UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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CALVERT CLIFFS' COORDINATING COMMITTEE, INC., :
NATIONAL WILDLIFE FEDERATION and
THE SIERRA CLUB, :

Petitioners :

v. : No. 24,871

U.S. ATOMIC ENERGY COMMISSION,
UNITED STATES OF AMERICA, :

Respondents :

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trans w/ltr 4-6-71

On Petition For Review From
The Atomic Energy Commission

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# BRIEF AMICUS CURIAE OF CONSUMERS POWER COMPANY

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ADOPTION BY THE AEC OF A TRANSITION PERIOD ENDING ON MARCH 4, 1971 BEFORE PUTTING SOME OF ITS NEPA PROCEDURES INTO EFFECT WAS A VALID EXERCISE OF ITS DISCRETION.

In issuing its revised version of Appendix D to 10 CFR Part 50, the AEC stated (Joint Appendix, p.6):

> "In 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, the issues described in paragraph 2 above may be raised only in proceedings in which the notice of hearing in the proceedings is published on or after March 4, 1971."

Paragraph 2, insofar as it was referred to in the above quotation, stated:

> "In a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or fuel reprocessing plant, any party to the proceeding may raise as an issue whether the issuance of the permit or license would be likely to result in a significant, adverse effect on the environment. If such a result were indicated, in accordance with the declaration of national policy expressed in the National Environmental Policy Act of 1969, consideration will be given to the need for the imposition of requirements for the preservation of environmental values consistent with other essential considerations of national policy, including the need to meet on a timely basis the growing national requirements for electric power."

The AEC explained this decision in the following way (Joint Appendix, p.8):

"The public is demanding substantially more electric power, and it is expecting the power to be available, without shortages or blackouts. Electric power use in the United States has been doubling about every 10 years. If prevailing growth pattern and pricing policies continue, electric power capacity may need to triple or quadruple in the next two decades. Meanwhile during the coming winter and summer and for the next few years, there is a real electric power and fuel crisis in this country.4/

Various authoritative statements and reports have stressed that the urgent near term need for electric power requires that delays be held to an absolute minimum. Also reports looking to the implementation of improved institutional arrangements on siting of power plants recommend procedures for expediting the process consistent with protection of the environment. Thus in the Report 'Electric

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"4/ Chairman Nassikas of the Federal Power Commission stated, at hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, on August 3, 1970: 'The current situation is such that little leeway remains for additional delays if the country is to avoid critical future shortages in meeting anticipated real power needs.'

In a 'Statement on the Fuel Situation for the Winter of 1970-71', Paul W. McCracken, Chairman, Council of Economic Advisers, and General George A. Lincoln, Director, Office of Emergency Preparedness, said:

'We have continued to study the energy supply situation and find that as winter approaches the nation faces a potential shortage in the supplies of natural gas, residual fuel oil and bituminous coal. The potential shortage appears to be more serious in some regions of the country than in others, but no section is completely immune from concern.'"

Power and the Environment' published by the Energy Policy Staff of the Office of Science and Technology in August 1970, in which all of the Federal agencies responsible for environmental and power programs participated, the Basic Findings stated:

> New public agencies and review procedures must take into account the positive necessity for expediting the decision-making process and avoiding undue delays in order to provide adequate electric power on reasonable schedules while protecting the environment.

> The Commission believes that revised Appendix D takes into account the necessity for avoiding undue delays in order to provide adequate electric power and that it reflects a balanced approach toward carrying out the Commission's environmental protection responsibilities under the National Environmental Policy Act of 1969 and the Atomic Energy Act of 1954, as amended. Its main concern here has been to find out and strike a reasonable balance of those considerations in the overall public interest. The Commission expects that revised Appendix D will be implemented to that end."

We leave it to the Government and other amici to argue the legal permissibility of a reasonable transition period leading toward full implementation of the AEC's NEPA procedures in nuclear power plant licensing proceedings. If the Court should agree with the Government as to that point, however, it seems clear that the gravity of the electric power shortage facing the nation constitutes ample justification for the adoption by the AEC of the

particular transition period at issue here.* Although we do not wish to duplicate the full statement which we expect the Government will make as to the dimensions of this situation, we call the Court's attention to the Analysis by FPC of Preliminary Reports Filed with Federal Power Commission by Major Electric Utilities on Summer 1971 Load Supply Situation, which was released on February 22, 1971. In this analysis (at p.1), the FPC stated:

> "Reports filed with the Federal Power Commission by the Nation's major electric utility systems and pools indicate that some areas of the country may experience tight power supply problems during this coming summer as a result of inadequate installed capacity to meet forecasted summer peak loads. The shortage of capacity is due primarily to delays being experienced in placing new generating facilities in service."

The petitioners dismiss the AEC's findings on the power shortage as "facile assumption" (Brief, p.22). These are findings of an administrative agency in a field in which it is expert. As such, they are entitled to respect from the Court. Indeed, even if they could be overcome by a strong

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* Petitioners contend (Brief, p.24) that, even if a transition period were permissible, it could not go beyond June 1, 1970, because the Council on Environmental Quality's Interim Guidelines of May 1970 required all agencies "to be in compliance with NEPA" by that date. The requirement was merely to establish certain formal NEPA procedures by that date. See paragraph 3. Appendix D establishes such procedures. The issue in this case is the validity of some of them.

What emerges clearly from the declaration of policies and goals in §101 is the necessity for balanced decision-making which takes competing considerations into account. This is precisely what Appendix D does.

Petitioners argue (Brief, p.22) that the issue of whether the gravity of the power shortage should be taken into account in permitting a pending case to proceed without a full hearing on non-radiological environmental issues may only be considered "in a particular case" and not "pre-judge[d]...for every reactor." This position is contrary to established law. It has long been held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency". (SEC v. Chenery Corp., 332 U.S. 194, 203 (1946); accord, Alabama-Tennessee Natural Gas Co. v. FPC, 359 F.2d 318, 343 (5th Cir.), cert. denied, 385 U.S. 847 (1966); Regular Common Carrier Conference v. United States, 307 F. Supp. 941, 943 (D.D.C. 1969) (three-judge court); see American Airlines v. CAB, 123 App. D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843 (1966). "Courts increasingly are recognizing the validity and necessity of rule making in situations which could support adjudication instead." Regular Common Carrier Conference v. United States, supra, at 944. "[W]hen, as here, a new policy is based upon the general characteristics of an industry, rational

decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them." WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.) (Friendly, J.), cert. denied, 393 U.S. 914 (1968). Although large power plants provide energy directly to the area in which they are located, they also serve the needs of those far beyond the immediate service area. Inter-ties connect most power companies with what is becoming a national electric grid; the electrical energy of a system or pool which at any given time is in excess of its needs can be transmitted over great distances to areas where shortages exist.* Thus, the integrated nature of the nation's power supply system means that power supply is a national problem and justifies the AEC's treatment of it in Appendix D with a general rule of nation-wide effect.

