

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of

THE TOLEDO EDISON COMPANY AND
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY

Davis-Besse Nuclear Power Station

Docket No. 50-346

APPLICANTS' BRIEF IN OPPOSITION
TO EXCEPTIONS FILED BY LIFE
AND COALITION FOR SAFE NUCLEAR POWER

I. INTRODUCTION

Intervenors Living in a Finer Environment (hereafter "LIFE") and Coalition for Safe Nuclear Power (hereafter "Coalition") have separately filed exceptions to the initial decision of the Atomic Safety and Licensing Board dated March 23, 1971, which granted a construction permit to Applicants for the Davis-Besse Nuclear Power Station.

With one exception, each of the points raised by intervenors related to the National Environmental Policy Act and AEC's implementation of that Act. The only other contention is Coalition's Exception No. 6, which relates to the Board's exclusion of testimony on the safety procedures for transporting radioactive materials from the plant site.

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II. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The Board refused to permit non-radiological environmental effects as matters in controversy at the public hearing. This decision was in complete accord with 10 CFR Part 50, Appendix D, which permits such issues to be raised only at those proceedings for which the notice of hearing is published after March 4, 1971. Thus, although all of Coalition's Exceptions and LIFE's Exceptions Nos. 4 and 5 are phrased in terms of challenges to decisions of the Board, they are in reality a challenge to the validity of Appendix D itself.

Coalition chose to rely upon LIFE's brief to support its NEPA exceptions. Despite LIFE's assertion that it would not repeat in detail what it had said in its Brief Re: Implementation of National Environmental Policy Act and LIFE's Reply Brief Regarding Implementation of National Environmental Policy Act of 1969, LIFE's brief in support of its exceptions is largely a verbatim copy of those earlier briefs. Consequently, the arguments which LIFE makes have, in large part, already been dealt with in Applicants' Brief in Reply to LIFE's Brief Relating to AEC's Compliance with the National Environmental Policy Act of 1969, submitted on March 4, 1971, and we respectfully direct the Appeal Board's attention to that brief and the following supplementary considerations.

NEPA does not explicitly require that environmental considerations be the subject of a public hearing. Nor does NEPA establish immutable or inflexible timetables or schedules for its implementation. The provisions of NEPA itself direct Federal agencies "to use all practicable means, consistent with other essential considerations of national policy" in implementing the Act. Section 101(b). Indeed, Section 103 anticipates a review of agency policies extending at least until July 1, 1971. Under that section agencies must, inter alia, review their existing regulations to determine whether there are any deficiencies interfering with full compliance with NEPA. Agencies are given until July 1, 1971 to propose to the President any measures (including amendments to regulations) necessary to assure full compliance. The proposed Guidelines of the Council on Environmental Quality impose a deadline of May 1, 1971 for implementing the Council's guideline for holding public hearings whenever appropriate. Paragraphs 3, 12, 36 Fed. Reg. 1398, 1400 (January 28, 1971). AEC clearly satisfied both deadlines by issuing its Appendix D on December 4, 1970.

LIFE alleges that AEC's only justification for the transition period was one of "administrative convenience." Brief in Support of LIFE's Exceptions to Initial Decision, page 2. Applicants are unaware of any attempt by the Commission

to justify the transition period for reasons of "administrative convenience." The statement of consideration for the December 4, 1970 Appendix D specifically states that the transition period was necessary

"to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power." 35 Fed. Reg. 18470.

The statement of consideration documents this need by referring to statements of the Chairman of the Federal Power Commission, the Chairman of the Council of Economic Advisors, and the Director of the Office of Emergency Preparedness, as well as a report by the Energy Policy Staff of the Office of Science and Technology. 35 Fed. Reg. 18472. The need for electric power is hardly the equivalent of AEC's "administrative convenience."

The Commission's position is in accord with the views of the Council on Environmental Quality. In a letter quoted, in part, by LIFE in its brief, p. 4, written by the Chairman of the Council on Environmental Quality to Congressman John Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife, Mr. Russell E. Train, while, perhaps, implicitly supporting the proposition that detailed environmental statements should be considered in public hearings, clearly stated that the Council recognized the propriety of evolving appropriate procedures for public consideration of

such statements,

"Our view is that the National Environmental Policy Act is so general in its language, so innovative in its procedures and so all-embracing in the range of government activities included that, rather than make new across-the-board requirements we should evolve appropriate procedures for the various major categories of activity involved."
1 ELR 10009 (emphasis added).

While non-radiological matters appropriately were not considered in the public hearing, it should be clear that in the review of the proposed Davis-Besse Nuclear Power Station, environmental considerations have been thoroughly considered in compliance with NEPA. Radiological environmental effects received comprehensive consideration under the Commission's long-standing procedures. Environmental comments from appropriate agencies were obtained, the detailed environmental statement was prepared, and all of this material was provided to the Council on Environmental Quality and other interested parties. Water quality matters are being dealt with under the procedures established by Section 21(b) of the Federal Water Pollution Control Act. Applicants' Construction Permit is specifically conditioned on compliance with that Act. Construction Permit No. CPPR-80, para. 2.E. The permit is further conditioned on Applicants' observance of all validly imposed environmental standards which the Commission determines are applicable to the Davis-Besse Nuclear Power Station (other than water

quality matters covered by Section 21(b) of the Federal Water Pollution Control Act, and radiological matters which are dealt with through the Commission's existing procedures). Para. 2.D. Through these two conditions, AEC's regulatory process will continuously be available to carry out any necessary enforcement.

