UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

3-4-71

SUPPLEMENT TO APPLICANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW PERTAINING TO THE NATIONAL ENVIRONMENTAL POLICY ACT

In Applicants' Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision, filed February 20, 1971, discussion of the issues raised by intervenors LIFE and Reany (hereinafter LIFE) pertaining to the National Environmental Policy Act of 1969 (NEPA) was deferred pending receipt of LIFE's memorandum in support of its allegations. On February 22, 1971, Applicants received LIFE's brief regarding AEC implementation of NEPA. Applicants hereby submit a reply brief (attached) and the following Proposed Findings of Fact and Conclusions of Law relating to NEPA and consideration of it in this proceeding.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

41. Pursuant to the National Environmental Policy Act of 1969 (NEPA),[a/] and in accordance with Appendix D of 10 CFR Part 50 of AEC regulations which prescribes the Commission's

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a/ 42 U.S.C. §4321 et seq.

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general policy and procedure for implementation of NEPA, the Commission has issued a detailed statement on the environmental considerations involved in the proposed Davis-Besse station.[b/] Under the provisions of the currently effective Appendix D, and the previous forms of Appendix D which were to be used as interim guidance, the Commission's detailed environmental statement is to accompany the application through the licensing process and was introduced as a Staff exhibit for that purpose.[c/]

41a. LIFE contended that NEPA required the public hearing, convened in this proceeding, to consider the nonradiological environmental effects of the proposed Davis-Besse facility; that AEC's Appendix D and its forerunners, which were proposed for public comment but were to serve as interim guidance, were invalid; and that there was no proof in this proceeding that AEC's interim NEPA procedures were observed.

41b. Upon review of briefs filed by LIFE, Applicants and the Staff, this Board finds that NEPA does not mandate that the matters to be considered in the detailed statement prepared pursuant to Section 102(2)(C) of NEPA be reviewed at a public hearing. The Congress specifically refrained from directing the licensing agency to make findings with regard to the environmental effects of the subject Federal action. This Board finds that the AEC's

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b/ Staff Exhibit 1, Detailed Statement on the Environmental Considerations by the Division of Reactor Licensing U.S. Atomic Energy Commission Related to the Proposed Construction of Davis-Besse Nuclear Power Station by the Toledo Edison Company and the Cleveland Electric Illuminating Company, November 20, 1970.

c/ Tr. pp. 495-98.

implementation of NEPA has been neither arbitrary nor capricious and has been consistent with the guidelines of the Council on Environmental Quality, which was established by NEPA. Furthermore NEPA does not require that proof of compliance with its terms be determined in hearing proceedings such as the instant one. We note, however, that the detailed environmental statement issued by the Staff, was made available to the public, thereby satisfying the disclosure requirements of NEPA.

Respectfully submitted,

SHAW, PITTMAN, POTTS,
TROWBRIDGE & MADDEN

By _____
Gerald Charnoff
Counsel for
The Toledo Edison Company

Dated: March 4, 1971

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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 REPLY TO LIFE's BRIEF RELATING TO AEC's COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

I. INTRODUCTION

In a brief filed with the Atomic Safety and Licensing Board, intervenors Living In a Finer Environment and William E. Reany (hereafter collectively referred to as LIFE) allege the Atomic Energy Commission failed to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. §4321 et seq. (hereafter NEPA), in its consideration of Applicants' construction permit application, and thereby disregarded appropriate environmental considerations. An analysis of LIFE's brief uncovers three main contentions. First, LIFE asserts that NEPA requires the public hearing on Applicants' construction permit application to include "a full consideration of the plant's environmental consequences." Second, LIFE alleges that the Commission's regulations implementing NEPA are an invalid exercise of administrative discretion. Third, LIFE contends that "there is no proof that proposed Appendix D [to 10 CFR, Part 50] was complied with in this case."

None of LIFE's contentions have any merit.