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* The interdependence of our local electric systems is well illustrated by the fact that the great Northeast black-out of November 1965 was caused by an erroneous setting on a relay switch in Canada. See FPC, Prevention of Power Failures--A Report to the President, Vol. I at 7 (1967).

IV.

PETITIONERS' CONTENTION THAT THE AEC MUST INQUIRE INTO THE ADEQUACY OF EXISTING FEDERAL, STATE AND REGIONAL ENVIRONMENTAL STANDARDS AND REQUIREMENTS IS NOT SUPPORTED BY NEPA, IS INCONSISTENT WITH THE CURRENT PATTERN OF FEDERAL-STATE RELATIONSHIPS IN THE FIELD OF ENVIRONMENTAL PROTECTION AND WOULD CAUSE CHAOS IN THE ELECTRIC POWER INDUSTRY. AT THE VERY LEAST, THE AEC HAD DISCRETION TO REJECT THIS APPROACH.

Section 102(2)(A) of the National Environmental Policy Act requires all Federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." Section 102(2)(B) requires all Federal agencies to "identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." Section 102(2)(C) of NEPA requires all Federal agencies to include a detailed statement on environmental issues "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Section 102(2)(D) requires Federal agencies to study, develop and describe alternatives to recommended courses of action

where unresolved conflicts over resource use exist. Section 102(2)(F) requires Federal agencies to make environmental information available to anyone who wants it. Section 102(2)(G) requires Federal agencies to "initiate and utilize ecological information in the planning and development of resource-oriented projects."

Section 101(b) provides:

> "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 to the end that the Nation may --
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> 1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
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> 2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
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> 3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> 4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> 5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> 6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

The policy referred to in §101(b) is set forth in §101(a) as follows:

> "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Section 103 of the Act requires all Federal agencies to bring their regulations and procedures into conformity with the intent and purposes of the Act expressed in §101.

On the basis of the foregoing provisions, petitioners argue (brief, Part III) that the AEC, in evaluating the environmental impact of the licensing of a nuclear power plant, must examine into the adequacy of existing environmental quality standards and requirements which have been established by authorized Federal, state and regional agencies and that AEC must establish different standards on an ad hoc basis whenever it finds them inadequate. This argument verges on the frivolous for, as is apparent from the portions of NEPA outlined above, there is not the slightest support

for it either in the language of the statute's operative provisions or in its stated purposes.* Indeed, Section 101(a) declares that it is the policy of the Federal Government to pursue NEPA's objectives "in cooperation with State and local governments."

Petitioners' position would require us to conclude that, in enacting NEPA, Congress intended to make a wholesale re-allocation of responsibilities for regulation of the environment, between the Federal government and state and local governments and between Federal licensing agencies (such as AEC and the Corps of Engineers) and Federal standard-setting agencies.

We submit, however, that in the absence of a clear manifestation of congressional intent, NEPA should not be interpreted as requiring AEC to review and overrule standards and requirements adopted by State and local agencies or their Federal counterparts.

In the field of environmental protection, distinct and complex patterns of Federal-state regulatory relationships and responsibilities have been established by Congress.

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*In Northern States Power Co. v. State of Minnesota, CCH ATOMIC ENERGY L. REP. ¶16,608 (D. Minn. Dec. 22, 1970), relied on by petitioners at p.31 of their Brief, it was held that there was Federal preemption of regulation of radioactive releases by nuclear power plants on the basis of implicit intent found in amendments to the Atomic Energy Act and very explicit manifestations of that intent in the legislative history of those amendments.

Typically, in such fields as water and air pollution control, national standards and criteria are established by a Federal agency having specialized capability; more specific requirements are established, and approvals or disapprovals issued, by state or local agencies within the framework of the Federally approved criteria and procedures. Complex Federal and state statutes establish specialized Federal and state agencies with specialized personnel and with funds and organizational structures and authority to carry out their respective responsibilities and to coordinate their programs. This allocation of responsibilities as established in those programs should not be modified by the Courts in the absence of clear direction by the Congress.

The inconsistency between petitioners' position and the current pattern of Federal-state relationships in the field of environmental protection may be illustrated by reference to just a few provisions of the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970 and the Clean Air Act, as amended by the Clean Air Amendments of 1970.

The Federal Water Pollution Control Act provides for the establishment of comprehensive programs for water pollution control by the Environmental Protection Agency "in cooperation with other Federal agencies, with State water pollution control agencies and interstate agencies, and with

the municipalities and industries involved...." (Sec. 3(a)). Programs are established for interstate cooperation and the enactment of uniform state laws relating to the prevention and control of water pollution (Sec. 4(a)); and for financial grants for water pollution control programs (Sec. 7(a)). A water pollution control advisory board is established whose members "shall be selected from among representatives of various State, interstate and local government agencies," as well as other interested public and private organizations (Sec. 9(a)). Elaborate provisions are included for the establishment by the states of water quality criteria subject to the approval of the Administrator of EPA (Sec. 10). Federal licensing agencies are prohibited from issuing licenses for the construction or operation of facilities "which may result in any discharge into the navigable waters of the United States" unless the applicant provides the Federal "licensing or permitting agency a certification from the State in which the discharge originates...or, if appropriate, from the interstate water pollution control agency having jurisdiction...that there is reasonable assurance... that such activity will be conducted in a manner which will not violate applicable water quality standards" (Sec. 21(b)(1)).

