UNITE STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION


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| In the Matter of | ) | |
| PUBLIC SERVICE COMPANY OF INDIANA | ) | Docket Nos. 50-546<br>50-547 |
| (Marble Hill Nuclear Generating Station, Units 1 & 2) | ) | (Order confirming suspension of construction) |

MEMORANDUM AND ORDER

The Sassafras Audubon Society (SAS) and the Knob and Valley Audubon Society (KVAS) have requested a hearing on an order issued by the Director of the Office of Inspection and Enforcement. For reasons explained below, the request for hearing is denied.

Background

On August 15, 1979, the Director of the Office of Inspection and Enforcement issued an "Order Confirming Suspension of Construction" to the Public Service Company of Indiana (PSI), holder of construction permits for the Marble Hill Nuclear Generating Station, Units 1 and 2. Pursuant to Section 189a. of the Atomic Energy Act, the order provided that any person whose interest may be affected by the order could request a hearing.

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PSI, in a letter to the Director dated August 31, stated that it would comply with the terms of the order and did not desire a hearing. The Commonwealth of Kentucky, participating under 10 CFR 2.715(c), similarly declined to request a hearing, but indicated that it would participate if a hearing were held. Both SAS and KVAS requested a hearing in filings dated September 1 and September 4, respectively. The NRC staff filed a motion dated October 4 opposing the hearing requests of SAS and KVAS. SAS responded to this motion on October 20.

Standing

It is settled that the Commission will apply judicial concepts of standing to determine hearing and intervention rights under Section 189a. of the Atomic Energy Act. See, e.g., Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). In Portland General the two-prong test for standing was stated as follows:

> First, one must allege some injury that has occurred or probably will result from the action involved. Under this "injury in fact test" a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing. One must, in addition allege an interest "arguably within the zone of interest" protected by the statute. (4 NRC 610, 613.)

The Commission's Appeal Board has formulated the "injury in fact" criterion as "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another". Nuclear Engineering Co. (Sheffield

Low-level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). We need not reach the "zone of interests" test in this case, because petitioners have failed to show how their interests will be adversely affected by the Director's order to halt safety-related construction at Marble Hill.

SAS pursues a line of argument which may be phrased as follows: its interests are "adversely affected" by the Director's order because it will permit resumption of construction without addressing a number of matters alleged by SAS as potentially threatening to public health and safety. SAS asserts that it is entitled to a hearing as a matter of right to explore facts not (in its view) considered in the order as a possible basis for suspension or revocation of the licensee's construction permits. Stated concisely, SAS would rest its standing on alleged injury caused by actions not taken, rather than actions taken.

The NRC staff filing applies the Sheffield "outcome" test to this case, and concludes that the only possible outcome -- since the licensee has not challenged the Director's order -- is continued suspension of construction. While this straightforward application of the test has initial appeal, it ignores the possibility that, if a hearing were granted as requested by petitioners, a possible outcome could be the imposition of further remedies, among them revocation of the construction permits for Marble Hill. Petitioners could therefore argue that their interests would be affected by this choice of outcomes, since suspension implies eventual resumption of construction (leading to operation) while revocation does not.

We find, however, that the terms of the Director's Order in this case would not permit a hearing on further remedies. The Order states:

> In the event a hearing is requested, the issues to be considered at such a hearing shall be:
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> (1) Whether the facts set forth in Parts II and III of this Order are true;
> (2) Whether this Order should be sustained.

The scope of a hearing directed at these issues would not include consideration of enforcement remedies beyond those already granted by the order. It is then necessary to inquire whether the NRC has authority to so limit the scope of proceedings in enforcement actions.

Our reading of applicable court cases on this question leads us to conclude that such authority exists. In Cities of Statesville v. AEC, 441 F.2d 962 (1969), the Court of Appeals for the District of Columbia stated:

> This court has held that when a petitioner can show that it possesses a substantial interest in the outcome of the proceedings, it has a right to intervene. However, an agency "should be accorded broad discretion in establishing and applying rules for ... public participation, including ... how many are reasonably required to give the [agency] the assistance it needs in vindicating the public interest." (Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 339-340, 359 F.2d 994, 1005-1006 (1966).)

The D.C. Circuit later quoted this language in BPI v. Atomic Energy Commission, 502 F.2d 424 (1974), another case involving intervention rights, and then added:

> This decision [i.e., Cities of Statesville], more clearly than Easton [Easton Utilities Commission v. AEC, 424 F.2d 847 (1970)], supports Commission authority to depart from petitioners' reading of section 189(a) of the Act. Easton and Cities of Statesville demonstrate that this court has not deemed section 189(a) to be the last word on the subject of intervention. Other factors are indeed relevant to Commission control of proceedings necessary to carry out the purposes of the Act. (502 F.2d at 427, emphasis added.)

