

BEFORE THE  
UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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| In the matter of               | ) |                    |
|                                | ) |                    |
| CONSUMERS POWER COMPANY        | ) | Docket Nos. 50-329 |
| (Midland Plant, Units 1 and 2) | ) | 50-330             |
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MEMORANDUM IN SUPPORT OF MOTION  
OF ENVIRONMENTAL DEFENSE FUND, INC.  
AND SAGINAW VALLEY NUCLEAR STUDY GROUP, ET AL.  
FOR DETERMINATION OF ENVIRONMENTAL ISSUES

The motion now before the Board seeks a decision by the Board that the environmental impact of this plant may be fully explored in this proceeding as required by the National Environmental Policy Act. At issue is the legal validity of those portions of Appendix D of 10 CFR, Part 50 which exclude environmental issues from this hearing and even if such issues were before the Board, exclude examination of certain facts and evidence relevant to those issues.

The questions for decision by this Board are:

- 1) Does the Board have the authority to reveal the validity of Appendix D of 10 CFR, Part 50?\*
- 2) If so, what parts if any of Appendix D are invalid?

The answer to the first question depends upon the meaning of the AEC's Memorandum in the Matter of Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2) (hereinafter Calvert Cliffs

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\* Incorporated herein by reference is pages 2-5 of certain Intervenor's Memorandum in Support of their December 1, 1970 Motions and in Opposition to Briefs Filed By Applicant and Intervenor Dow Chemical Company on December 15, 1970 (Filed January 11, 1971).

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Memorandum, a copy of which is attached) where the Commission set forth the scope of review of an AEC regulation by an Atomic Safety and Licensing Board. The answer to the second question depends upon an analysis of the requirements of the National Environmental Policy Act as applied to the AEC. The relevant arguments have been presented in the brief for Petitioners in the case of Calvert Cliffs Coordinating Committee v. AEC (CA D.C. No. 24,871) now pending before the United States Court of Appeals for the District of Columbia Circuit.<sup>1/</sup> Rather than reiterate those arguments here a copy of that brief is attached to this memorandum and incorporated herein by reference.

Turning then to the first question and the Calvert Cliffs Memorandum it appears quite clear that the Board has the power to review Appendix D on the grounds raised here. The Calvert Cliffs Memorandum arose as the result of a statement contained in the Initial Decision for issuance of a construction permit. In that statement the Board remarked that where evidence is produced at a hearing which draws into question the validity of Part 20, the board "might not be able to rely upon [that Part] as establishing the outer limit of acceptable risk."

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1/ The pendency of that case should not inhibit this Board's decision. The decision of the Court of Appeals will of course control this, as well as all other AEC proceedings concluded on or after January 1, 1970 (when the National Environmental Policy Act became effective). But this Board can avoid the delay inherent in waiting for that decision by reaching its own judgment and allowing the parties here to proceed to act on that judgment.

The Commission responded by indicating that the Part 20 standards are general rules and not subject to amendment on a case by case basis based upon the evidence produced at a hearing.

(Calvert Cliffs Memorandum, p. 3) In short, the Board was not free to substitute its judgment for that of the AEC on the factual question of the adequacy of Part 20 safety standards.<sup>2/</sup>

However, the AEC specifically acknowledged that the Board does have the authority to challenge the validity of a Commission regulation on (Calvert Cliffs Memorandum, p. 3):

"... limited grounds, if the contested regulation relates to an issue in the proceeding. By limited grounds we mean, whether the regulation was within the Commission's authority; whether it was promulgated in accordance with applicable procedural requirements; and, as respects the Commission's radiological safety standards, whether the standards established are a reasonable exercise of the broad discretion given to the Commission by the Atomic Energy Act for implementation of the statute's radiological safety objectives."