The Clean Air Act, as amended by the Clean Air Amendments of 1970, also provides for a complex pattern of Federal-state relationships and responsibilities in the

control of environmental pollution. As summarized in part in the conference committee report on the Clean Air Amendments of 1970 (H. Rep. No. 91-1783 on H.R. 17255):

> "Section 111. The conference agreement, as did the Senate bill, provides for national standards of performance on emission from new stationary sources. Included under this section would be emissions from new or modified installations of major industries. These sources, important in themselves and involved in industries of national scope must be controlled to the maximum practicable degree regardless of their location. Standards of performance must be set at the greatest degree of control attainable through the application of the best system of emission reduction which has been adequately demonstrated.
>
> Sources for which the Congress would expect standards of performance to be established include: ***
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> Steam electric powerplants.
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> ***
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> Section 113. Federal enforcement under section 113 leaves the primary responsibility with the States for enforcing requirements under implementation plans. The Administrator can issue an abatement order to a polluter or go to court seeking an injunction only after 30 days' notice to an individual polluter, or 30 days after notifying the State that the Federal Government is generally assuming enforcement powers in that State because of a widespread failure of States' enforcement. This gives States 30 days in which to take appropriate action themselves.
>
> For Federal standards of performance for new sources and emission standards for hazardous air pollutants, the Administrator may enforce without delay by either issuing an order to abate or seeking an injunction in court. This authority may be delegated to States but the Administrator retains authority to act directly without notice to the State.

Petitioners' position is not only inconsistent with the pattern of intergovernmental relations and responsibilities embodied in existing legislation, but also with important proposed new legislation.

The President, acting upon a recommendation of the Office of Science and Technology, recommended to Congress, in his Environmental Message of February 8, 1971, that a law be enacted providing for the establishment within each State or region of a single agency to adjudicate disputes over environmental issues in the certification of specific power plant sites and transmission line routes. (See Environment Reporter at p.21:0327). Section 7(a) of the bill submitted by the President authorizes these state and regional agencies to issue certificates authorizing the construction and operation of bulk power supply facilities if they find "that the use of the site or route will not unduly impair important environmental values and will be reasonably necessary to meet electric power needs." It further provides that "the judgment of the Federal, State or regional certifying body shall be conclusive on all questions of siting, land-use, State air and water quality standards, public convenience and necessity, aesthetics, and any other State or local requirements." This would take away a good part of the AEC's environmental responsibilities in nuclear power plant licensing cases, giving them to still another

type of government agency. Section 7(a) further provides that the aforementioned certificates "shall be granted only after the appropriate certifying body has ascertained that all applicable Federal standards, permits, or licenses have been satisfied or obtained." Thus, the integrated review by the AEC of all environmental issues in nuclear power plant cases which petitioners regard as being required by NEPA and essential to good regulation are not so regarded by the President and the Office of Science and Technology.

The President's power plant siting bill is not the only currently proposed legislation which is inconsistent with petitioners' philosophy that good environmental regulation requires comprehensive powers in the operating or licensing agency to review and revise any and all environmental standards set by other agencies. Title III of S.3354, a bill to amend the Water Resources Planning Act sponsored by Senator Jackson, NEPA's principal sponsor in the Senate, if enacted, would establish a program for the adoption of statewide land use plans (applicable to power plants as well as other facilities) by a specially designated state agency in each state, which plans would have to be consistent with "Federal guidelines and requirements"* and approved by a new Federal body - the Land and Water Resources Council.

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*Sec. 303(c), S.3354, 91st Cong., 2d Sess.

In sum, the entire argument in petitioners' brief as to why integrated review by the AEC of all environmental problems and standards in a nuclear power plant case is necessary is inconsistent with the current pattern of Federal-state relations in environmental matters as evidenced by existing and proposed legislation in the field.

Petitioners' argument boils down to an expression of their own convictions, no doubt sincerely held, but hardly the basis for overturning the quasi-legislative judgment of an expert administrative body.

Petitioners seem at times to define this issue to be "what kind of standard-setting would be best as a matter of policy?". Although the question is irrelevant as a matter of law, petitioners' argument on the policy considerations is hardly convincing. For example, there is no reason to think that the AEC is more qualified to set standards for emission by nuclear power plants of non-radiological substances into water than state or regional water quality agencies, the Environmental Protection Agency or the Army Corps of Engineers. It would hardly make sense, in view of the expertise which resides in these agencies, to give the AEC power to revise or disregard their standards in particular cases. Yet, this is where petitioners' position leads us.

Perhaps sensing an inability to find support for their thesis in the statute, petitioners argue (Brief, p.35)

that NEPA would be meaningless if it did not require the AEC to independently determine the adequacy of environmental standards set by other government agencies. This is patently untrue. The obvious purpose of NEPA was to ensure that all Federal agencies would consider both the environmental impact of any action that they might take or authorize and possible alternatives to the action contemplated as factors in deciding whether or not to take or authorize such action. Although NEPA made it clear that Congress wanted environmental problems to be considered, it left to the various Federal agencies broad discretion in choosing the means by which that task would be accomplished. The AEC decided to fulfill the mandate of NEPA by accepting existing governmental environmental standards and requirements and by filling in the gaps on a case by case basis where there are no applicable standards or requirements. Surely, this approach is not so lacking in reason as to constitute an abuse of discretion.

Petitioners (Brief, pp. 30 n.25 and 35) seem to harbor a deep distrust of environmental regulation by the states. Although the question of who would do a better job is not properly before this Court, we feel constrained to point out that the states have a strong incentive to establish and enforce effective environmental regulation of power plants within their jurisdiction, for their own residents are the

ones most immediately affected by such plants. Moreover, the EPA has the ultimate voice in approving water and air quality standards* thereby assuring reasonably uniform and effective standards in all states.

In order to convey to the Court the range of environmental standards and requirements to which a nuclear power plant is subject, we are attaching as an addendum to this brief a summary of all the non-AEC environmental regulation applicable to Consumers' proposed Midland plant. Even the smallest of environmental effects is treated within the scheme of regulation by agencies with the specialized knowledge and/or understanding of local problems to deal effectively with them, leaving to the AEC jurisdiction under NEPA to regulate whatever has been left unregulated** and to make the overall judgment as to whether or not the plant should be built. We submit that this scheme is precisely what is contemplated in NEPA.

Petitioners state (Brief, p.33) that, normally, standards and requirements set by other bodies will be sufficient and that all they are asking for is a willingness

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*See §10(c) of the Federal Water Pollution Control Act, §§108-110 of the Clean Air Act and Reorganization Plan No. 3 of 1970, ENVIRONMENT REPORTER 71:0211-0212.

