section 117(a) providing for the deferral by the Secretary of Transporation to state highway departments with respect to all of the Secretary's responsibilities for investigating the planning, construction, etc. of secondary highways conflicts with a NEPA requirement that there by an independent analysis of the environmental consequences of the highway before approval of the grant. Such a conflict requires application of Section 103 of NEPA. Here, of course, there is no conflict between the Atomic Energy Act and NEPA. To the extent the Court in Bartlett suggests that a DOT consideration of environmental consequences should not be made under NEPA, we respectfully suggest that the Court is in error. In the subsequent decision by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, No. 1066, U.S. Supreme Court, (March 2, 1971) a primary highway was involved but the Court suggests that generally the Secretary's obligation to investigate the environmental impact of highway projects is broader than the Secretary had previously assumed.

validly established environmental standards and requirements including the requirement to obtain certificates from federal and state agencies. Nothing in that section or in any of the legislative history cited by Respondent or the Amici even suggests that certification by a federal or state agency excuses the AEC from obtaining from the certifying agency comments on the environmental impact of the project or from considering those comments in its decision making processes.

The AEC relies upon the language of Section 104 of NEPA and the legislative history of NEPA and the Water Quality Improvement Act of 1970, particularly floor debate by several leading sponsors of the legislation in support of its position (Resp. brief, pp. 20-38.[24/] As noted above, that legislative history merely establishes that the AEC may not license a project which does not at least meet state water quality standards and that the AEC need not include in the detailed environmental statement

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24/ The AEC also suggests (Resp. brief, p. 29) that the rule of review of AEC regulations laid down in the matter of Baltimore Gas and Electric Company (Jt. App. (Vol. II) 26-30) will allow the case by case challenge to the general rules in Appendix D. But under that decision the challenger will have the heavy burden of rebutting the presumptive correctness of an AEC regulation when under NEPA there should be no such impediment to consideration of environmental consequences. See the recent opinion of the hearing board Chairman In the Matter of Consolidated Edison (Docket No. 50-247) transcript of hearing March 24, 1971, (pp. 698-704) where he holds that in such a challenge the "burden [is] on the challenger to the regulation" (p. 702).

a discussion of water quality.[25] It does excuse the AEC from considering comments from state or federal agencies or the public on environmental consequences related to water quality nor does it excuse the AEC from considering those comments in its decision. The unique aspect of NEPA is the requirement that each federal decision with respect to specific activities may be made only after a full consideration of the goals in Section 101 and the areas of investigation in Section 102. Thus the issuance to a nuclear power plant of a certificate of compliance with a state water quality standard is neither a certificate that the plant's operation will not have an adverse environmental impact nor that in applying the standard to the plant the investigation and balancing of factors required by NEPA have been conducted.[26] In this regard compare 33 USC Section 1160(c)(3) which prescribes the factors to be considered in setting water quality standards with Sections 101 and 102 of NEPA.

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25/ The AEC in fact does discuss water quality in its detailed environmental statements. Paragraph 6 of Appendix D (Jt. App. (Vol. I)9).

26/ In fact the issuance of the certificate occurs automatically if there is reasonable assurance that water quality standards will be met. There is no consideration of the environmental impact of the proposed project nor of the alternatives to it or its social value. 33 USC Section 1171(b). Also in the recent Draft Environmental Statement prepared by the AEC with respect to the Vermont Yankee Nuclear Power Corporation (Docket No. 50-271) the AEC exhibits some reluctance to apply state permit requirements. The draft statement on

Senator Jackson in his comments on the changes made in S. 1075 summarized the position which we urge here (115 Cong. Rec. (daily ed.) S. 12113 (October 8, 1970)):

> Subsection 102(b) requires the development of procedures designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment that the impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other stated consideration of national policy, that short-term uses are consistent with long-term productivity, and that any irreversible and irretrievable commitments of resources are warranted.
>
> The agreed-upon changes mentioned previously would change the language of some of these requirements, but their substance would remain relatively unchanged. 27/

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fn. 26 cont'd.

p. 28 discusses the fact that operation of the plant as planned will violate the water use permit by discharging 5 to 10 cubic feet per second of heated water in excess of the thermal limits set by the permit. Rather than enforce the permit (as Appendix D requires) the AEC attempts to excuse the non-compliance by demonstrating that only a small percentage of the water discharged will violate the permit.

