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MAR 11 1972

50-346

Chairman Schlesinger  
Commissioner Ramey  
Commissioner Johnson  
Commissioner Larson  
Commissioner Doub

WAIVER OF STATE CERTIFICATION REQUIREMENT IN DAVIS-BESSE PROCEEDING

Pursuant to the provisions of section 21 (b)(1) of the Federal Water Pollution Control Act, all applicants for an AEC construction permit must provide the Commission with a State certification of compliance with applicable State water quality standards. The same section also provides that this certification requirement shall be waived if the applicable State

"fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request..."

By letter dated January 27, 1972, the Toledo Edison Company and the Cleveland Electric Illuminating Company requested a Commission determination that certification pursuant to section 21 (b) is not required in connection with the construction permit for the Davis-Besse facility, "because it has been waived pursuant to the provisions of section 21 (b)(1)".

A construction permit was issued for the Davis-Besse facility on March 24, 1971. Under the "grandfather clause" provisions of section 21 (b)(8) of the Federal Water Pollution Control Act, State certification was not required at that time. However, the same section specifically provides that any construction permit issued pursuant to this exemption

"shall terminate at the end of one year unless prior to that time the...permittee submits to the Federal agency that issued such...permit a certification and otherwise meets the requirements of this subsection".

Thus, unless applicants receive State certification by March 24, 1972, or the Commission finds that the certification requirement has been waived, it would seem that their construction permit will automatically terminate on that date.

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The Davis-Besse applicants filed their requests for State certification on April 9, 1971 (applicants had filed an earlier request in January, 1971, but this was before Ohio had issued regulations required by section 21 (b)). In July, 1971, Ohio held hearings on the applicants' request. However, on October 18, 1971, the Ohio Water Pollution Control Board decided that it did not have sufficient expertise to rule on the applicants' request, and authorized the conduct of a study on the application. On December 5, 1971, Governor Gilligan of Ohio announced that a contract had been concluded with the Columbus Laboratories of the Battelle Memorial Institute for a 7-month study of the total environmental impact of the proposed facility.

The Office of the General Counsel advises that, since the State has had applicants' request for certification for nearly a full year, a Commission determination that the certification requirement has been waived would be legally justified. Because the Environmental Protection Agency has the primary responsibility for implementing Federal Water Pollution Control Act Programs, the staff also met with EPA representatives to discuss this matter. EPA has informally agreed that a waiver of the certification requirement would be justified under the present circumstances. 1/ The EPA regulation construing the waiver provisions of section 21 (b) provides that the "reasonable period of time" required by section 21 (b) "shall generally be considered to be 6 months" (40 CFR § 115.16, 36 FR 22488, November 25, 1971).

On February 9 we received a telegram from the State Assistant Attorney General advising us that "the Water Pollution Control Board opposes... applicants' request," and promising that "briefs in opposition to said request will follow". We did not receive a brief from the State until March 10, by which time (see below) there was some evidence that the State might act on applicants' certification request before March 22. The State's brief states that:

"For the purpose of expediting the certification procedure, the Board has requested an acceleration of the [Battelle] study. The Board has informed counsel that the research contractor will submit its report within the next month, and that the Board will be able to reach a decision within several days after receipt of that report."

1/ We would propose to obtain formal EPA concurrence prior to any Commission waiver determination and reflect that concurrence in the text of the determination itself (see the attached draft waiver determination).

In a telephone conversation on March 10 with Chairman Schlesinger, Governor Gilligan advised that the State expected to be in position to act on the Davis-Besse certification request by March 22. A proposed letter from the Chairman to the Governor, referring to this advice, is attached.