**In paragraph 11(b) of Appendix D, the AEC defers to other government agencies only "with respect to those aspects of environmental quality for which environmental quality standards and requirements have been established" by such agencies.

on the part of the AEC to undertake an independent evaluation of those standards and requirements where the evidence shows that they will not be adequate as applied to a particular power plant. The implication is that the AEC will only have to consider the adequacy of existing standards and requirements in the rare and exceptional case. This is not true. Once it is established that all existing governmental standards and requirements are susceptible to AEC review, they will be subject to challenge by litigious intervenors in every case. Indeed, the practical effect of such a ruling would be to shift the arena for the consideration of environmental standards from orderly rulemaking proceedings before expert Federal, state and local agencies to hotly contested adjudicatory proceedings before an agency with little expertise in non-radiological matters. The inevitable, wasteful delay is apparent.

Quite apart from the negative consequences of permitting challenges before the AEC of standards set by other agencies, acceptance by the AEC of such standards has a positive, salutary effect. It permits the electric utility industry to rationally design, plan, and build nuclear power plants which will comply with governmental standards and requirements known in advance of any AEC hearings. If all standards and requirements are subject to revision in every case by the AEC, it will be very difficult for the utilities to plan

intelligently for future construction to meet increasing energy demands. The situation could become chaotic, increase plant costs to the detriment of ratepayers, and imperil the national interest in an assured and adequate supply of electrical energy.

Intervenors' remedy with respect to any non-radiological, adverse environmental effect within the jurisdiction of a Federal agency other than the AEC, or within the jurisdiction of a regional, state or local agency, is before such agency. No justification or grounds have been advanced by petitioners as to why the courts should interpret NEPA as creating jurisdiction in the AEC to modify the rulings of such other agencies.

## CONCLUSION

For all of the foregoing reasons, arguments II and III of petitioners' Brief should be rejected and the portions of the AEC's Appendix D to 10 CFR Part 50 which are challenged therein should be sustained.

Dated: March 22, 1971.

Respectfully submitted,

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# A D D E N D U M

# ADDENDUM

Prior to operation of the Midland Plant, and in many cases prior to construction of the Plant, Consumers Power Company must receive numerous approvals from various Federal, State and local agencies. Many of these approvals either directly or indirectly consider, evaluate and regulate the impact of the Plant, its related facilities and its construction on the environment. The purpose of this Addendum is to present the purposes of these various approvals, the grounds on which they are based and the procedures involved in securing them.

## I.

## FEDERAL REGULATION

### A. United States Army Corps of Engineers

The approval of the United States Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, is necessary prior to building any structures in, or altering the channel of, a navigable river. The regulations of the Corps of Engineers provide that a decision to issue a permit must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. 33 CFR §209.120(d)(1). Pursuant to a memorandum of understanding between the Secretary of the Army and the Secretary of Interior, the Corps of Engineers

upon receipt of an application under Section 10 shall notify all interested parties, including the Regional Directors of the Federal Water Pollution Control Administration (now EPA), the U. S. Fish and Wildlife Service, the National Park Service, and appropriate State conservation, resources and water pollution agencies. 33 CFR §209.120(d)(11). This memorandum further provides that such Regional Directors shall advise the District Engineer whether work proposed to be covered by the permit

> "will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment."

Where the Regional Director determines the above issue in the affirmative, the District Engineer will encourage an applicant to resolve the objection and in the absence of a satisfactory response will forward the application to the Chief of Engineers for appropriate action. In cases where the Regional Director determines the above quoted issue in the negative, the District Engineer may proceed following evaluation of relevant factors to issue the permit.

On May 20, 1969, Consumers Power met with representatives of the Corps of Engineers to discuss the dredging and installation of inlet and outlet structures and the widening of the channel of the Tittabawassee River. By letter application dated July 2, 1969, Consumers Power requested permission to widen the existing channel of the Tittabawassee River and to install inlet and discharge structures in the river. The Corps

of Engineers, on July 9, 1969, issued notice of Consumers Power's application asking for comments and stating that determination would be based

> ". . .on an evaluation of all relevant factors including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, and the general public interest."

The Corps of Engineers issued Permit No. 69-23-2, dated August 5, 1969, permitting dredging and installation of inlet and outlet structures in accordance with the drawings attached and, among other things, requiring compliance with any valid regulations, conditions or instructions affecting the work issued by any Federal or State agency "for conservation or protection of fish and wildlife or abatement or prevention of water pollution."

Additionally, pursuant to the Refuse Act of 1899, 33 USC §407, and Executive Order 11574, 35 F.R. 19627, it is necessary to receive a permit from the U. S. Army Corps of Engineers prior to discharging refuse matter into a navigable water of the United States. Executive Order 11574 provides that the Secretary of the Army shall be responsible for Refuse Act permits. The Executive Order further provides that in the performance of the Secretary's duties he shall accept findings and interpretations of the Environmental Protection Agency (EPA) respecting applicable water quality standards and compliance with those standards and shall deny a permit whenever certification as to compliance with applicable water quality standards under section 21(b) of the Federal Water Pollution Control Act has been denied, or

where issuance would be inconsistent with any finding, determination or interpretation of EPA. The Secretary shall also consider factors other than water quality under other pertinent laws and shall consult with the Secretaries of Interior and Commerce, with EPA and with the head of any affected state agency regarding effects on fish and wildlife resulting from any control or modification imposed on the stream by the discharge. Additionally, where appropriate, the Secretary shall prepare environmental statements and receive comments thereon pursuant to the National Environmental Policy Act of 1969.

The Secretary of the Army (acting through the Army Corps of Engineers) has issued proposed regulations, 35 F.R. 20005, December 31, 1970, providing that a decision as to whether to issue a permit will be based on an evaluation of the impact of the discharge on:

> "(i) anchorage and navigation, (ii) water quality standards, which under the provisions of the Federal Water Pollution Control Act, were established 'to protect the public health or welfare, enhance the quality of water and serve the purposes of that Act, with consideration of 'their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other legitimate uses,' and (iii) in cases where the Fish and Wildlife Coordination Act is applicable (where the discharge for which a permit is sought impounds, diverts, deepens the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made), the impact of the proposed discharge or deposit on fish and wildlife resources which are not directly related to water quality standards."