27/ This latter comment is particularly relevant in light of the Respondent's suggestion that the changes in NEPA may have somehow invalidated the significance of S. Rep. No. 91-269, supra (Resp. brief, p. 25, fn. 16).

IV

In Appendix D the AEC has recognized the validity of Petitioner's argument that where a nuclear power plant obtained a construction permit before January 1, 1970, and will ultimately have to obtain an operating license to which NEPA will be applicable, steps should now be taken to ensure consideration of the environmental consequences before further construction of the plant makes it impossible as a practical matter, to modify the plant or its method of operation. Thus the AEC has required that all construction permits "whenever issued" shall include a condition that any validly imposed state or federal non-radiological environmental standard or requirement which is applicable to the plant be observed by the applicant (paragraph 9, (Jt. App. (Vol.1) 9)).[28/] We have no quarrel with this provision. The AEC also requires that a detailed environmental statement with respect to each plant for which a construction permit has been issued be prepared even before the time for filing such

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28/ Of course the applicant was already bound by the federal or state law involved to comply with the environmental standard or requirement but the reaffirmation of this obligation in the AEC construction permit will not be harmful. Also with respect to water quality standards the provisions of 33 USC Section 1171(b) provide some leeway with respect to when the state water quality certificate must be obtained with respect to plants already under construction.

a statement in conncection with an application for an operating license. We have no quarrel with this provision. However, the AEC refuses to utilize the data contained in or attached to the detailed environmental statement as a basis for modification of the construction permit. It also refuses to permit meaningful consideration of whether further construction of the plant should be halted pending the completion of in depth environmental studies. We have substantial quarrel with these latter two positions.

Petitioners are not, as one Amicus suggests (Indiana and Michigan Electric Company, et al, brief 53-66), seeking retroactive application of NEPA. In every case involved the requirements of NEPA will have to be met at the operating license stage. Petitioners want to make the NEPA review that must eventually occur as meaningful as possible. Respondents and the Amici would be willing to permit the passage of time and further construction of the plant to effectively foreclose environmentally desirable alternatives to the plant design and operation. A reading of the arguments in the briefs by Amici (particularly Consumers Power Company, brief, pp. 11-19), make clear that applicants for operating licenses intend to argue that the extent to which construction of a nuclear plant has occurred will limit the extent to which NEPA will be applied and the extent to which environmental protections will be incorporated into the plant design and operation.

In paragraph 11 of its guidelines for implementation of NEPA the Council on Environmental Quality has addressed this very problem and indicated that where further major federal action will occur on previously authorized projects the agency should "to the fullest extent possible" (i.e. unless prohibited by their statute (see pp. 3-4 , infra)) shape future major actions "so as to minimize adverse environmental consequences." (35 Fed. Reg. 7392 (May 12, 1970); 36 Fed. Reg. 1400 (January 28, 1971). If the AEC will not now consider [29/] whether construction of the plant should be halted while the environmental consequences of the plant's present design and location

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29/ The consideration should be in the form of a proceeding where the public, applicant and other federal and state agencies can submit their views. This need not be a hearing before a board at which oral testimony is adduced. What we seek is a forum for consideration of these views at which the applicant will have the burden to establish that further construction of the plant before the investigation under NEPA has occurred is not contrary to the goals of NEPA. As one Amicus indicates (Duke Power, et al, brief, pp. 45-46) the most effective way to consider whether the full review required by law should delay continued construction of the plant is to do it on a case by case basis as is now required with respect to the review of antitrust matters in Section 105(c)(8) of the Atomic Energy Act as amended by P.L. 91-560. See also Environmental Defense Fund v. Corps of Engineers, supra at pp. 1268, 1269.

are assessed and weighed against other relevant factors[30] and will not modify the construction permit to the extent that the environmental assessment contained in the detailed statement warrants, it will not in any sense minimize, to the fullest extent possible, the adverse environmental consequences of the plant.

Much of the AEC and Amici argument is addressed to allegations that power needs and the costs of delays would make halting construction and imposition of modifications in the construction permit undesirable. Those issues are not relevant in this proceeding. Petitioners do not seek from this Court any relief which will in and of itself delay the construction of any nuclear power plant or modify the construction permit of any plant.[31] Petitioners seek an opportunity

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30/ The AEC suggests that consideration of whether to issue an order to show cause can be made on the basis of present AEC regulations (Resp. brief, p. 61). But those regulations as written do not explicitly indicate that the kind of environmental concerns involved here would be a relevant basis for the issuance of a show cause order nor that such an order will issue in all cases.

