



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. STN 50-518
(Hartsville Nuclear Plants)	STN 50-519
Units 1A, 2A, 1B, and 2B))	STN 50-520
)	STN 50-521

NRC STAFF BRIEF IN OPPOSITION
TO EXCEPTIONS OF WILLIAM N. YOUNG
ET AL. TO THE LICENSING BOARD'S
DECISION ON MOTION FOR SUMMARY
DISPOSITION DATED OCTOBER 31, 1978

I. Summary of NRC Staff Positions

Issues intervenors attempt to raise here are foreclosed as having been decided by this Board. Even assuming these issues are not foreclosed, intervenors have failed to raise genuine issues of fact in accordance with the requirements of 10 CFR 2.749(b). There is no factual basis in this record to impose an operating license condition at the construction permit stage.

II. Statement of the Case

On April 28, 1977, the Licensing Board in this proceeding issued an initial decision authorizing the issuance of construction permits.^{1/}

^{1/} Tennessee Valley Authority, (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), LBP-77-28, 5 NRC 1081 (April 28, 1977), (hereafter initial decision).

At pages 1106-07 of the initial decision, the Licensing Board discussed the location of the discharge diffuser as affected by the environmental impact on an endangered species, the lampilis orbiculata. Two locations were considered. The Licensing Board found the "downstream location" environmentally acceptable but stated that the record with respect to the "upstream location" was incomplete because the Department of Interior had not approved that location. The Licensing Board found the upstream location acceptable provided it was approved by the Department of Interior.

The Licensing Board's initial decision was affirmed by the Appeal Board except with respect to the downstream and upstream locations.^{2/} In ALAB-463, this Board reversed the Licensing Board's approval of the upstream location. This Board stated that if the Applicant consulted with the Department of Interior and received the Department's views with respect to the upstream location, they could petition the Licensing Board for approval of that location. This Board further directed that if such a petition were filed, the Licensing Board should treat it in accordance with the principles enunciated in ALAB-463 and should take into account any future decisions of the federal courts under the Endangered Species Act.^{3/}

^{2/} Tennessee Valley Authority, (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, (March 17, 1978). (hereafter ALAB-463).

^{3/} This Board noted that Hill v. TVA, 549 F.2d 1064, (6th Cir. 1977) was at that time pending before the U.S. Supreme Court. That case was decided by the U.S. Supreme Court on June 15, 1978. 98 S.Ct. 2279.

In ALAB-463, this Board reserved decision as to the correctness of the Licensing Board's approval of the downstream location for the discharge diffuser. On March 29, 1978, this Board granted TVA's motion to defer the schedule for submission of briefs and written sworn testimony with respect to the downstream location of the discharge diffuser until the 30th day following the rendition of the Licensing Board's decision on TVA's petition with regard to the upstream location. This Board also provided that if the decision on the upstream location were favorable to TVA, it would entertain a motion that the submission concerning the downstream location be further deferred to await the outcome of the review of the decision on the upstream location. Consideration of the downstream location therefore, is not relevant to these proceedings.

On March 29, 1978, TVA filed a motion for summary disposition on the acceptability of construction of the discharge diffuser at a point between Dixon Island and the upstream end of the mussle bed (the upstream location).^{4/}

^{4/} The Licensing Board gave the parties ample opportunity to address the issues. On June 7, 1978, Intervenor's filed their answer in opposition to the Applicant's motion. Also on June 7, 1978, the NRC Staff filed its response in support of the Applicant's motion. On June 21, 1978, the Applicant filed a motion for leave to reply to the answer of the Intervenor's to the Applicant's motion for summary disposition. On July 6, Intervenor's filed a pleading entitled "Answer of Intervenor's, William N. Young, et al., to Applicant's Motion, dated June 21, 1978, for Leave to Reply to Intervenor's Answer to Applicant's Motion for Summary Disposition". By Memorandum and Order dated July 6, 1978, the Licensing Board granted the Applicant's motion for leave to reply to the answer of the Intervenor's. By letter dated July 14, 1978, the Applicant advised the Board that the brief filed by the Applicant in support of its June 21, 1978 motion for leave to reply to the answer of Intervenor's to Applicant's motion for summary disposition was intended to constitute TVA's reply. On August 14, 1978, with permission of the Licensing Board, Intervenor's filed a "Further Response of Intervenor's, William N. Young, et al. to Applicant's Motion for Summary Disposition on the Discharge Diffuser Location Issue".

On October 31, 1978, the Licensing Board granted TVA's motion for summary disposition, approving construction of the discharge diffuser at the upstream location. On November 15, 1978, Intervenors filed their exceptions to the Licensing Board's decision and on December 18, 1978 filed their brief in support of exceptions.

