UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the matter of	)	Docket No. 50-346
THE TOLEDO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Brief in Support of LIFE's Exceptions to Initial Decision
(Davis-Besse Nuclear Power Station)	)	

All of LIFE's exceptions to the March 23, 1971 Initial Decision of the Atomic Safety and Licensing Board are based on the Board's failure to recognize that the National Environmental Policy Act of 1969 (NEPA) (incorrectly referred to as the National Environmental Protection Act in paragraph 49 of the Initial Decision) required full consideration of non-radiological environmental factors prior to the issuance of a construction permit.

Exception No. 1 is based on the fact that the Board has erroneously disregarded the significance of an intervenor's objections as applied to the specific circumstances of this case. LIFE's contentions concerning NEPA are not abstract propositions but pertain to the fact that Davis-Besse will be built under an invalid construction permit issued by a Board which never considered its possible adverse environmental consequences.

LIFE's exceptions 2 and 3 are substantiated by the clear intent of NEPA as expressed in its language and in its legislative history. These aspects of NEPA have been fully discussed on pp. 1 - 10 of LIFE's "Brief re: Implementation of National Environmental Policy Act" and LIFE's "Reply Brief" on this issue filed previously in these proceedings. LIFE respectfully refers the Commission to those Briefs and hereby incorporates the arguments and citations of authority therein rather than repeating them in detail at this time.

The Board should have found that the Commission's postponement of full compliance with NEPA until March 4, 1971, was an unreasonable exercise of administrative discretion. One of the key problems recognized by NEPA was the need to consider and protect the environment before a project had been so far completed that irrevocable commitments had been made. The action-forcing procedures of NEPA outlined in Section 102 were to be complied with unless existing

law positively prohibited compliance.

> ". . . it is the intent of the conferees that the provision "to the fullest possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." (emphasis added) (H. Conf. Rep. 91-765, p. H. 12635)

The unreasonably long transition period during which the AEC has not permitted consideration of environmental factors at evidentiary hearings is in violation of the statute. The stated AEC reason of administrative convenience (35 Fed. Reg. 18970, Dec. 4, 1970) is not a reasonable justification.

Arguments of administrative convenience may be appropriate where large numbers of small administrative decisions are involved, for example in welfare, social security or selective service cases. But the present situation, where a handful of cases involving hundreds of millions of dollars and irrevocable commitments for future generations is at stake--mere administrative convenience must not prevail.

The authority all indicates that the postponement embodied in 10 CFR Part 50 Appendix D is illegal.

(1) The act itself does not include a "grandfather clause."

(2) The legislative history is full of references to the environmental crisis and the need for speed of remedial and preventive measures.

(3) President Nixon himself in Executive Order 11514, March 5, 1970 (35 Fed. Reg. 4247) ordered all federal agencies to include a discussion of environmental factors in their existing public hearings.

(4) The Council on Environmental Quality Interim Guidelines (May 12, 1970, 35 Fed. Reg. 7391) require all agencies to be in compliance with NEPA and Executive Order 11514 by June 1, 1970.

All of the above facts indicate that the AEC's postponement was a clear abuse of discretion. If any transition period was allowable, it ended on June 1, 1970--six months before hearings in the Davis-Besse case began!

Since NEPA's enactment, numerous cases have held that failure to comply with its requirements, at least when the final decision is not made until after Jan. 1, 1970, invalidates agency actions.

In a very recent case, Environmental Defence Fund v. Corps of Engineers, 2 ERC 1260, reported subsequent to earlier filings, an Arkansas Federal District Court held that environmental factors had to be fully considered pursuant to NEPA even in a project begun several years prior to the enactment of NEPA. Wilderness Society v Hickel, (District Court, D.C., April 23, 1970) 1 Environmental Reporter 1335, involved an application filed before Jan.1, 1970 for permits to construct the Transalaskan Pipeline and a road parallel to the pipeline. The District Court held in favor of the Wilderness Socioy , granting a preliminary injunction against the issuance of a permit until the requirements of NEPA had been met. It should be noted that the Hickel case injunction was granted in April just a few months after the enactment of NEPA. Certainly there is much more reason to demand compliance by the AEC with NEPA in the present case coming over a year after NEPA.

In Texas Committee on Natural Resources v United States (W.D. Tex, February 5, 1970) —F. Supp.—the Court ordered a stay pending appeal of a denial of preliminary motion. The Court's grounds for granting the stay were that the petitioner had a good chance of success in appeal in halting the grant of funds approved but not disbursed prior to the passage of NEPA until NEPA was implemented.

Zabel v Tabb, 430 F2d 199 (C.A. 5th July 15, 1970) held that NEPA requires the Army Corps of Engineers to consider all environmental factors before granting a dredge and fill permit. Sierra Club v Laird, —F.Supp.—(Arizona, June 27, 1970) is another case [illegible] preliminary injunction until NEPA is applied to a [illegible] authorized by statute prior to January 1, 1970.

In Environmental Defense Fund Inc. v U.S. Army Corps of Engineers (D.D.C. Jan. 15, 1971) the court issued a preliminary injunction to halt construction of the Cross-Florida Barge Canal (a project authorized in 1942 and for which construction began in 1964). All of these cases invalidated agency action for failure to comply with NEPA. They did not happen to involve agency action based on the record of a public hearing, but the cases clearly establish the principle that an agency must include environmental

factors in whatever decisionmaking process that agency happens to follow.