If the State does act on the certification application by March 22, no Commission decision on the applicants' request for a waiver determination will be necessary. If State action is not forthcoming, however, there would appear to be no assured legal basis for preventing the termination of the Davis-Besse construction permit without determining that the State certification requirement has been waived. Any AEC attempt to extend the permit would seem to require a strained construction of the Federal Water Pollution Control Act, which probably would be challenged by persons who had intervened in the Davis-Besse construction permit proceeding. If the construction permit is allowed to terminate, it could be argued that all the procedural requirements of the Atomic Energy Act and the National Environmental Policy Act would have to be satisfied anew before construction could be resumed under a new permit.

Consequently, the staff recommends that the application for a waiver determination be granted if the State does not act on applicants' certification request by March 22. A proposed waiver determination is attached. As stated in the proposed determination, we believe that the State will have various other avenues for effectively participating in the remaining reviews of the Davis-Besse facility prior to its scheduled commencement of operation at the end of 1974, even after the Commission issues its determination.

(signed) L. M. Muntzing

L. Manning Muntzing  
Director of Regulation

Attachments:  
As stated

cc: General Manager (2)  
General Counsel (2)  
Secretary (2)

bcc: DR Files LMMuntzing  
OGC Files Gertter  
MRowden  
HKShapar  
LSilverstrom

|         |              |         |            |  |  |
|---------|--------------|---------|------------|--|--|
| OFFICE  | OGC          | OGC     | DR         |  |  |
| SURNAME | LSilverstrom | jd      | LMMuntzing |  |  |
| DATE    | 3/13/72      | 3/17/72 | 3/14/72    |  |  |



UNITED STATES  
ATOMIC ENERGY COMMISSION  
WASHINGTON, D.C. 20545

Honorable John J. Gilligan  
Governor of Ohio

Dear Governor Gilligan:

I found very informative our telephone conversation of March 10 regarding the Toledo Edison Company - Cleveland Electric Illuminating Company application for State certification pursuant to the Federal Water Pollution Control Act, in connection with the proposed Davis-Besse Nuclear Power Station. We are desirous of cooperating with State governments wherever possible, especially where a primary interest of the States is involved. The structure and history of the Federal Water Pollution Control Act clearly demonstrates Congress' belief that water pollution control is indeed such a primary State interest.

In the hope that this proves helpful, permit me to outline our understanding of the Davis-Besse situation. Pursuant to the provisions of section 21(b)(1) of the Federal Water Pollution Control Act, all applicants for an AEC construction permit must provide the Commission with a State certification of reasonable assurance of compliance with State water quality standards applicable under that Act. The same section also provides that this certification requirement shall be waived if the cognizant State

"fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request..."

A construction permit was issued for the Davis-Besse facility on March 24, 1971. Under the "grandfather clause" provisions of section 21(b)(8) of the Federal Water Pollution Control Act, State certification was not required at that time; however, under the same section, the permit terminates by operation of law at the end of one year, unless the permittees prior to that time submit such certification to the AEC and otherwise meet the requirements of the section. Applicants thus have only until March 24, 1972, when their permit is scheduled to terminate, to submit Ohio's certification to the AEC.

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Honorable John J. Gilligan

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By letter dated January 27, 1972, the Davis-Besse permittees requested a Commission determination that section 21(b) certification is not required "because it has been waived pursuant to the provisions of section 21(b)(1)." In that request, they stated that they had applied to the Ohio Water Pollution Control Board for State certification on January 5, 1971, before the Board had adopted appropriate procedures for giving public notice of such application. Following the Board's adoption of a notice rule, the permittees apparently filed a second application on April 9, 1971. The Board held hearings on the applicant's request in July 1971, at which both AEC and Environmental Protection Agency representatives testified. However, on October 18, 1971, the Board decided that it did not have sufficient expertise to rule on the request, and authorized the conduct of a study on the matter. On December 5, 1971, you announced that the State had concluded a contract with the Columbus Laboratories of the Battelle Memorial Institute for a study of the total environmental impact of the proposed facility.