III. Issues Raised By Intervenors
Have Been Finally Determined

A. Construction Impacts

Section III of Intervenors' brief is entitled "IMPACTS OF CONSTRUCTION." At pp. 4-7, they discuss Exceptions 1 and 2 and end with a paragraph which reads as follows:

Subject to this Board's acceptance of the compromise monitoring plan as stated above, Intervenors withdraw Exception 2 and pursue Exception 1 only as to effects of operation of the discharged diffuser.

By "compromise monitoring plan," the Staff assumes that Intervenors are referring to the monitoring plan approved by the parties and accepted by the Licensing Board in its October 31, 1978 Decision on Motion for Summary Disposition. In Intervenors' brief at pp. 5 and 6, they state that their agreement that there are no longer any genuine issues of material fact regarding construction effects of the upstream diffuser location is conditioned on the agreement of all parties that dredging during construction will not result in deposition of sediment on the Dixon Island mussel bed to a thickness in excess of one-fourth inch. The monitoring plan was agreed to by all parties and accepted by the Licensing Board with a minor modification not relevant here (p. 7,

Licensing Board's October 31, 1978 Decision on Motion for Summary Disposition). This is not the place or the time for Intervenors to take exception to a provision of the plan they agreed to before the Licensing Board.

B. Impacts of Operation

The rest of Intervenors' brief addresses alleged error by the Licensing Board in assessing the impacts of heated water, releases of radiation, and environmental impact during operation of the facility. It is the Staff's position that these issues are not available to Intervenors because they were finally determined by this Board in ALAB-463.

In paragraph 110 of the initial decision (5 NRC at 1108), the Licensing Board found, in response to Intervenors' contention, that radiological releases from the plant would not produce significant adverse effect on the mussels in the Cumberland River. This Board (ALAB-463, 7 NRC at 360-1) found that the Licensing Board was justified in relying upon the expertise of Dr. B. G. Blaylock with respect to the impact of radiological releases and that none of the Intervenors' expert witnesses on this subject had expertise anywhere near as relevant as that of Dr. Blaylock (p. 361, ALAB-463).

At pp. 361-362 of ALAB-463, this Board stated:

"C. Nonradiological Effects and Location of the Discharge Diffuser

Intervenors take the position that, even though their contention on mussels only addressed harm that might flow from radiological releases from the plant, the

Licensing Board had an independent obligation under Section 7 of the Endangered Species Act to consider all possible adverse effects upon the mussels stemming from the construction or operation of the plant. They are plainly correct. By its express terms, Section 7 obligates the Commission to insure that the actions it authorizes do not jeopardize the continued existence of an endangered species. It does not matter what the source of the jeopardy might be. And the section may not be reasonably interpreted to limit the scope of the Commission's duty to resolving contentions raised by the parties. Once informed that an endangered species lived in the vicinity of the plant, the Licensing Board was obligated to examine all possible adverse effects upon the species which might result from construction or operation of the plant and to make findings with respect to them. Its failure to do so was error. But that error, as it has turned out, is not fatal. As the Licensing Board did admit evidence offered by the applicant and the staff as to nonradiological effects and as the intervenors were not precluded from submitting evidence on that subject, we are in a position to evaluate it and to make the findings ourselves.

This Board then proceeded to evaluate and make findings with respect to nonradiological effects. No detrimental effect was found from chlorine (7 NRC at 362) and no adverse effect was found from heated water (7 NRC at 362).

The only adverse environmental impact of any kind not finally resolved by this Board was the impact of sedimentation from dredging during construction (7 NRC at 363). That matter has been fully addressed by the monitoring plan agreed to by the parties and accepted by the Licensing Board in its Decision on Motion for Summary Disposition (October 31, 1978). In addition, Intervenor's have abandoned their exceptions that relate to the impacts of construction.

Thus, the only other issue left open by ALAB-463 is the stated requirement that TVA consult with the Department of Interior and obtain its opinion with respect to the upstream location. (7 NRC at 363-4). TVA's motion for summary disposition shows that this has been accomplished. (See the Biological Opinion of the Fish and Wildlife Service dated March 15, 1978 attached to TVA's motion for summary disposition). Intervenors, of course, do not contest that this requirement has been met.

IV. Intervenor's Opposition To Applicant's Motion for Summary Disposition Failed to Demonstrate That There Was a Genuine Issue of Fact.

Even if it is assumed that the issues Intervenors attempted to advance were available to them, they failed to demonstrate that there was a genuine issue of fact.

Section 2.749(b) of the NRC Rules of Practice requires that a party opposing a motion for summary disposition,

"...may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered."

