

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	50-346
	)	
THE TOLEDO EDISON COMPANY	)	Docket No. 50-346
THE CLEVELAND ELECTRIC ILLUMINATING	)	
COMPANY	)	4-21-71
	)	
(Davis-Besse Nuclear Power Station)	)	

AEC REGULATORY STAFF'S REPLY BRIEF TO INTERVENOR LIFE'S  
EXCEPTIONS TO THE INITIAL DECISION OF THE PRESIDING BOARD

Intervenors Living in a Finer Environment and William E. Reany (LIFE), on April 9, 1971, filed exceptions to the Initial Decision of the presiding Atomic Safety and Licensing Board, dated March 23, 1971. These exceptions are all based upon an alleged inadequacy of the Commission's implementation of the National Environmental Policy Act of 1969 (NEPA), contained in Appendix D to Part 50 of the Commission's rules and regulations in 10 CFR Chapter 1.

Upon briefs filed by the parties after the completion of the hearing, the presiding Board determined that LIFE had not raised a substantial question as to the validity of Appendix D to 10 CFR Part 50 that should be certified to the Commission before issuing its Initial Decision, in accordance with the Commission's Memorandum Decision in the Calvert Cliffs case.<sup>1/</sup>

<sup>1/</sup>  
In the Matter of Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2) Docket Nos. 50-317, 50-318, August 8, 1969.

Exception No. 1 is to paragraph 49 of the Initial Decision which found that the assertions of LIFE were not novel and that they had been considered by the Commission during its recent rule making proceedings on Appendix D. Exception No. 2 is to paragraph 50 of the Initial Decision which stated that, in light of the briefs filed by the parties, and since LIFE offered no arguments not already considered by the Commission, the presiding Board found no reason to refer the same issues to the Commission again.

LIFE takes exception to these two findings because the presiding Board failed to find that there was a substantial question as to whether the Commission abused its discretion in promulgating Appendix D, which question, they argue, should be referred to the Commission. LIFE argues that the March 4, 1971, dividing line between hearings in which there would not be and those in which there would be consideration of nonradiological environmental matters is a violation of NEPA, Executive Order 11514 and the Interim Guidelines of the Council on Environmental Quality.

The regulatory staff believes that the policy declared and the procedures required by NEPA were broadly stated so that each agency could develop the methods and procedures necessary for implementing NEPA which would provide the best integration with each agency's existing procedures. The staff's position with respect to the implementation of NEPA is more fully explained in the brief filed

by the Commission in the U. S. Court of Appeals for the District of Columbia Circuit which is hereby made a part of this reply brief. <sup>2/</sup>

Contrary to the contentions of LIFE, NEPA, Executive Order 11515 of March 5, 1970, <sup>3/</sup> and the Interim Guidelines of the Council on Environmental Quality published on May 12, 1970, <sup>4/</sup> do not require the holding of evidentiary hearings with respect to actions subject to 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. <sup>5/</sup> On June 3, 1970, the Commission published for comment proposed amendments to Appendix D which provided interim guidance. <sup>6/</sup> Subsequently, on December 4, 1970, the Commission published a revised Appendix D which became effective January 3, 1971. <sup>7/</sup>

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<sup>2/</sup> The Brief for the Respondents in the U. S. Court of Appeals for the District of Columbia Circuit, No. 24,871, Calvert Cliffs' Coordinating Committee, Inc., et al. v. U. S. Atomic Energy Commission, et al., filed March 1971. It is our understanding that the appeal board and substantially all of the parties already have a copy of this brief; of course, a copy will be sent to any party on request.

<sup>3/</sup> 35 F.R. 4247, March 7, 1970

<sup>4/</sup> 35 F.R. 7390

<sup>5/</sup> 35 F.R. 5463

<sup>6/</sup> 35 F.R. 8594

<sup>7/</sup> 35 F.R. 18469

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.<sup>8/</sup> Upon receipt of the comments of these agencies, the designee of the Director of Regulation prepared the detailed environmental statement. In this proceeding the detailed statement and the 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.<sup>9/</sup> 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.

New Appendix D does permit a party to raise an issue related to the nonradiological environmental effects of a proposed activity only in those cases in which the notice of hearing is published on or after March 4, 1971. Using March 4, 1971, as a starting point for evidentiary hearings on nonradiological environmental effects is not an abuse of the Commission's discretion. First, NEPA does not explicitly require such evidentiary hearings. Second, as the Commission in the Statement of Considerations published with Appendix D stated:

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<sup>8/</sup> In any event, in the June 3 proposed amendments to Appendix D and the December 4 revision the Commission recognized that some period of time may be required before full compliance with the procedures themselves can be achieved.

<sup>9/</sup> Transcript page 495

"In its consideration of Appendix D, the Commission has recognized the public interest in protecting the environment as well as the public interest in avoiding unreasonable delay in meeting the growing national need for electric power."

The approach adopted reflects an appropriate balancing of the various public interest considerations involved--particularly in the light of the transitional period reasonably required to implement NEPA. This approach does not ignore the nonradiological environmental effects of the Davis-Besse Nuclear Power Station since both an environmental report and detailed statement were prepared. Also, conditions are incorporated into the license that require the licensee to observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility.<sup>10/</sup>

Exception No. 3 is to paragraph 51 of the Initial Decision which found that the regulatory staff complied with the requirements of Appendix D. LIFE contends that the regulatory staff failed to comply with the Commission's interim guidance contained in the proposed amendment of Appendix D to 10 CFR Part 50 published on June 3, 1970.

A review of the record in this proceeding clearly indicates that this contention is unfounded. The procedures specified in the interim

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See reference in footnote 2 and in particular Part II, pages 46-56.

guidance were followed by both the applicants and the AEC regulatory staff as the record shows. <sup>11/</sup> 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. <sup>12/</sup> Offering the detailed statement in 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. 4 is to paragraph 56(4) of the Initial Decision which concludes that the issuance of the construction permit will not be inimical to the common defense and security or to the health and safety of the public. LIFE objects that such a finding cannot be made since nonradiological environmental matters were not considered. Exception No. 5 is to paragraph 57 of the Initial Decision which orders the Director of Regulation to issue a construction permit. LIFE states that such order is invalid since nonradiological environmental matters were not considered.

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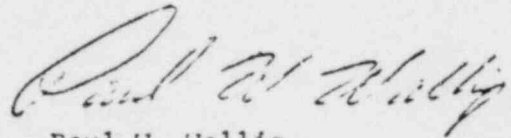
<sup>11/</sup>  
Transcript pages 495-498

<sup>12/</sup>  
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.

As discussed above, Appendix D must be here considered a valid exercise of the Commission's discretion and since the conclusion and order excepted to were in accordance therewith, there is no basis for these exceptions.

For the above reasons, the AEC regulatory staff believes that the exceptions of LIFE should be denied and the Initial Decision of the presiding Board should be affirmed.

Respectfully submitted,



Paul W. Wallig  
Counsel for AEC Regulatory Staff

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