LIFE's Exceptions Nos. 1, 2, and 3 attack narrow factual statements by the Board and can be disposed of on similarly narrow grounds. Exceptions Nos. 1 and 2 are as follows:

1. Paragraph 49 -- in which the Board finds that "the position taken by LIFE in this proceeding was formally and expressly urged upon the Commission a significant period of time prior to December 4, 1970."

2. Paragraph 50 -- in which the Board finds "there is nothing new of such substance here presented to warrant the Board to conclude the same issue should again be referred to the Commission. LIFE has not sustained the heavy burden of showing the Commission abused its discretion in promulgating Appendix D."

The statements by the Board that LIFE's position on NEPA was urged upon AEC prior to December 4, 1970 (the date that Appendix D to 10 CFR, Part 50 was published) and that there was nothing new of substance in LIFE's contentions regarding NEPA are completely accurate. The "Discussion of Comments Received in Response to Notice of Proposed Rule-making Published June 3, 1970," part of the statement of

consideration for the December 4, 1970 Appendix D, makes clear that AEC considered the suggestion of including in the public hearing evidence on non-radiological environmental matters.

"One comment urged that the atomic safety and licensing board should hear evidence concerning environmental matters, pass on the adequacy of the Detailed Statement, and make findings concerning environmental impact." 35 Fed. Reg. 18471.

Having considered this suggestion, AEC decided to give atomic safety and licensing boards, for proceedings noticed for hearing after March 4, 1971, the power to hear evidence and make findings on environmental matters.

As for the Board's finding that LIFE has not met the heavy burden of showing an abuse of discretion on the Commission's part, Applicants respectfully refer the Appeal Board to Applicants' Brief in Reply to LIFE's Brief Relating to AEC's Compliance with the National Environmental Policy Act of 1969, pp. 11-12.

LIFE's Exception No. 3 attacks the Board's finding that there is "no requirement in the Commission's regulations that the environmental statement of considerations must be made part of the evidentiary record." This is, of course, an accurate statement of Appendix D as it applied to this proceeding. See paragraph 2, Appendix D (April 2, 1970); paragraph 7, Proposed Revised Appendix D (June 3, 1970);

paragraph 13, Appendix D (December 4, 1970). LIFE then challenges the Board's finding that the "procedure required by Appendix D of April 2, 1970, as revised June 3, 1970, was followed by the Applicants and the Staff." As the transcript clearly indicates, pp. 495-497, the detailed environmental statement was identified and marked for identification to show compliance with Appendix D in order that it could accompany the record through the Commission's review processes. This fully complies with the requirements of Appendix D, as well as those of NEPA.

The Board properly found that no substantial challenge to 10 CFR, Part 50, Appendix D was presented as is required in any challenge to the Commission's regulations in a licensing proceeding.

III. TRANSPORTATION OF RADIOACTIVE MATERIALS

Coalition's Exception No. 6 challenges the refusal by the Board to consider in the hearing the safety procedures which will be used in transporting radioactive materials from the site of the Davis-Besse Nuclear Power Station.

The transportation of radioactive materials is not within the scope of a reactor construction permit hearing such as the instant proceeding. See In the Matter of Northern States Power Company, Docket No. 50-263, Initial Decision, Attachment D, p. 4, which by Memorandum of the Atomic Safety

and Licensing Appeal Board, dated February 25, 1971, constituted the final action of the Commission. Detailed regulations of the Department of Transportation (DOT) and separate regulations of the AEC govern the transportation of solid waste containing radioactive waste material and spent fuel.

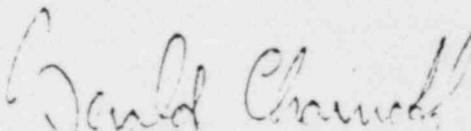
Coalition's reference to the recently promulgated 10 CFR Section 50.34a and its application to this proceeding is in error. That section, requiring a general description in the application for a construction permit of provisions for packaging, storage, and shipment of solid waste containing radioactive materials, is to provide information with which the AEC can evaluate the safety of onsite procedures for waste handling, storage and preparation for shipment. Section 50.34a in its entirety is intended to deal with releases of radioactivity arising from activities at the site. It does not apply to offsite transportation which is covered by other specific AEC and DOT regulations. The untimeliness of Coalition's effort to introduce Section 50.34a as an issue in the proceeding and the relevance of Section 50.34a to offsite transportation was fully considered in the public hearing record (Tr. pp. 1206-19, 1220-23, and 1398-99). The public hearing record also shows that the information required by Section 50.34a was provided by Applicants in the application (Tr. pp. 1219-20, 1394-97).

CONCLUSION

For the reasons stated above, the Exceptions filed by Coalition and LIFE in this proceeding should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS,
TROWBRIDGE & MADDEN

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Dated: April 20, 1971