This standard of review clearly includes the challenge to Appendix D now before the Board. The essence of that challenge is that the National Environmental Policy Act 1) requires the AEC to include consideration of environmental issues in all of its hearings where the initial decision (i.e. the major federal action) does not occur until

<sup>2/</sup> The precise scope of this limitation is not at issue here but it would appear to acknowledge that where, as a general matter, substantial evidence does not exist to sustain the Part 20 standards then the Board may set aside those standards and apply more stringent standards.

after January 1, 1970, and 2) requires the AEC to permit evidence to be introduced at those hearings on all possible adverse environmental effects of the plant regardless of what state, regional or federal environmental standards are met by the plant. In short the AEC was without authority to require in Appendix D that consideration of environmental issues not occur at any hearing noticed before March 4, 1971 and that even after March 4, 1971, an Atomic Safety and Licensing Board is prohibited from receiving evidence on any adverse environmental impact if the adverse impact relates to an impact of the plant which has been certified as coming within any applicable state, regional or federal environmental standard or requirement.

The concept that the Board can hold invalid a Commission regulation which exceeds the Commission's authority (as expressed in the Calvert Cliffs Memorandum) is comparable to the usual standard of review applied by the Courts in determining whether federal agency action is valid. See for instance Sections 10(a)(2)(A) and (C) of the Administrative Procedure Act (5 U.S.C. Sections 706(2)(A) and (C)) which require a reviewing court to hold unlawful and set aside agency action found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

\* \* \* \*

(C) in exercise of statutory jurisdiction, authority,  
or discretion, or short of statutory right.

3/

The early cases on judicial review have applied the same standard. In *SEC v. Cheney Corp.*, 317 U.S. 82, 84 (1942) the Court observes that while factual findings of agencies are subject to great deference, an agency decision based upon an erroneous legal theory must be reversed. See also *Kovach v. Immigration and Naturalization Service*, 339 U.S. 247 (1950), 121 (CA 9th, 1950); *Parsons Bank v. Camp*, 425 F. 2d 131, 347-348 (CA 9th, 1970). In *De Vore's Estate*, 350 U.S. 24 569, 75 (CA 9th, 1956). In the latter case the Court, in language particularly relevant here, defined the standard of review (350 U.S. 24 at 571 (n. 7)):

Administrative action is arbitrary if it is taken without any authority of law or upon a misconception of the statutory authority under which it is supposed to be taken.

It is said and action that Appellant is violating the National  
Environmental Policy Act and that the SEC, therefore, exercise its  
authority to grant or deny permits under the statutorily mandated effective  
date of the National Environmental Policy Act and be attending to

24. Thus, the action taken is on a record with public hearing (such  
as issuance of a construction permit or operating license). If  
a public hearing is held, the question for review is whether there is sub-  
stantial evidence to support the decision. 5 U.S.C., Section  
706(2)(e).



narrow the statutorily mandated broad inquiry into environmental issues. That challenge falls squarely within the scope of permissible review of AEC regulations by this Board as promulgated in the Calvert Cliffs Memorandum. <sup>4/</sup>

This proceeding presents special problems with respect to AEC compliance with NEPA. Here the AEC published a notice of hearing and set a date for hearings to begin even though the AEC had not completed the preparation of the Draft Environmental Statement much less the Detailed Environmental Statement. As of March 1 the Detailed Environmental Statement had not been filed. Nonetheless the applicant continues to push for early discovery with respect to environmental issues and the beginning of hearings. Attempting to proceed on either of these matters before receipt of the Detailed Environmental Statement and its thorough analysis is equivalent to proceeding with discovery and hearings on the safety issues prior to preparation and distribution of the PSAR and the Staff Safety Evaluation. Hearings are intended to begin when the Staff has completed its review and is satisfied with the plant. This review has not been completed and we assume the Staff cannot be satisfied with the plant with respect to environmental problems. Indeed the staff has not had an opportunity to examine the yet to be prepared Detailed Environmental Statement

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<sup>4/</sup> Appendix D could also be challenged by this Board under the standard that it is not a "reasonable exercise of the broad discretion given to the Commission" because any regulation which violates a statute (here the National Environmental Policy Act) is unreasonable and an abuse of discretion. See for instance Moss v. CAB, F. 2d \_\_\_\_ (C.A. D.C., 1970); Citizens Committee for the Hudson Valley v. Volpe, 425 F. 2d 97 (C.A. 2nd, 1970); Wilderness Society v. Michel, F. Supp. \_\_\_\_ (D. D.C., 1970); Environmental Defense Fund v. Finch, 428 F. 2d 1083.