The decisions cited above demonstrate that the Courts intend to take NEPA seriously and that compliance is a judicially enforceable administrative duty. Indeed, whatever the form of the evidence, (whether a Section 102(2) (c) "detailed statement" or some other environmental study) a thorough consideration of environmental factors in this case is necessary as a matter of general administrative law. In Udall v F.P.C., 387 US 482 (1967) and Scenic Hudson Preservation Conference v F.P.C., 354 F.2d 608 (Ca 2nd, 1965) cert. den. 384 U.S. 941 (1965), the Courts required that all data relevant to a federal action must be included in the record upon which the action is based. See also, Environmental Defense Fund v Hardin, 428 F.2d 1093 (1970).

LIFE further excepts to paragraph 51 of the Initial Decision (Exception No. 3) on the grounds that the Board has no basis for determining that the purported environmental statement was in fact an environmental statement of the type required by Appendix D since that statement was not made a part of the evidence and therefore not subject to evaluation by the Board. It is therefore impossible for the Board to know whether the AEC complied with interim Appendix D. The adequacy of an environmental statement can be challenged and determined in an appellate court review of these proceedings. It was error to prohibit such a challenge at the administrative level.

Even if the environmental statement were adequate, it served no purpose in the Davis-Besse case because it was not introduced into evidence, intervenors were not permitted to question its assertions, and the Board did not consider it in making a decision. It was a meaningless document. The interim procedures admittedly required that the statement accompany proposed action through existing agency review processes. Section 102 (2)(c). NEPA did not specifically name each review process, because every agency has its own version decision making procedures. If a public hearing is part of the review process, however, the detailed statement must be part of that hearing. This was clearly the intent of NEPA as is indicated in a comment by Council on Environmental Quality Chairman, Russell Train in a letter to Congressman Dingell, dated November 19, 1970 (the text of which is published in 1ELR 10008.) Speaking of the time relationship between public availability and criticism of a detailed environmental statement and the agency's decision and action, Chairman Train said:

"...(1)it is clear that completion of the final detailed statement must precede the ultimate decision and action and (2) the final detailed statement should 'accompany the proposal through the agency review processes.' It should be borne in mind that the great majority of environmental statements deal with activities, appropriations, or legislation with respect to which full public hearings in advance of decision are already required presently by either Congressional, statutory, or administrative procedure."

It is nonsense to claim that the detailed statement has accompanied the application through the review process when the hearing board, an integral part of the review process, does not have that statement in evidence before it and, therefore, cannot even consider it in making its decision.

Finally, LIFE excepts to the Board's conclusion that the proposed Davis-Besse facility will not be inimical to the health and safety of the public. (Exception No. 4) Such a conclusion can not be based on adequate findings of fact since non-radiological environmental consequences were not considered by the Board. Without review of environmental issues, the Board is not able to conclude that the Davis-Besse plant will not endanger the public health and safety by its adverse effects on the environment. For this reason, LIFE also excepts to the Board's order in paragraph 57 of the Initial Decision granting the construction permit. (Exception No. 5) The AEC decision-making process in this case ignored NEPA and its mandate to consider environmental consequences. A permit issued under such circumstances is invalid. Neither the postponement of full compliance until after March 4, 1971, nor the content of the interim procedures of Proposed Appendix D can be justified as a legitimate exercise of administrative discretion. Furthermore, there is no proof that proposed Appendix D was complied with in this case.

The essence of NEPA is planning and early action before disastrous environmental consequences occur. This requires consideration of environmental factors as early as possible before major federal action is taken. There is no excuse for failure to comply with NEPA in a case like Davis-Besse in which the hearings began almost a year after NEPA's enactment. The construction permit stage is the first opportunity for major federal commitment to the project. It should also be an opportunity to consider environmental consequences.

Davis-Besse is an installation of considerable magnitude. Its effects will be felt for a long period of time over a large geographical area. To have totally ignored its environmental impact was an abuse of AEC authority, and before consideration of whether a construction permit should be issued, a full hearing on all environmental factors must be held.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copeis of the foregoing Notice of Exceptions and Brief in Support Thereof to Gerald Charnoff, Attorney for Applicant, Shaw, Pitman, Potts, Trowbridge, Madden, 910 17 Street, N.J. Washington, D.C. 20006; to Thomas S. Englehardt, AEC Regulatory Staff, Washington, D.C. 20545; to Russell Baron, Attorney for the Coalition for Safe Nuclear Power c Brannon, Ticktin, Baron, and Lanzini, 930 Keith Bldg. Cleveland, Ohio; and to Glenn Lau, RR.1, Box 186, Oak Harbor, Ohio, this 9th day of April 1971.

Barbara R. Bleicher

procedures the Applicant will use to transport radioactive materials from its proposed plant location.

Jerome S. Kalur

Jerome S. Kalur
1425 National City Bank Building
Cleveland, Ohio 44114
216-621-4333
Attorney for Intervenor Coalition
For Safe Nuclear Power

SERVICE

Copies of the foregoing exceptions and the brief attached hereto have been sent to the following by regular U.S. mail on this _____ day of April, 1971: Gerald Chanoff, Esq., attorney for the Applicant, 910 17th Street, N.W., Washington, D.C. 20006; Thomas S. Englehardt, Esq., attorney for the A.E.C. regulatory staff, Atomic Energy Commission, Washington, D.C. 20545; and Beatrice K. Bleicher, Esq., attorney for Intervenor Life, 7th Floor Toledo Trust Building, Toledo, Ohio 43604.

Jerome S. Kalur

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