31/ Petitioners do request that the backfitting requirement of Section 50.109(a) of 10 CFR Part 50 be amended to allow backfitting of systems which will improve environmental protection. But even then no practical modification of the construction permit would occur until the AEC had decided that backfitting was required in a specific case.

to have the AEC decide whether construction should be halted and to decide whether the construction permit should be modified. At that time the alleged need for power and the cost of delay or modification in the construction permit would be relevant considerations as well as evidence of probably adverse environmental consequences, narrowing of available alternatives and all other relevant factors in Sections 101 and 102 of NEPA.

With respect to Petitioners argument for backfitting, the AEC suggests that the brevity of the argument shows a lack of seriousness (Resp. brief, p. 62). In fact the brevity indicates Petitioners confidence in the argument. As noted above the AEC is charged by the Council on Environmental Quality to minimize adverse environmental consequences to the fullest extent possible. Backfitting would provide an additional measure of protection and is clearly possible as shown by existing AEC regulations. NEPA requires that an agency utilize the maximum effort to minimize adverse environmental consequences of its actions and the AEC offers no legally valid excuse for its failure to consider in each case whether backfitting of technological advances should be required. The AEC would of course retain the discretion to decide whether the environmental benefits to be obtained by backfitting, warrant the cost which would be incurred. Here again we marvel at the AEC's

reluctance to use the kind of discretion which NEPA has given to it -- i.e. the discretion to decide on a case by case basis what action will be taken in light of the data obtained in the thorough review and analysis required by NEPA.

## Conclusion

Numerous factual allegations are contained in the briefs of the Amici which suggest that as to their particular nuclear power plants there is really no need to fully apply the procedures in Section 102 of NEPA. Were this the full hearing on environmental consequences of these nuclear power plants which we urge this Court to require, we would have much to say about the wisdom of the proposed issuance or modification of those construction permits and issuance of those operating licenses. Obviously this is not the forum for that exploration.

But the variety of relevant factors involved in assessing the wisdom of allowing construction or operation of these plants and the variety of state and federal standards and reviews involved underscores, in our opinion, the need to consolidate in one public proceeding a thorough consideration of the environmental consequences of the proposed project, unavoidable adverse consequences, alternatives to the proposal, the rela-

tionship between short-term uses and long-term productivity, irreversible and irretrievable commitments of resources; and all of this to be weighed with the factors in Section 101 of NEPA by an independent hearing board which, with the benefit of views from federal and state agencies and the public, will make the decision to issue or not to issue the requested permit or license. To the extent that other agencies have conducted thorough reviews of those matters their comments with supporting data will provide invaluable assistance to the hearing board and will help make the hearing both meaningful and brief.

Despite apparent fears by the Amici, the Petitioners and other environmentalists are unalterably opposed to unnecessary delay in the decision to issue construction permits or operating licenses. They also lack the resources to intervene in every NEPA hearing and their decision to intervene will depend in part upon the thoroughness of the reviews and studies conducted prior to that hearing and included in or attached to the detailed environmental statement. If those studies and reviews are adequate and reveal no substantial problems those who devote themselves to protecting and enhancing the environment will not waste their time and effort on the project and applicants with such projects should welcome the opportunity that NEPA provides for a complete investigation of all relevant environmental factors.

This litigation does not involve an attempt to needlessly delay or interfere with the development of nuclear power. It is essentially involved with the procedural rights and protections guaranteed to the public by the National Environmental Policy Act. We urge this Court to apply the clear language of NEPA and to overturn those portions of Appendix D which prevent the full compliance with the requirements of NEPA.

Respectfully submitted,

BERLIN, ROISMAN & KESSLER

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| CALVERT CLIFFS' COORDINATING COMMITTEE, INC.<br>NATIONAL WILDLIFE FEDERATION, and<br>THE SIERRA CLUB,<br><br>Petitioners, | ) | |
| v. | ) | No. 24, 871 |
| U.S. ATOMIC ENERGY COMMISSION,<br>UNITED STATES OF AMERICA,<br><br>Respondents. | ) | |

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 1971 a copy of the attached Reply Brief in the above-captioned proceeding was served on

Marcus A. Rowden, Solicitor
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