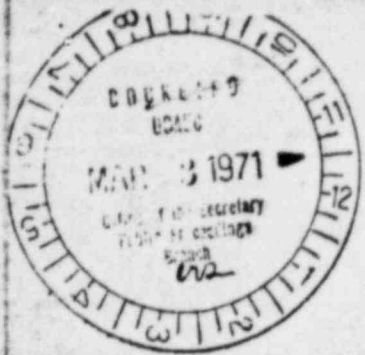


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DOCKET NUMBER
PROD. & UTIL. EAC. 50-346



UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

3-3-71

Docket No. 50-346



AEC REGULATORY STAFF'S REPLY BRIEF TO INTERVENOR LIFE'S
BRIEF REGARDING IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL
POLICY ACT OF 1969

Introduction

On February 22, 1971, pursuant to the posthearing briefing schedule established by the presiding atomic safety and licensing board (board), intervenors Living In A Finer Environment (LIFE) and William E. Reany (hereinafter referred to as LIFE) filed a brief regarding the Commission's implementation of the National Environmental Policy Act of 1969 (NEPA). At the same time LIFE filed proposed conclusions of law relating to the same subject.

In its brief LIFE contends that the Commission has violated the provisions of NEPA by not including as part of the evidentiary hearing on the application for a construction permit for the Davis-Besse Nuclear Power Station (facility) nonradiological environmental considerations. As a consequence, LIFE argues that the issuance of any construction permit would be unlawful. More specifically LIFE contends that (1) the Commission's policy state-

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ments implementing the provisions of NEPA with respect to facility licensing actions violate the provisions of NEPA and (2) the Commission failed to comply with its own procedure for implementing NEPA in this proceeding.

Discussion

In its brief LIFE interprets the provisions of NEPA as requiring the Commission in a facility licensing action such as that contemplated in this proceeding to expand the issues for consideration in such a proceeding which are required by the Atomic Energy Act of 1954, as amended, to include nonradiological environmental effects. LIFE's citations to the legislative history of NEPA and to the Act itself do not support such an interpretation. In fact, contrary to LIFE's contention, there is no explicit requirement in NEPA that a Federal agency must hold evidentiary hearings on unquantified environmental amenities in connection with actions subject to NEPA.

Section 101(b) of NEPA provides that, in order to carry out the policy set forth in the 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 toward certain stated ends.

In section 102 of NEPA, the Congress authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of

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the United States shall be interpreted and administered in accordance with the policies set forth in the Act. All Federal agencies are to develop methods and procedures to give appropriate consideration to unquantified environmental amenities along with economic and technical considerations. Further, all agencies of the Federal Government are required to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment ^{1/} a detailed statement by the responsible official on certain specified environmental considerations. Prior to making the detailed statement, the responsible Federal official is required to 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 the detailed statement and the comments and views of the appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards are to accompany the proposal through the existing agency review processes.

The policy declared and the procedures required by NEPA were broadly stated so that each agency could develop the methods and procedures

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As provided in Appendix D to 10 CFR Part 50, a "major Federal action significantly affecting the quality of the human environment" includes facility licensing actions of the Commission such as the issuance of a construction permit for the Davis-Besse Nuclear Power Station.

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necessary for implementing NEPA which would provide the best integration with each agency's present procedure.

Also, contrary to the contentions of LIFE, Executive Order 11514 of March 5, 1970,^{2/} and the Interim Guidelines of the Council on Environmental Quality published on May 12, 1970,^{3/} 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.^{4/} On June 3, 1970, the Commission published for comment proposed amendments to Appendix D which provide interim guidance.^{5/} Subsequently, on December 4, 1970, the Commission published a new Appendix D to become effective January 3, 1971.^{6/}

Under the June 3 proposed amendments to Appendix D, which were followed in this proceeding, the Commission required applicants for licenses to

^{2/} 35 F.R. 4247, March 7, 1970.

^{3/} 35 F.R. 7390.

^{4/} 35 F.R. 5463.

^{5/} 35 F.R. 8594.

^{6/} 35 F.R. 18469.

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submit an environmental report which was then circulated to the appropriate Federal, State, and local agencies. ^{7/} 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 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. ^{8/} 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 as an issue in those cases in which the notice of hearing is published on or after March 4, 1971, the nonradiological environmental effects of a proposed activity. Using March 4, 1971, as a starting point for evidentiary hearings on unquantified environmental amenities 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 Consideration published with Appendix D stated:

^{7/} 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.

^{8/} Transcript page 495.

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"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.

Finally, LIFE has contended that the 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 guidance were followed by both the applicants and the AEC regulatory staff as can be noted in the record. ^{9/} Neither the effective Appendix D published on April 2, 1970, or 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

^{9/} Transcript pages 495-498.

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the detailed statement accompany the application through the review process.^{10/} 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.

Although LIFE has contended in its brief that the Commission has abused its discretion with respect to its implementation of NEPA, LIFE has failed to offer any persuasive arguments to support such a contention. The record in this proceeding fails to support such a contention.

The cases cited by LIFE in its brief do not support the proposition that NEPA requires an evidentiary hearing on unquantified environmental amenities or that the detailed environmental statement must be part of the evidentiary record.

Conclusion

For the reasons stated above, there is no support for the contentions of LIFE regarding the Commission's implementation of NEPA and the application of the Commission's NEPA guidance to the licensing action which is the subject of this proceeding. In summary, LIFE has failed to show that

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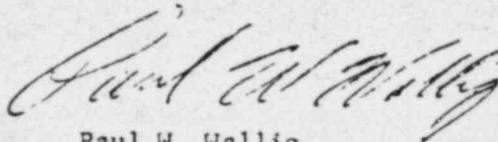
10 CFR Part 50, Appendix D, Paragraph 2. as published on April 2, 1970, and Paragraph 7. as published on June 3, 1970.

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Appendix D to 10 CFR Part 50 was not within the Commission's authority, was not promulgated in accordance with applicable procedural requirements, or was not a reasonable exercise of the Commission's discretion. Accordingly, the proposed conclusions of law submitted by LIFE in this connection should be rejected.

Respectfully submitted,



Paul W. Wallig
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 3rd day of March, 1971.