to determine if changes are required in the Staff Safety Evaluation or the PSAR. <sup>5/</sup>

The AEC in recent action related to the Vermont Yankee Nuclear Power Plant (Vernon) has ruled that hearings on environmental issues must be postponed until a reasonable time after preparation and distribution of the Detailed Environmental Statement to enable the parties, apparently by pre-hearing discovery based upon the Detailed Statement, to prepare for the hearing. (A copy of this letter ruling is attached.) Thus if the Board only grants the first request in our motion, thus placing this case in the same status with respect to review of environmental issues as the Vernon Plant, it must allow a reasonable time after the preparation and distribution of the Detailed Environmental Statement for pre-hearing discovery.

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<sup>5/</sup> It is difficult to understand how the Staff Safety Evaluation and the PSAR, which the AEC agrees are to be modified as required by the results of the Detailed Environmental Statement, can now be the subject of any in depth analysis by intervenors or even how a notice of hearing could be properly filed by the AEC where the Staff Safety Evaluation and the PSAR are incomplete. In this proceeding the Staff Safety Evaluation and the PSAR are on their face invalid because they have been prepared without regard to Detailed Environmental Statement, a document whose relevance to the PSAR and Staff Safety Evaluation are beyond dispute. See Udall v. Federal Power Commission, 387 U.S. 428 (1967).

Should the Board deny all parts of this Motion two important environmental issues will remain both of which must await receipt of the Detailed Environmental Statement for their resolution. First, this Board will have to decide whether the Staff has complied with Section 102(2)(C) of NEPA by preparing a sufficiently thorough and scientifically and technically adequate Detailed Environmental Statement. If this Motion is not granted the Board will not be able to resolve substantive non-radiological environmental issues. But it will and must be able to decide whether these non-radiological environmental issues have been adequately examined by the Staff or whether instead the Detailed Environmental Statement is a cursory and conclusory document which fails to fully investigate all environmental issues and thus is an inadequate justification for the decisions made by the Staff with respect to environmental protection.

This inquiry into the legality of the Detailed Environmental Statement is similar to the inquiry permitted under the Calvert Cliffs Memorandum related to AEC regulations. If the Detailed Environmental Statement does not reflect sufficient examination of the relevant environmental considerations then the conclusions reached by the Staff on the basis of that Statement are arbitrary and capricious and beyond the Staff's authority. Environmental Defense Fund, Inc. v. Ruckelshaus, \_\_\_\_ U.S. App. D.C. \_\_\_\_, \_\_\_\_ F. 2d \_\_\_\_ (C.A. D.C., decided January 7, 1971); Greater Boston Television Corp. v. FCC



(decided November 13, 1970) (C.A. D.C., No. 17,785 slip op. at 15-22); Medical Committee for Human Rights v. SEC, \_\_\_\_ U.S. App. D.C. \_\_\_\_, 432 F. 2d 659, 673-676 (C.A. D.C., 1970); Moss v. CAB, \_\_\_\_ U.S. App. D.C. \_\_\_\_, 430 F. 2d 891 (C.A. D.C., 1970); Wellford v. Ruckelshaus, \_\_\_\_ U.S. App. D.C. \_\_\_\_, \_\_\_\_ F. 2d \_\_\_\_ (decided January 7, 1971) (C.A. D.C., No. 24,434). The measure of the legality of the Statement depends upon Section 102(2)(C) of NEPA.

Second, after receipt of the Detailed Environmental Statement Intervenor will need a reasonable period of time for discovery with respect to the radiological environmental issues. These issues are of course properly before the Board in this proceeding regardless of the disposition of this Motion, but examination of the evidence with respect to these issues must await the Detailed Environmental Statement which is the definitive AEC document on radiological environmental considerations. <sup>6/</sup>

A Memorandum in Support of this Motion is attached.

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<sup>6/</sup> In any event some of the parties have requested that disposition of environmental issues be certified to the Commission. See also Calvert Cliffs Memorandum (p. 4). We also reiterate our support of this suggestion. Obviously certification of these issues to the AEC will leave final disposition of these matters in doubt for a longer period but will ultimately serve to shorten the entire proceeding by allowing discovery to proceed with full knowledge of the issues validly involved in the proceeding.

Respectfully submitted

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