The proposed regulations recognize that responsibility for water quality improvement lies primarily with the States and the EPA and provide that the EPA shall "advise the Corps with respect to the meaning, content, and application of water quality standards." The proposed regulations provide that following consideration of all of the effects of a discharge; consultation with EPA and other designated departments of the Federal government; receipt of certification that there is reasonable assurance that the discharge will be conducted in a manner which will not violate water quality standards; preparation and circulation of an environmental statement, where necessary; public notice and, where there is sufficient public interest, a public hearing; the Corps of Engineers District Engineers may issue a permit if they determine that anchorage and navigation will not be injured thereby and that issuance of a permit will not be inconsistent with policy guidelines respecting water quality and, where applicable, fish and wildlife. There is also a proposed Memorandum of Understanding between the Administrator of EPA and the Secretary of the Army, 36 F.R. 983, January 21, 1971, which details the relationship between EPA and the Corps of Engineers in implementing the Refuse Act permit program in regard to water quality matters. The proposed Memorandum of Understanding makes it clear that EPA will be responsible for determining compliance with applicable water quality standards. Following the issuance of effective regulations by the Secretary of the Army, Consumers Power will make application for a Refuse Act permit for its proposed Midland Plant.

B. Federal Clean Air Act Requirements

The Federal Clean Air Amendment of 1970, P.L. 91-604, passed December 31, 1970, provides that the Environmental Protection Agency (EPA) shall create air quality control regions (§107), publish a list of air pollutants (§108(a)(1)), issue air quality criteria for those pollutants contained in the preceding list (§108(a)(2)) and promulgate national primary and secondary ambient air quality standards for air pollutants for which air quality criteria have been issued (§109). Air pollutants are those emissions which have an adverse effect on public health or welfare. Each State, within nine months of the promulgation of a national primary ambient air quality standard for any air pollutant, shall adopt and submit to EPA a plan for implementation, maintenance and enforcement of such primary standard in each air quality control region in each State (§110). Similar action is required following promulgation of secondary standards. EPA shall approve or disapprove any such plans within four months. Approval shall be based on the State plan providing for (1) expeditious attainment of primary standards, including emission limitations, standards and timetables, (2) monitoring and analyzing air quality, (3) review of any new sources of emissions, (4) intergovernmental cooperation and (5) adequate State administration of the program. The Act also provides for the promulgation of standards of performance for new stationary sources which would require all new sources to

meet standards of performance (§111). "Standards of performance" means a standard that reflects the degree of emission limitations achievable through the best system of emission reduction available. The EPA is also empowered to develop national emission standards for hazardous air pollutants (§112). A hazardous air pollutant is defined as an air pollutant for which no ambient air quality standard is applicable and which may "cause or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." In the absence of expeditious State action, EPA may enforce any applicable standard (§113) and EPA may provide for monitoring and inspection, including the making of emission records public (§114).

The Act clearly provides for a comprehensive program regulating air quality and emissions into the atmosphere. The central portion of Michigan, including Midland, has recently been proposed as an air quality control region, 36 F.R. 1544, February 2, 1971. The EPA has published proposed national primary and secondary ambient air quality standards, including a list of air pollutants, 36 F.R. 1502, January 30, 1971. At present the list of air pollutants does not include materials emitted from nuclear plants. Should any materials emitted from nuclear plants be determined to be air pollutants and standards placed thereon, Consumers Power would of course be required to conform to any applicable standards.

C. United States Coast Guard

The approval of the United States Coast Guard for the construction, maintenance and operation of bridges and approaches thereto over the navigable waters of the United States is required by the General Bridge Act of 1946, as amended, 33 U.S.C. 502(b), and 49 CFR Part 1.

In late 1968 preliminary correspondence regarding the proposed railroad bridge to serve the Plant was initiated with the U.S. Coast Guard. A meeting with the Coast Guard regarding this bridge was held in Midland on May 20, 1969. Formal application describing the location and construction of the proposed bridge was made on May 23, 1969. On June 10, 1969, the Coast Guard issued public notice that the application had been submitted, that approval or disapproval of the bridge would be based primarily on its effect on present and future navigation but that "other pertinent factors such as fish and wildlife, public parks and historic sites" would be considered and that interested parties were requested to express their views. On June 18, 1969, pursuant to a request from the Coast Guard for its views and following study and recommendation from its Committee on County Affairs, the Midland County Board of Supervisors by resolution found no objection to the proposed bridge. Bridge Permit (155-69) was issued September 9, 1969, approving construction of the proposed bridge.

## II.

## STATE REGULATION

### A. Michigan Water Resources Commission

The Michigan Water Resources Commission (WRC) was created to:

> ". . . protect and conserve the water resources of the state and . . . [to] have control of the pollution of surface or underground waters of the state of Michigan. . . ." (§2, Act No. 245 of P.A. 1929, as amended, MCLA §323.2)

WRC is charged with establishing pollution standards, making regulations and orders restricting the polluting content of waste material or polluting substances discharged or sought to be discharged into state waters and to take all appropriate steps to prevent pollution which WRC deems unreasonable and against public interest. MCLA §323.5. The Act creating WRC specifically prcvides:

> "(a) It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational or other uses which are being or may be made of such waters; or which is or may become injurious to the value or utility of riparian lands; or which is or may become injurious to livestock, wild animals, birds, fish, aquatic life or plants or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.
>
> "(b) The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the state shall be con-

> sidered prima facie evidence of the violation of section 6(a) of this act unless said discharge shall have been permitted by an order, rule or regulation of the commission. Any city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in section 7 of this act." (MCLA §323.6(a)(b))

Any person contemplating a new or substantial increase in use of waters of the State for sewage or waste disposal purposes is required to file a statement with WRC following which WRC will issue an order of determination stating the minimum restrictions to be imposed on the use to guard against the unlawful uses set forth in MCLA §323.6. The statement of use to be filed with WRC is required to set forth:

> ". . .the nature of the enterprise or development contemplated, the amount of water required to be used, its source, the proposed point of discharge of the wastes into the waters of the state, the estimated amount so to be discharged, and a fair statement setting forth the expected bacterial, physical, chemical and other known characteristics of the wastes." (MCLA §323.8(b))

Pursuant to the statute, WRC on January 4, 1968 adopted comprehensive intrastate water quality standards for the state of Michigan. The standards provide that the Tittabawassee River is to be protected for tolerant fish, warm-water species and for commercial and other uses. However, WRC, in its meetings of October 15-16, 1970, unanimously approved the raising of the river's classification to protection of intolerant, warm-water species and agricultural uses by January 1, 1974.