These decisions are in accord with Supreme Court pronouncements on agency discretion to control enforcement of regulations. In Moog Industries v. Federal Trade Commission, 355 U.S. 411 (1958), the Supreme Court stated:

> Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically. (355 U.S. at 413.)

The Supreme Court later expressly approved this holding in FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967). That the NRC is afforded similar discretion in seeking to carry out the Atomic Energy Act is clear from numerous judicial decisions. See, e.g., Siegel v. AEC, 400 F.2d 778, 783 (1968).

We therefore regard it as established that the NRC may, within reasonable limits, control the scope of its enforcement proceedings for the purpose of carrying out its basic health and safety mandate. It is reasonable to limit proceedings in the enforcement context to whether the facts as stated in an order are true and whether the remedy selected is supported by those facts.

By the same token it is reasonable to draw the line, in specific cases, at whether or not further, more drastic remedies are called for.

The reasons for this are simple. We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions. Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions. Rather than consent and risk a hearing on whether more drastic relief was called for, licensees would, to protect their own interests, call for a hearing on each enforcement order to ensure that the possibility of less severe action would also be considered. The end result would be a major diversion of agency resources from project inspections and engineering investigations to the conduct of hearings. In our view cases such as Moog Industries, supra, clearly permit an agency to adopt a policy which avoids such a result.

Finally, the NRC already provides a separate procedure, under 10 CFR 2.206, for any interested person to seek enforcement actions beyond those adopted. Furthermore, in appropriate cases

enforcement orders may provide a broader scope, as has already been done in certain orders related to the Three Mile Island Nuclear Station.[1/] The order in this case, however, was limited to the issues noted above, and as such would not grant standing to parties seeking additional remedies.[2/]

Summarizing the above discussion, we conclude that the NRC may control "standing in its enforcement proceedings by the terms of orders granting hearing rights under Section 189a. In this case the order confers standing on parties claiming injury from the suspension of construction, but does not extend to parties asserting injury from failure to grant more extensive relief. Phrased another way, the order limits "adverse effects" to the effects of the suspension rather than effects related to the eventual resumption of construction. It follows directly that SAS and KVAS do not meet the "injury in fact" test and therefore do not have standing to request a hearing as a matter of right on the Director's order.

Discretionary Hearing

It was also held in Portland General, supra, that the Commission has broad discretion to provide hearings or permit

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1/ See, e.g., Order and Notice of Hearing, In the Matter of Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141 (1979).

2/ Our decision on this point is consistent with a recent Final Decision by the Administrator of the Environmental Protection Agency: In Re Environmental Defense Fund, et al., FIFRA Docket Nos. 411 et al. (August 20, 1979).

interventions in cases where these avenues of public participation would not be available as a matter of right. 4 NRC 610, 614-615. We decide not to grant a discretionary hearing in this case for several reasons.

First, an enforcement order has already been issued halting safety-related construction and requiring the licensee to meet a number of stringent conditions before construction can be resumed. Our review of the Director's order and the petitioners' filings does not lead us to conclude that the Director has failed to adequately address the construction problems at Marble Hill. If petitioners are dissatisfied with the steps taken by the licensee to comply with the Director's order -- when those steps have been completed to the Director's satisfaction -- they may utilize the procedure of 10 CFR 2.206 to again [3/] request suspension or revocation of the construction permits. Any such request, however, would have to be based upon specific facts and could not rest upon general allegations that construction problems still exist at the site. In any event, we are for the moment satisfied that the Director's order will ensure compliance with our regulations, and that construction at Marble Hill will not resume until such compliance has been achieved. We are also requesting below that the Director brief the Commission prior to lifting the order of

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3/ SAS previously filed a request under 10 CFR 2.206 with the Director of the Office of Nuclear Reactor Regulation. This request was granted insofar as the order in this case addressed construction issues. The Director denied other aspects of this petition.

suspension.[4/] If it appears at that time that further action is necessary to protect public health and safety, the Commission will not hesitate to order that such action be taken before construction is resumed.

Second, we cannot see any useful purpose to be served by a public hearing under these circumstances. The Director's order makes very clear -- and the licensee admits -- that construction practices at the Marble Hill site have failed to meet applicable standards in a number of respects. The NRC staff is continuing its investigation of these practices and the Director and the Commission will review all of the steps proposed by the licensee to correct the deficiencies. Although SAS asserts that a hearing is necessary to develop "as complete a factual record as possible for the assessment of the extent and seriousness of constructional deficiencies at Marble Hill and the extent to which they have been and can be repaired and mitigated," SAS does not state specifically what additional facts might be uncovered by a public hearing that have not been or will not be by pending investigations.[5/]

We conclude that the circumstances of this case do not warrant the granting of a discretionary hearing.