Against this background, we found extremely welcome your advice that the State expects to be in a position to act on the Davis-Besse certification request by March 21. We hope the State will be able to take timely action on the certification request, and that the Commission will be notified as to State action in this regard by March 22, so that the Commission can carry out its responsibilities under the Federal Water Pollution Control Act.

Sincerely,

Chairman

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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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

DETERMINATION THAT THE CERTIFICATION REQUIREMENT OF  
SECTION 21(b) OF THE FEDERAL WATER POLLUTION  
ACT HAS BEEN WAIVED

1. Pursuant to the provisions of section 21(b)(1) of the Federal Water Pollution Control Act, all applicants for an AEC construction permit must provide the Commission with a State certification of reasonable assurance of compliance with State water quality standards applicable under that Act. The same section also provides that this certification requirement shall be waived if the cognizant State  

"fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request..."
2. A construction permit was issued for the Davis-Besse Nuclear Power Station on March 24, 1971. Discharges resulting from the operation of the plant will be made into the Toussaint River and Lake Erie. Under the deferral provisions of section 21(b)(3) of the Federal Water Pollution Control Act, State certification was not required

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at the time the permit was granted; however, the same section specifically provides that any construction permit issued pursuant to this exemption

"shall terminate at the end of one year unless prior to that time the...permittee submits to the Federal agency that issued such...permit a certification and otherwise meets the requirements of this subsection."

3. By letter dated January 27, 1972, the Toledo Edison Company and the Cleveland Electric Company (the permittees) requested a Commission determination that certification pursuant to section 21(b) is not required in connection with the construction permit for the Davis-Besse facility "because it has been waived pursuant to the provisions of section 21(b)(1)."
4. The permittees filed their request for State certification on April 9, 1971. (Applicants had filed an earlier request on January 5, 1971, but this was before Ohio had issued regulations required by section 21(b)). Hearings on this request were held in July 1971, at which both Environmental Protection Agency and AEC representatives testified. However, on October 18, 1971, the Ohio Water Pollution Control Board decided that it did not have sufficient expertise to rule on the applicants' request, and authorized the conduct of a study on the application. On December 5, 1971, Governor Gilligan of Ohio announced that a contract had been

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concluded with the Columbus Laboratories of the Battelle Memorial Institute for a seven-month study of the total environmental impact of the proposed facility. A state brief in opposition to applicants' current application for a waiver determination was received by the AEC on March 10, 1972, stating, inter alia, that

"for the purpose of expediting the certification procedure, the Board has requested an acceleration of the study. The Board has informed counsel that the research contractor will submit its report within the next month, and that the Board will be able to reach a decision within several days after receipt of that report."

[Fill-in sentence, based on what State does by 3/22/72.]

5. In view of the Environmental Protection Agency's primary responsibility for the implementation of Federal Water Pollution Control Act programs, the Commission has consulted with the Agency on applicants' request for a waiver determination. The Agency agrees that a waiver determination in the circumstances of this proceeding, as described above, would be reasonable and proper. The Commission notes that the Agency's own regulation construing the waiver provisions of section 21(b) states that the "reasonable period of time" required by section 21(b) "shall generally be considered to be six months, but in any event shall not exceed one year." (40 C.F.R. § 115.16, 36 F.R. 22488, Nov. 25, 1971).

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6. Finally, the Commission notes that, despite the current determination, the State of Ohio will have various other avenues for effectively participating in the remaining reviews of the Davis-Besse facility in regard to water quality matters prior to its scheduled commencement of operation at the end of 1974.
7. Upon consideration of the above, the Commission has determined that:
  - a. The State of Ohio has failed to act on applicants' request for certification under the provisions of section 21(b) of the Federal Water Pollution Control Act within a reasonable period of time after receipt of that request, and that
  - b. The requirements for State certification consequently are waived with respect to the Davis-Besse construction permit, pursuant to the provisions of section 21(b)(1).

FOR THE ATOMIC ENERGY COMMISSION

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W. B. McCool  
Secretary of the Commission

Dated at  
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