Another specific power of WRC is to:

> ". . . have control over the alterations of natural or present watercourses of all rivers and streams in the state to assure that the channels and the portions of the flood plains that are the floodways are not inhabited and are kept free and clear of interference or obstruction which will cause any undue restriction of the capacity of the floodway." (§2a Act No. 245, P.A. 1929 as amended by Act No. 167, P.A. 1968, MCLA §323.2a)

Consumers Power Company at the WRC's meeting of January 18, 1968, made an initial presentation of its plans to WRC to acquaint it with the Midland Plant project and to receive advice regarding necessary approvals. Subsequently, Consumers Power attempted to keep the WRC fully informed as the project developed. By letter, dated May 29, 1969, Consumers Power applied to the WRC for permission to construct structures over the Tittabawassee River and within the normal flow line and flood plain of the river. These structures included a submerged intake, a single spur track railroad bridge, an outlet structure and an earth dike to enclose the cooling pond and involved interruption and relocation of drains. The application contained a description of the structures to be constructed, a description of the methods to be used to construct the structures and to protect against erosion, and an evaluation of the effect of the structures on the river's flood stage. Pursuant to conversations with the staff representing the WRC the application was amended by a letter, dated June 13, 1969, to lessen the impact of the structures on the flood

stage of the river. Following approval of the county drain commissioner and examination and consideration of the application by the staff and the WRC, the WRC at a public meeting, June 25, 1969, issued Order and Permit No. F9-55, permitting the construction of the railroad bridge, improvement of the river channel, creation of the cooling pond, construction of a bridge over Bullock Creek and several drains subject to listed conditions and restrictions. Among these conditions and restrictions are restrictions to prevent erosion, to regulate the placement of fill and to provide that fill would be of an inert nature and would not endanger public health or safety.

On June 9, 1970, Consumers Power filed with the WRC a Statement of New or Increased Use of Waters of the State For Waste Disposal Purposes. Following discussions with the staff of WRC, Consumers Power filed a revised statement, dated July 15, 1970, replacing the previously filed statement. The statement contained a description of Consumers Power's proposed use of the waters and a description of the wastes to be released from the Plant to the river. On August 10, 1970, WRC held a public hearing in Midland, Michigan at which Consumers Power presented details of its proposed use and various members of the public, including some who have since intervened in the present Atomic Energy Commission proceedings, presented their views and supporting evidence. On October 15, 1970, the WRC issued its Order of Determination placing restrictions and conditions on Consumers Power's proposed use of the waters of the Tittabawassee River.

The Order of Determination specifically limits discharges from the Plant as follows:

> "Wastes discharged to the Tittabawassee River from all sources, either separately or combined, including but not limited to cooling and condensing water, demineralizer regeneration water, and miscellaneous process wastes from the operation and maintenance of the proposed electrical generating nuclear unit, shall be so treated or controlled that they shall:
>
> 1. Contain no radionuclides in excess of the following limits:
>
>  a. If the discharge is an unidentified mixture of radionuclides, the concentration averaged over any 365 consecutive days shall not exceed $1 \times 10^{-7}$ uc/cc; or
>
>  b. If all radionuclides present in the discharge are identified as specified in Appendix B, Table II of Title 10, Chapter 1, Part 20, Code of Federal Regulations, 'Standards for Protection Against Radiation', the concentrations shall be such that, when averaged over any 365 consecutive days, the sum $\sum i \frac{Ci}{MPC_i} \leq 1$ where Ci is the concentration of each of the radionuclides and $MPC_i$ is the corresponding MPC in Appendix B, Table II of Title 10, Chapter 1, Part 20, Code of Federal Regulations, 'Standards for Protection Against Radiation'.
>
> 2. Be reduced in radioactivity to levels as low as practicable consistent with available treatment technology.
>
> 3. Not contain settleable or floating solids or any other substances, or heat, in amounts sufficient to create unnatural deposits on the bed, surface or banks of the receiving waters, or create conditions which are or may become injurious to the public health, safety or welfare, or which are

or may become injurious to domestic, commercial, industrial, agricultural, recreational or other uses which are being or may be made of such waters, or which are or may become injurious to the value or utility of riparian lands, or which are or may become injurious to livestock, wild animals, birds, fish or aquatic life or the growth or propagation thereof.

4. Not, separately or in combination with wastes from other than Company sources, increase the temperature of the waters of the Tittabawassee River outside a zone of mixing as shall be designated by the Chief Engineer of the Commission, more than five degrees (5°) Fahrenheit above natural stream temperature, nor above levels specified in the following table:

| J. | F. | M. | A. | M. | J. | J. | A. | S. | O. | N. | D. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 41 | 41 | 50 | 63 | 76 | 84 | 85 | 85 | 79 | 68 | 55 | 43" |

In addition to imposing limits on discharges, the order required processing of sanitary sewage at the licensed facilities of Dow Chemical Company, submission of design criteria to and approval of such criteria by the WRC Chief Engineer and performance of pre- and post-operational studies to determine accumulative effects of radioactive wastes and thermal discharges on the aquatic environment. Such environmental studies are to be developed in consultation with the WRC staff and approved by the Chief Engineer.

By letter, dated January 12, 1971, Consumers Power Company requested WRC to certify, in accordance with the provisions of Section 21(b) of the Federal Water Pollution Control Act,

33 USCA §1171(b), that there is reasonable assurance, as determined by the Michigan Water Resources Commission, that the construction and operation of the Midland Nuclear Plant will be conducted in a manner which will not violate applicable water quality standards. The WRC, at its meeting of February 18, 1971, voted to so certify. However, pending development of a proper form for such certification, the certificate has not been issued.

B. Michigan Air Pollution Control Commission

Pursuant to the Air Pollution Act, MCLA §336.11 et seq., the Michigan Air Pollution Control Commission is empowered, among other powers, to promulgate rules and regulations for controlling or prohibiting air pollution, to control and abate air pollution pursuant to any such rule or regulation, and require prior approval of plans for air cleaning devices. MCLA §336.15 "Air contaminants" are defined in the Act as "dust, fume, gas, mist, odor, smoke, vapor, or any combination thereof" and "air pollutant" is defined to mean:

> ". . . the presence in the outdoor atmosphere of air contaminants in quantities, of characteristics and under conditions and circumstances and of a duration which are injurious to human life or property or which unreasonably interfere with the enjoyment of life and property, and which are reasonably detrimental to plant and animal life in this state . . . ." MCLA §336.12

The rules of the Commission, R336.11 et seq., 1954 Michigan Administrative Code (1967 Annual Supp.) provide that any person planning to construct any process which may be a source of air pollution shall submit plans and specifications to the Commission for approval prior to construction. R336.21 Applications shall include the expected composition of the effluent stream and expected physical characteristics of particulates. R336.24 Present standards of the Commission relate to emissions from specified types of facilities or to standards of smoke density and are not applicable to a nuclear plant.