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4/ Independent of this proceeding, the Commission requested such a briefing in a memorandum to the Executive Director for Operations dated January 23, 1980.

5/ As SAS notes in its October 20 filing, these investigations include that of the NRC staff, the Senate Subcommittee on Nuclear Regulation, the Justice Department, and the American Society of Mechanical Engineers.

Disposition

For the foregoing reasons, SAS's and KVAS's requests for hearing are denied.

We request that the Director of the Office of Inspection and Enforcement closely scrutinize the SAS filings in this case to determine whether or not they contain information not already considered in the Order Confirming Suspension of Construction and in the Director's decisions on SAS's 10 CFR 2.206 request. This review should be completed before permission is granted to the licensee to resume construction at the site. Any matters raised by the filings not yet considered should be investigated thoroughly and remedied, by further enforcement action if necessary.

It is further requested that the Director of Inspection and Enforcement brief the Commission prior to lifting the order suspending construction at Marble Hill. In that briefing, the Director should be prepared to address the issues raised in the SAS statement. Following that briefing, construction may resume at the Director's discretion unless otherwise ordered by the Commission, but in any event not earlier than five days after the briefing.

Commissioners Gilinsky and Bradford dissent from this order.*

For the Commission:

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D. C.
this 13th day of March, 1980

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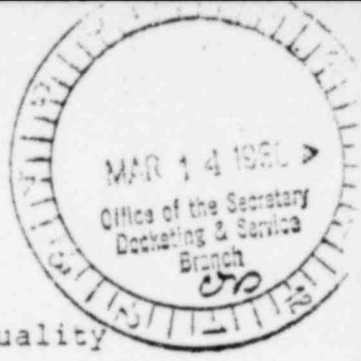
* Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841 provides that action of the Commission shall be determined by a "majority vote of the members present." Had Commissioner Bradford been present at the meeting he would have voted with the minority. Had Commissioner Hendrie been present, he would have voted with the majority. Accordingly, the formal vote of the Commission was 2-1 in favor of the decision.




DISSENTING VIEWS OF COMMISSIONER BRADFORD

I would have granted a hearing in this case. The quality assurance and quality control (QA-QC) program is supposed to assure that the plant is built according to its design. If the QA-QC program fails, the plant becomes a potential threat to the public health and safety, for NRC's regulatory decisions assume the plant is built according to its design. A serious undetected flaw in the containment integrity at Three Mile Island, for example, could have had led to a containment failure at the moment of the 28 psig pressure spike which would have had serious consequences. NRC does not normally monitor nuclear power plant construction in great detail. Instead, NRC relies primarily on the licensee and their contractors to assure the QA-QC program is working. See Consumers Power Company (Midland Units 1 & 2) 7 AEC 7, 11 (1974). The substantial reliance the NRC places on the utility and the contractors is indicated by the fact that NRC has found it difficult to support a civil penalty sanction for QA-QC violations because of the general nature of construction permit and QA program requirements.

Against this background, the following testimony was given at Congressional hearings on Marble Hill*:

1. Supervisory personnel of one of the contractors ordered that certain holes (honeycombs) in the containment be improperly covered over before inspectors could see them.

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*Construction Problems at Marble Hill Nuclear Facility: [illegible] clear Regulatory Commission Oversight, Hearings Before a Subcommittee of the Committee on Government Operations, November 27-28, 1979 at pages 43, 55, 56, 64 and 65.

2. Utility and contractor personnel approved patchwork which had not been done properly.

3. The NRC inspectors found gross nonconformance across the board in the control of concrete placement at the site.

4. The NRC inspectors concluded that serious deficiencies existed in the management controls of the construction at the site and that implementation of the quality assurance program was not effective.

The Director of NRC's Division of Inspection and Enforcement has properly suspended safety-related construction at the site pending the licensee's submission of a new QA-QC program which will be judged according to certain stated criteria. The issue is whether the inspection efforts in this case and the Director's judgment about the proper remedy should be examined in an evidentiary proceeding. Given the seriousness of the problems uncovered at the site and their possible significance to the safe operation of the plant, a hearing is potentially helpful to us as a supplement to our own enforcement effort. Additionally, it would allow interested citizens to participate in assessing and determining the risks they are being told to live with. If construction had proceeded smoothly and the suspension had been the result of a clearly isolated practice or event, the Commission might be justified in denying a hearing. That is anything but the case at Marble Hill, where events have given citizens some basis for concern about the licensee commitment to their safety and about the sufficiency of NRC surveillance.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
14th day of March 1980.

Peggy A. Downing
Office of the Secretary of the Commission

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