II. NEPA DOES NOT REQUIRE THAT ENVIRONMENTAL CONSEQUENCES BE CONSIDERED AT A PUBLIC HEARING

LIFE contends that NEPA requires that all environmental considerations, including particularly nonradiological matters, be the subject of a public hearing. Because the Board ruled that nonradiological environmental matters were not to be dealt with at this public hearing, LIFE claims this proceeding violated NEPA. Apart from these assertions, LIFE presented no authority for the proposition that NEPA requires consideration of environmental matters at a public hearing.

Section 102(2)(C) of NEPA requires the AEC to prepare a detailed statement of the environmental consequences of a major federal action significantly affecting the environment, to make copies of that statement available to the public, and to have the statement accompany the proposal for agency action through the existing agency review processes.* There is no provision which specifies that public hearings shall be held or that environmental matters must be dealt with in public hearings required by other laws.

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* Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: . . .

(2) all agencies of the Federal Government shall -- ....

(C) include in every recommendation or report on proposals for legislation and other major

A thorough search of NEPA's legislative history has disclosed not a single reference to any obligation that the detailed environmental statements be considered in public hearings. LIFE did not cite any statutory language or legislative history to support this proposition. On those few occasions when

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> Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
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> (i) The environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes.

the relevant portions of Section 102 were discussed, members of Congress and the Committee report simply repeated the statutory language of the final paragraph of Section 102(2)(C). See, e.g., NEPA Conference Report, H. Rpt. 91-765, 91st Cong., 1st Sess., p.8.

One significant change which was made to Section 102(2)(C) while it was being considered in Congress strongly supports the proposition that NEPA does not require a public hearing. Section 102(C)(C) as originally passed by the Senate required a federal agency to make a "finding" as to the environmental consequences of a proposed action.

> "Sec. 102. The Congress authorizes and directs .... that all agencies of the Federal Government .... (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a <u>finding</u> by the responsible official...."
> S. Rpt. 91-296, 91st Cong., 1st Sess., p. 2 (emphasis added).

When NEPA was again being discussed on the Senate floor to provide instructions to the Senate conferees to the Conference Committee, the "finding" requirement was deleted. In its place the Senate, and ultimately the Congress, directed agencies to prepare "detailed statements."

The change was not inadvertent. Senator Muskie, in discussing this modification, said

> "This language eliminated the requirement that a 'finding' be made but provides that environmental impact be discussed as a part of any report on legislation, or any decision to commence a major activity. The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be." 115 Cong. Rec. S.12111 (daily ed., October 8, 1969).

If NEPA had required an agency to hold a public hearing to consider the environmental considerations of a proposed action, findings would have been required pursuant to the Administrative Procedure Act, 5 U.S.C. 557, 706. The substitution of a "detailed statement" for a "finding" thus clearly indicates that Congress did not intend that the detailed environmental statement should necessarily be the subject of an agency hearing.

On pages 6 and 7 of LIFE's brief, LIFE cites four cases which demonstrate that noncompliance with NEPA may form the basis for invalidating agency action. While this proposition may be true,* the cited cases do not hold that NEPA requires a public hearing to be held to consider the detailed environmental statement. Indeed, the matter of a public hearing was not an issue in these cases.

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* But see, Bucklein v. Volpe, 2 Envir. Rptr. 1082 (N.D. Cal. 1970), in which the court stated, "it is highly doubtful that [NEPA] can serve as the basis for a cause of action."

III. THE COMMISSION'S DECISION TO PERMIT CONSIDERATION OF NONRADIOLOGICAL ENVIRONMENTAL ISSUES IN PUBLIC HEARINGS NOTICED AFTER MARCH 4, 1971 WAS A PROPER EXERCISE OF ITS DECISION

As discussed in II above, NEPA contains no explicit requirement for a public hearing. The Commission's regulations, published December 4, 1970, implementing NEPA do, however, provide that nonradiological environmental considerations may be raised at public hearings for construction permits and operating licenses for which a notice of hearing is published on or after March 4, 1971. Paragraph 11(a), Statement of General Policy and Procedure: Implementation of the National Environmental Policy Act of 1969, Appendix D to 10 CFR Part 50, 35 F.R. 18469.* Paragraph 11(a) would permit any party to raise as an issue whether the issuance of a construction permit or an operating license would be likely to result in a significant adverse effect on the environment. If such a result were indicated, consideration would then be given to the need for imposing on the applicant requirements for the preservation of environmental values.