Intervenor's opposition to Applicant's Motion for Summary Disposition is not supported by specific facts demonstrating genuine issues. Intervenors submit that there are genuine issues of material

fact as to the effects of the temperature of the effluent and from impacts of routine releases of radiation as "can be seen from even a cursory reading of the three affidavits of Robert J. Neff, Ph.D., which were submitted as part of Intervenor's responses to Applicant's Motion for Summary Disposition dated June 7, 1978." (Intervenor's Brief, p. 9.) Intervenor's point to nothing in the record or in their affidavits to support their views. They reference the three affidavits generally and then on pp. 11 and 12 of their Brief set forth a proposed operational monitoring plan which they conclude flows from the content of Dr. Neff's affidavits. The NRC Staff's review of the material in the affidavits reveals no material issue of fact.

V. Construction Permit Condition
Concerning Impact of Operation
is Inappropriate

Intervenors cite Arkansas Power and Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25 (1973) in support of their statement that a Licensing Board, in a construction permit proceeding, can impose requirements applicable to the operating license stage. The Arkansas case was discussed in South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-114, 6 AEC 253 (1973). In Arkansas, the condition which imposed a restriction on effluent discharges was part of the foundation for the ultimate NEPA conclusion. In Summer, the Licensing Board imposed a condition on the construction permit requiring the Applicant to establish a radiation monitoring system to determine radioiodine concentration at the site boundary. The Appeal Board held such a condition

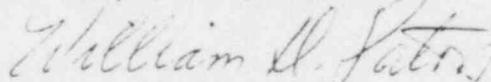
inappropriate because the condition did not play any independent part in the NEPA balancing performed by the Licensing Board. (6 AEC 253, 255.) Here, this Board has determined that there will be no significant impact on the mussels absent a restriction on effluent discharges. Intervenors have previously argued on this record that the Endangered Species Act requires a determination that there will be no impact on the mussels and that therefore a restrictive condition is required. This Board, however, has rejected that argument; "Intervenors' argument that the [Endangered Species] Act requires a finding that the radiological releases will not have any adverse effect on the mussels is without merit. Insignificant effects are not proscribed by the statute." (ALAB-463, 7 NRC at 360.) Intervenors have made no effort to challenge that determination here nor have they demonstrated through their affidavits that any impact on the mussels will be significant.

There is no basis to impose a condition to be effective at the operating stage.

VI. Conclusion

The Licensing Board's October 31, 1978 Decision on Motion for Summary Disposition should be affirmed by this Board.

Respectfully submitted,



William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of February, 1979

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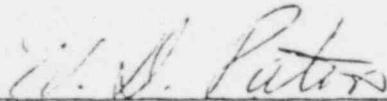
CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO EXCEPTIONS OF WILLIAM N. YOUNG ET AL. TO THE LICENSING BOARD'S DECISION ON MOTION FOR SUMMARY DISPOSITION DATED OCTOBER 31, 1978" dated February 1, 1979 in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 1st day of February, 1979:

*Alan S. Rosenthal, Esq., Chairman Atomic Safety and Licensing Appeal Board U. S. Nuclear Regulatory Commission Washington, D. C. 20555	Jr. Forrest J. Remick 207 Old Main Building Pennsylvania State University University Park, Pennsylvania 16802
*Dr. John H. Buck Atomic Safety and Licensing Appeal Board U. S. Nuclear Regulatory Commission Washington, D. C. 20555	Alvin H. Gutterman, Esq. Attorney for Applicant Division of Law Tennessee Valley Authority Knoxville, Tennessee 37902
*Mr. Jerome E. Sharfman Atomic Safety and Licensing Appeal Board U. S. Nuclear Regulatory Commission Washington, D. C. 20555	William Hubbard, Esq. William M. Barrick, Esq. Office of Attorney General 450 James Robertson Parkway Nashville, Tennessee 37219
John F. Wolf, Esq., Chairman Atomic Safety and Licensing Board 3409 Shepherd Street Chevy Chase, Maryland 20015	Raymond Gibbs, Esq. 111 Commerce Building 316 West Lytle Murfreesboro, Tennessee 37130
Dr. J. V. Leeds, Jr. 10807 Atwell Houston, Texas 77096	Leroy J. Ellis, III, Esq. Omer, Ellis and Brabson Chancery Building 421 Charlotte Avenue Nashville, Tennessee 37219

- * Atomic Safety and Licensing
Appeal Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555
- * Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555
- * Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Robert Pyle, Esq.
1700 Hayes Street, Suite 204
Nashville, Tennessee 37203



William D. Paton
Counsel for NRC Staff