

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
)
THE TOLEDO EDISON COMPANY)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
)
(Davis-Besse Nuclear Power Station))

4-21-71
Docket No. 50-346

AEC REGULATORY STAFF'S REPLY BRIEF TO INTERVENOR COALITION
FOR SAFE NUCLEAR POWER'S EXCEPTIONS TO THE INITIAL DECISION

The intervenors Coalition for Safe Nuclear Power (Coalition) filed exceptions by a letter postmarked April 8, 1971, to the Initial Decision of the presiding Atomic Safety and Licensing Board, dated March 23, 1971. Exceptions Nos. 1 through 5 concern the Commission's implementation of the National Environmental Policy Act of 1969 (NEPA). Exception No. 6 is concerned with the presiding Board's ruling that paragraph 32 of the Coalition's amended petition to intervene, which dealt with the transportation of radioactive materials from the proposed plant, is irrelevant to this hearing.

Exceptions Nos. 1 and 3-5 are basically an attack on Appendix D to 10 CFR Part 50 of the Commission's rules and regulations. Upon briefs submitted after the hearing, the presiding Board determined

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there was no substantial question raised by intervenor LIFE 1/ as to the validity of Appendix D, which should be certified to the Commission in accordance with the Commission's Memorandum Decision in Calvert Cliffs. 2/ The Coalition, in its exceptions, relies on the brief filed by LIFE with the presiding Board.

The staff opposes these exceptions for the reasons contained in its brief filed today in reply to the exceptions filed by LIFE in this matter.

1/ Intervenor Living in a Finer Environment and William E. Reany (LIFE), in its motion to reconsider its amended petition to intervene, limited itself to two contentions: first, Part 20 was invalid; and second, Appendix D was invalid. The presiding Board ruled that evidence could be offered as to Part 20 but that the validity of Appendix D was not an evidentiary matter and hence would be handled by briefs at the close of the hearing. The Board ruled that any party that desired to do so could file a brief arguing either for or against the validity of Appendix D (Tr. 618-619, 630). The only parties to file briefs on Appendix D were LIFE, the applicants, and the regulatory staff. These parties and intervenor Glenn Lau also filed proposed findings of fact and conclusions of law as to the validity of Appendix D. The Coalition's failure to file either a brief or proposed findings of fact and conclusions of law concerning the validity of Appendix D is in the nature of a default with respect to that matter and in any event the staff urges that the Coalition's exceptions on that point should not be permitted at this stage.

2/ In the Matter of the Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-317 and 50-318, August 8, 1971.

Exception No. 2 contends that the presiding Board did not require the applicant to comply with the requirements of NEPA and to require the AEC to implement the provisions of NEPA.

The Commission's implementation of NEPA fully complies with all of the requirements of that statute. To implement the provisions of NEPA, the Commission first published Appendix D to 10 CFR Part 50 of its regulations on April 2, 1970. 3/ On June 3, 1970, the Commission published for comment proposed amendments to Appendix D which provided interim guidance. 4/ Subsequently, on December 4, 1970, the Commission published a revised Appendix D which became effective January 3, 1971. 5/

Under the June 3 proposed amendments to Appendix D, which were followed in this proceeding, the Commission required applicants for licenses to submit an environmental report which was then circulated to the appropriate Federal, State and local agencies. 6/ Upon receipt of the comments of these agencies, the designee of the Director of Regulation prepared the detailed environmental statement. In this proceeding, this detailed statement and the

3/ 35 F.R. 5463.

4/ 35 F.R. 8594.

5/ 35 F.R. 18469

6/ In any event, in the June 3 proposed amendments to Appendix D the Commission recognized that some period of time may be required before full compliance with the procedures themselves can be achieved.

applicants' environmental report covered those areas enumerated in NEPA. Both of these documents were offered as an exhibit in this hearing by the AEC regulatory staff on December 10, 1970. 7/ New Appendix D, effective January 3, 1971, does not require any different procedure for proceedings pending at the time that the amended Appendix D was published.

A review of the record in this proceeding clearly indicates that both the applicants and the regulatory staff complied with the provisions of NEPA as implemented by the Commission in Appendix D. The procedures specified in the interim guidance were followed by both the applicants and the AEC regulatory staff as can be noted in the record. 8/ Neither the effective Appendix D published on April 2, 1970, nor the proposed revision published on June 3, 1970, which were applicable to this proposed licensing action, required that the detailed statement of environmental considerations be made a part of the evidentiary record. The only requirement in this regard is that the detailed statement accompany the application through the review process. 9/ Offering the detailed statement in

7/ Transcript page 495.

8/ Transcript pages 495-498.

9/ 10 CFR Part 50, Appendix D, paragraph 2, as published on April 2, 1970, and paragraph 7 as published for comment on June 3, 1970.

evidence, as was done in this proceeding, for the limited purpose of showing compliance with Appendix D is an appropriate means to identify the statement for the record and assure that it accompanies the application through the review process.

Exception No. 6 claims the presiding Board erred by ruling as irrelevant to this hearing the consideration of the transportation of radioactive waste from the proposed plant.

Neither the construction permit nor an operating license for this plant would, if issued, of itself authorize the shipment of radioactive material, including spent fuel, from the plant. Requirements applicable to shipment and transportation of radioactive materials are provided for in 10 CFR Part 71 of the Commission's rules and regulations. Part 71 and Parts 30, 40 and 70 list the requirements for shipment and transportation of radioactive material which include compliance with the applicable regulations of the Department of Transportation. 10/ These regulations also provide for the issuance of the appropriate licenses, license amendment, or other authorizations necessary to transport radioactive material. The construction permit which was the subject of this proceeding carries with it no right to receive, ship or transport source, special nuclear, or

10/ 49 CFR Parts 170-189, 14 CFR Part 103 and 46 CFR Part 146.

byproduct materials. Such authorization is a matter of separate licensing in accordance with 10 CFR Parts 30, 40 and 70.

Although no exception is taken, on page 2 of the Coalition's brief, the following statement is found: "10 CFR Sec. 50.34(a), effective January 2, 1971, should have been made applicable to the hearings. Bureaucratic efficiency is not an element Congress chooses to weigh against the public health and safety."

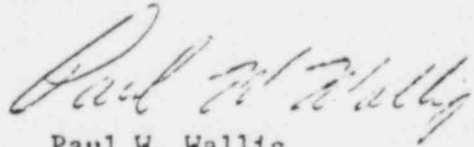
We believe that the Coalition is referring to 10 CFR 50.34 a., which is part of the "low as practicable" amendments published in the Federal Register on December 3, 1970. As the staff testified at the hearing applicants provided the information required by §50.34 a. during the review of the application by the regulatory staff. 11/ Furthermore, the Coalition did not raise this issue until January 21, 1971, even though it had filed its petition to intervene on November 18, 1970, amended the petition on December 5, 1970, and rested its case on January 7, 1971. 12/

11/ Transcript pages 1219-1221.

12/ Transcript pages 917-918.

For the above reasons, the AEC regulatory staff believes that the exceptions of the Coalition should be denied and that the initial decision of the licensing board should be affirmed.

Respectfully submitted,



Paul W. Wallig
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 21st day of April, 1971.