Paragraph 11(a), a clear exercise of the Commission's discretion, goes beyond the requirements of NEPA, the President's Executive Order and the Guidelines of the Council on Environmental Quality. On March 5, 1970, the President issued

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* This Statement became effective on January 3, 1971, and replaced the Commission's initial version of Appendix D, 35 F.R. 5463 (April 2, 1970) and the proposed revisions to it, 35 F.R. 8954 (June 3, 1970).

Executive Order 11514, 35 F.R. 4247. Section 2(b) directed Federal agencies to:

> "Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. This procedure shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information...."

It is important to note that the Executive Order did not require that agencies immediately provide for public hearings, but only that they develop procedures including, whenever appropriate, public hearings. Furthermore, Section 2(b) only applies to "Federal plans and programs," not to the issuance of detailed statements or to "major Federal actions significantly affecting the quality of the human environment." The intent may have been to allow public participation in the formulation of overall agency plans and programs rather than in particular licensing actions. In any event, the Executive Order clearly contemplated some time period in which agencies could develop the procedures and determine the appropriateness of public hearings. The Federal agencies were thus given substantial discretion.

Even if the Executive Order did require Federal agencies to hold public hearings to consider detailed statements, E. O. 11514 does not give LIFE any enforceable right to demand compliance with its provisions. Manhattan-Bronx

Postal Union v. Gronouski, 350 F. 2d 451, 456 (D.C. Cir. 1965), cert. denied 382 U. S. 978 (1966).

Under E. O. 11514, the Council on Environmental Quality has been given the responsibility for issuing

> "guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." Sec. 3(h).

The Council's Interim Guidelines of April 30, 1970 35 F.R. 7390 do not include a specific public hearing requirement. While paragraph 3(a) of those guidelines provided that

> "each agency will establish no later than June 1, 1970 its own formal procedures for . . . (5) meeting the requirements of section 2(b) of Executive Order 11514 for providing timely public information on Federal plans and programs with environmental impact,"

the guidelines did not require public hearing procedures to be established prior to June 1, 1970.

Recently proposed revisions to the Council's Guidelines, 36 F.R. 1398 (January 28, 1971), would require agencies to consider the appropriateness of public hearings. A new proposed paragraph 12(a) would provide

> "In accord with the policy of the National Environmental Policy Act and Executive Order 11514 agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action." (emphasis added)

Paragraph 3 of the proposed revised Guidelines would set a May 1, 1971 deadline for meeting the additional requirements not included in the Interim Guidelines, such as the development of procedures for public hearing whenever appropriate. Thus, the March 4, 1971 effective date in Appendix D is actually ahead of the timetable set forth in the proposed guidelines of the Council on Environmental Quality and is broader than the proposed guidelines because it applies to all AEC construction permit and operating license hearings and not merely to "Federal plans and programs with environmental impact."

The transition periods employed by both the Council on Environmental Quality and the Commission are in accord with the language of NEPA and with general legal principles. The Declaration of National Environmental Policy, §101(a) of NEPA, states that it is the Federal Government's policy

"to use all practicable means and measures"

to carry out a national environmental policy.

NEPA also contemplates that Federal agencies shall balance environmental considerations against other national policies. Section 101(b) states,

> "In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources ...." (emphasis added)

The Commission was doing exactly what Section 101(b) contemplated

when it decided on the March 4, 1971 effective date for public hearing consideration of environmental issues. As explained in the Commission's Statement of Considerations, the effective date of this provision was delayed

> "[i]n order to provide an orderly period of transition in the conduct of the Commission's regulatory proceedings and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power..." 35 F.R. 18470.