On August 28, 1970, Consumers Power made application to the Michigan Air Pollution Control Commission fully describing the Plant and all of its auxiliary structures and the quantity and composition of its emissions. The application specifically asked for approval of the Plant's gaseous radioactive waste disposal system, which the Commission has previously stated was the only Plant system that would be recognized as an air cleaning device. Consumers Power in recognition of preeminent AEC jurisdiction regarding radioactivity in emissions specifically stated that the application was intended to recognize whatever jurisdiction the Commission had. It has not yet been finally determined whether a permit will be required.

C. Michigan Department of Natural Resources

The Inland Lakes and Streams Act, MCLA §281.748, provides that unless a permit has been granted by the Department

of Natural Resources it is unlawful to construct or dredge channels or ponds for interconnection with an existing navigable stream. The powers of the Department in issuing permits and the bases for such permits are as follows:

> "If the department finds that the project will not injure the public trust or interest, including fish and game habitat, that the project conforms to the requirements of laws for sanitation, and that no material injury to the rights of any riparian owners on any body of water affected will result, the department shall issue a permit authorizing the enlargement of the waterway affected. The department may impose such further conditions in the permit that it finds reasonably necessary to protect public health, safety, welfare, trust and interest, and to protect private rights and property. The existing and future owners of land fronting on the artificial waterway are liable for maintenance of the waterway in accordance with the conditions of the permit." (MCLA §281.751)

Pursuant to Consumers Power's letter request of June 13, 1969, the Department of Natural Resources treated Consumers Power's application to the Water Resources Commission under the Floodplain Act, Act No. 167 of 1968, dated May 29, 1969, as amended by the letter of June 13, 1969, as an application under the Inland Lakes and Streams Act. The application was amended by letter of July 22, 1969, forwarding a copy of the Midland Township order and permit resolution dated July 11, 1969, and a copy of Consumers Power's application to the U.S. Army Corps of Engineers. Following consideration and review of the information contained in such application and in Consumers Power's application to the U.S. Army Corps of Engineers,

the Department of Natural Resources issued a permit under the Inland Lakes and Streams Act permitting dredging adjacent to property fronting on the Tittabawassee River and requiring completion in conformance with U. S. Army Corps of Engineers' requirements.

D. Michigan Public Service Commission

The statute provides that:

> "The space between the rails and for a distance outside of the rails of 1 foot beyond the end of the ties shall be surfaced with a material which shall be as durable as the adjacent highway surfacing if reasonably practicable, and shall have minimum qualifiactions not inferior to wooden planks, and shall be maintained, as nearly as reasonably may be, in a condition as smooth as that of the adjacent highway, and such surfacing of planks or other material at all state trunk line highways and county highways shall have a width of not less than the width between the established curb lines, or, in the absence of such curb lines the width between established shoulder lines of the highway, but not less than 16 feet." MCLA §469.1

The Michigan Public Service Commission (MPSC) regulates and approves railroad grade crossings in the State of Michigan. MCLA §469.1 et seq. As part of the construction of the Plant, it is necessary to construct a new railroad spur crossing a public road and going to the Plant site. This new spur will be actively used during construction and occasionally used following operation of the Plant.

By letter, dated July 8, 1969, Consumers Power requested permission to establish and maintain the new public crossing. Following an inspection of the site the State railroad safety inspector, on February 23, 1970, submitted his report to the MPSC recommending the granting of permission. Copies of the report were sent to the Chesapeake & Ohio Railroad, Consumers Power, City of Midland, Midland Public Schools and the Michigan Department of Education with a cover letter informing them that if any of such parties objected to the recommendation or desired a formal hearing such advice was to be submitted to the MPSC within 21 days. No objections being received, the MPSC by Order dated July 20, 1970, granted permission to Consumers Power for the new grade crossing subject to conditions requiring the maintenance of proper drainage, the maintenance of clear vision areas and the installation and maintenance of proper warning devices.

## III.

## LOCAL REGULATION

A. Midland Township Zoning Board of Appeals

The Township Zoning Act, MCLA §125.271 et seq., provides for the establishment by townships of zoning ordinances:

> ". . . based upon a plan designed to promote the public health, safety, morals and general welfare, to encourage the use of lands in accordance with their character and adapta-

> bility and to limit the improper use of land, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation and other public requirements, and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources and properties; and shall be made with reasonable consideration, among other things, to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building and population development."
> (MCLA §124.273)

Pursuant to the statutory authority, Midland Township adopted its present zoning ordinance on December 20, 1967. The Midland Plant is to be located in the industrial zone of Midland Township and does not require approval of its location in such zone. The 880-acre cooling pond associated with the project is located in the residential zone.

Consumers Power, on July 18, 1969, petitioned the Township Zoning Board of Appeals for an order under Article 13, §13.2, of the Midland Township Zoning Ordinance, granting permission to locate, erect and use the proposed nuclear plant, cooling pond and appurtenant equipment, structures and facilities on property in Midland Township described in the petition. The Midland Township zoning ordinance provides:

> "The Board of Appeals shall have the power to permit the erection and use of a building, or an addition to an existing building, of a public service corporation or for public utility purposes, in any permitted district to a greater height or of larger area than the district requirements herein established, and permit the location in any use district of a public utility building, structure, or use, if the board shall find such use, height, area, building and structures reasonably necessary for the public convenience and service, provided such building, structure, or use is designed, erected and landscaped to conform harmoniously with the general architecture and plan of such district." (§13.2)

Pursuant to notice published in the Midland Daily News on August 1 and August 6, 1969, a public hearing was held August 12, 1969, on Consumers Power's petition. Following the hearing, the Township Zoning Board of Appeals by order, dated March 18, 1970, found, among other things, that:

> "5. The plant will not produce noise, dust, fumes or odors in objectionable quantity, and planned releases of radioactivity from the plant will be controlled so as to be within the limits established by the United States Atomic Energy Commission. The Company has advised the Board that its studies indicate that the incidence of local fogging will not increase by more than three or four days a year as a result of the proposed plant and pond operation. The Company has presented information including meteororological studies, indicating that physical damage to existing dwellings from fogging, water or ice due to the Company's project will not occur,
>
> "6. The Company's proposed plant, pond, and appurtenant equipment, structures and facilities will be attractively designed and landscaped.

* * * * * * *

"8. All of the petitioner's proposed improvements, with the exception of the cooling pond, will be located in Section 27 of Midland Township, which is zoned 'Industrial.' The pond and its structures will be located in an area zoned 'Residential A.'