Certainly the national need for electric power is an "essential consideration of national policy." Contrary to LIFE's allegation that the Commission had "unilaterally decided" that there was an "alleged need for power", LIFE's Brief, p. 5, the need for power has been often recognized. In this very proceeding, the Federal Power Commission's comments on the Davis-Besse Nuclear Power Station environmental report called attention to "the critical power needs of [the Applicants'] service areas...." Letter from John N. Nassikas, Chairman, FPC to Harold L. Price, Director of Regulation, AEC, November 3, 1970.

Under general principles of administrative law, the Commission and the Council on Environmental Quality have the discretion to decide how NEPA should be implemented.* It is the responsibility of each agency to establish procedures for carrying out the mandates of NEPA consistent with the

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* See Ely v. Velde, 2 Envir. Rptr. 1185 (E.D. Va., 1971) which holds that NEPA is a discretionary statute.

Guidelines of the Council on Environmental Quality. When an executive agency has the obligation to carry out the requirements of a statute, the courts have given great deference to the agency's implementing regulations. The Supreme Court has often called attention to this doctrine.

In Power Reactor Development Corp. v. International Union, 367 U.S. 396, 408 (1961), the Court stated,

> "Particularly in this respect due when the administrative practice at stake 'involves a contemporaneous construction of the statute by the men charged with the responsibility for setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

Certainly the parts of NEPA are still "untried and new." In Udall v. Tallman, 380 U.S. 1, 16 (1965), the Court stated,

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

In NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) the Court stated,

> "[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."

See also Perkins v. Matthews, 39 U.S.L.W. 4111 (January 14, 1971). There can certainly be no argument that Section 102 of NEPA is "a broad statutory term." See also Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946); F.C.C.

v. Schreiber, 381 U.S. 279 (1965); Conley Electronics Corp. v. F.C.C., 394 F.2d 620 (10th Cir. 1968); Coakley v. Postmaster of Boston, Mass., 374 F.2d 209 (1st Cir. 1967).

Finally, it must be noted that the burden of establishing the invalidity of a regulation, in this case the March 4, 1971, effective date for consideration at the public hearing of environmental issues, rests upon LIFE. New York Foreign Freight F. & B. Assn. v. Federal Maritime Commission, 337 F.2d 289 (2d Cir. 1964), cert. denied, 380 U.S. 910 (1965). Not only does LIFE have the burden of proving invalidity, but that burden is a heavy one. United States v. Ekberg, 291 F.2d 913 (8th Cir.), cert. denied, 368 U.S. 920 (1961).

The Commission and the Council on Environmental Quality clearly have the discretion to determine how compliance with NEPA shall be achieved. The method of compliance should not be disturbed unless it is unreasonable, irrational or arbitrary. The Commission gave a reasoned explanation for the March 4, 1971, date in its Statement of Considerations by stating that it will provide "an orderly period of transition in the conduct of the Commission's regulatory proceedings and [will] avoid unreasonable delays...." The Commission's action is clearly consistent with the Council's Interim Guidelines and the proposed revised Guidelines.

IV. AEC HAS FULLY COMPLIED WITH NEPA AND 10 CFR PART 50, APPENDIX D

Contrary to implications in LIFE's Brief that AEC has avoided any form of compliance with NEPA, AEC in fact met all of NEPA's requirements.

On August 3, 1970, Applicants submitted an Environmental Report approximately 110 pages long. Comments on this Report were received by the Commission from the Departments of Agriculture, Defense, Health, Education and Welfare, Housing and Urban Development, and Interior, the Federal Power Commission, and the Department of Health of the State of Ohio on behalf of itself and that Department's Public Health Council, Water Pollution Control Board and Air Pollution Control Board. In response to these comments, Applicants have submitted considerable additional information. In addition, comments had already been received, pursuant to then existing interagency arrangements, from the U. S. Geological Survey, the U. S. Coast and Geodetic Survey, the Environmental Science Services Administration, and the U. S. Fish and Wildlife Service.

Based upon these comments, reports and information, the Commission prepared a "Detailed Statement on the Environmental Considerations by the Division of Reactor Licensing, U. S. Atomic Energy Commission, related to the Proposed Construction of Davis-Besse Nuclear Power Station by the Toledo Edison Company and The Cleveland Electric Illuminating Company"

which it issued on November 20, 1970. These documents have been made publicly available. This brief description of the Commission's environmental review procedures of the Davis-Besse facility contradicts LIFE's claim that the Commission "totally ignored [the Davis-Besse facility's] environmental impact." LIFE's Brief, p. 13.

The public hearing on the Davis-Besse facility began on December 7, 1970, pursuant to a notice of hearing published on November 4, 1970. The pre-hearing conference took place on November 23, 1970. At all of these times, the applicable AEC NEPA regulations were the Appendix D published April 2, 1970 and the proposed revision published on June 3, 1970. The most recent version of Appendix D, published on December 4, 1970, did not take effect until January 3, 1971. Neither the April 2, 1970 regulations nor the June 3, 1970 proposed revisions contained any provision for review of the AEC Detailed Statement at a public hearing.

None of the cases involving NEPA which LIFE cites, LIFE's Brief, pp. 6-7, in any way call into question the validity of the Commission's regulations or AEC's actions under them. While the four decisions cited do discuss NEPA, none of them involve or even mention the question of testing an agency's compliance with NEPA at an administrative agency hearing. In both Texas Committee on Natural Resources v. United States, 1 Envir. Rptr. 1303 (M.D. Tex. 1970) and Sierra Club v. Laird, No. CIV-70-78-TUC (D. Ariz. 1970), the federal

agencies involved had apparently done nothing to comply with NEPA. In Wilderness Society v. Hickel, 1 Envir. Rptr. 1335 (D.D.C. 1970), the Secretary of Interior had apparently complied with NEPA with respect to some of the permits sought for the construction of the Trans-Alaska Pipeline but had not so complied with respect to other permits. Because the court found that the several requested permits were "in effect a single application," he ruled that there had not been NEPA compliance "with respect to said application, when considered together." Finally, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), merely held that the Corps of Engineers was entitled to refuse to issue a land fill permit on environmental considerations.

The legislative history of NEPA makes clear that compliance with NEPA is not to be judged by "environmental impact" agencies such as the AEC, but rather by the "environmental control" agencies. As Senator Muskie stated at the time of Senate passage of the Conference report,

> "Of course this legislation does not impose a responsibility or an obligation on these environmental-impact agencies to make final decisions with respect to the nature and extent of the environmental impact of their activities. Rather than performing self-policing functions, I understand that the nature and extent of the impact will be determined by the environmental control agencies." 115 Cong. Rec. S.17460 (daily ed. December 20, 1969).

The purpose of the detailed environmental statement is to

inform the environmental control agencies and place them in a position to take any action which they may deem necessary. The detailed environmental statement also informs the Council on Environmental Quality of the nature of proposed agency action. The Council is then able to carry out its functions under Executive Order 11514, including its responsibility under Section 3(a) to

> "Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment."

CONCLUSION

It is clear that the Atomic Energy Commission has complied both with the letter and the spirit of the law in carrying out its environmental protection obligations. It has in fact gone beyond the requirements of NEPA. It has acted neither capriciously nor arbitrarily. As the Chairman of the Council on Environmental Quality has stated, the Commission has been "doing an exceptional job." Testimony before House Merchant Marine Committee, December 7, 1970, reported in 1 Environmental Reporter: Current Developments 837 (December 11, 1970). NEPA does not require that the matters to be considered in the detailed statement prepared pursuant to Section 102(2)(C) be reviewed at a public hearing; nor does NEPA require that proof of compliance with its terms be determined

in hearing proceedings such as the instant one. The public disclosure provisions of NEPA have bee. observed by the AEC in this proceeding.

Respectfully submitted

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