"9. The Company's proposed nuclear power plant, cooling pond, and appurtenant equipment, structures and facilities, as described in the petition and at the hearing, are reasonably necessary for the public convenience and service, and will be designed, erected and landscaped to conform harmoniously with the general architecture and plan of the use districts in which they are proposed to be located." (pp. 99-100)

The Board of Appeals' order granted permission as requested, conditioned upon the following:

"1. The Company shall surround the cooling pond with a security fence which shall, at the northwest corner of the pond in the vicinity of Tisland Subdivision, angle northeasterly to follow the line of the pond dike instead of continuing northward along the Company's property line;

"2. The Company shall provide and maintain good evergreen trees and a continuous hedge along and on the outside of the security fence on the western side of the pond from Gordonville Road north, to terminate at existing vegetation near the edge of Bullock Creek, and shall provide and maintain good evergreen trees randomly spaced on the outside of the security fence along the Company's south property line running east to the flood plain of the River defined by the 100-year flood. The Company shall replace vegetation and screening in areas of existing vegetation near the edge of Bullock Creek and in any other areas of planting should the existing vegetation be removed or die off or the planting of new screening fail to provide proper screening in the future;

"3. Except on the river side, the Company shall locate the dike of the pond so that the center

of the dike shall be no closer than one hundred sixty (160) feet from the property line at any point, and the security fence shall not be placed less than ten (10) feet inside the Company's property line at any point.

"4. Company shall not erect any buildings on or along the dike not shown on drawings heretofore submitted to the Board, and shall not use this property for any other use than is provided for in this Order or as permitted by the Township Zoning Ordinance for the use district in which the project is located; Provided, however, that an information center concerning the nuclear power plant may be constructed on this property in a location other than that shown on such drawings, subject to the approval by the Board of the site thereof.

"5. If the Company abandons the use of the property as approved by this Order, then the dike and pond area shall be leveled and left with a cover of soil in such a manner as to be harmonious with the then-existent drainage and suitable for uses permitted by the Township Zoning Ordinance for the use district in which the dike and pond area is located." (pp. 101-102)

B. Midland City Council

Michigan law provides that each city may in its charter provide:

"For the use, regulation, improvement and control of the surface of its streets, alleys and public ways, and of the space above and beneath them;" MCLA §117.4-h(1).

The Charter of the City of Midland provides that:

"The Council shall have power to establish and vacate, to use and to control and regulate the use of the streets, alleys, bridges and public places whether such public places be located within or without the limits of the city, and the space above and beneath them. Such power shall include . . . regulation of the construction and use of openings in . . . streets . . . ."

The Midland City Council, pursuant to Consumers Power's request by resolution dated July 28, 1969, granted permission to Consumers Power to construct a single track railroad crossing on South Saginaw Road. The resolution provided that all costs of the reconstruction of Saginaw Road would be paid for by Consumers Power. By a companion resolution, the City Council created a specific payment district to cover the costs of reconstruction of Saginaw Road and required Consumers Power to deposit $10,000 to cover engineering and inspection fees which might be incurred by the city. The City Council found, among other things, that:

> ". . . the installation of said improvement in the manner so petitioned for is a necessary public improvement conducive to the general health and welfare of the people of the City of Midland."

The resolution also provided that:

> ". . . during the construction of this project through traffic shall be maintained by Consumers Power Company and/or their contractor. The method for maintaining traffic must be approved by the City of Midland and all costs for maintaining traffic shall be borne by the petitioner; . . . ."

It was also provided that the improvements be constructed in accordance with regulations of the City of Midland and to specifications of the Michigan Department of State Highways.

C. Midland Township Board

By letter, dated July 3, 1969, Consumers Power requested permission from the Midland Township Board to widen the channel of the Tittabawassee River in accordance with plans

submitted to the U. S. Army Corps of Engineers and the Michigan Water Resources Commission. By order and permit, issued July 11, 1969, the Midland Township Board granted permission to Consumers Power to widen the channel in accordance with plans submitted to, and as per approval of, the Corps of Engineers and the Water Resources Commission.

D. Midland County Road Commission

The Midland County Road Commission, pursuant to the County Road Law,MCLA §§224.1 et seq., has jurisdiction to create and abandon county roads.

It is expressly provided in the statute that roads shall be abandoned only when the Road Commission determines that it is in the best interest of the public that said road be abandoned. MCLA §224.18

On March 30, 1969, Consumers Power Company and The Dow Chemical Company petitioned the Midland County Road Commission for abandonment and discontinuance of the roads crossing the Plant site. By resolution at its meeting of April 9, 1970, the Road Commission voted to review the request for abandonment and to commence formal action and procedures at its April 22, 1970 meeting. The Road Commission subsequently approved abandonment of the roads. Also, pursuant to the request of Consumers Power, the Road Commission at its meeting of August 27, 1969, approved construction by Consumers Power of a temporary by-pass.

E. Midland County Board of Supervisors

In order to bridge a navigable stream it is necessary to secure the permission of the County Board of Supervisors. Mich. Const. of 1963, Art. 7, §12; MCLA §46.21. By petition, dated August 11, 1969, Consumers Power requested permission to construct a fixed railroad bridge across the Tittabawassee River. By resolution dated August 21, 1969, the Midland County Board of Supervisors granted Consumers Power permission to construct the bridge.

In addition to its specific approval of the bridge, the County Board of Supervisors by resolution dated June 18, 1969, informed the U. S. Coast Guard that it had no objections to the building of such a bridge.

F. Midland County Drain Commissioner

Michigan law provides that drains may be relocated "whenever the same shall be conducive to the public health, convenience and welfare", MCLA §280.2, and that the County Drain Commissioner shall have jurisdiction over established county drains, MCLA §280.10.

Representatives of Consumers Power Company met with the Midland County Drain Commissioner on January 20, 1969, and presented plans and profiles relative to relocation of two drains in Midland County. By letter to the Michigan Water Resources Commission, dated January 21, 1969, the Drain Commissioner approved relocation of the drains subject to a number

of conditions. These conditions primarily provided that Consumers Power furnish the Drain Commissioner with the necessary easements for relocation, cover all expenses of the project, and further engineering reports as to flood control on one drain. Since this time, Consumers Power has furnished the Drain Commissioner with further information as it became available. The relocation of the drains has also been included in the Michigan Water Resources Commission flood plains order discussed above.