


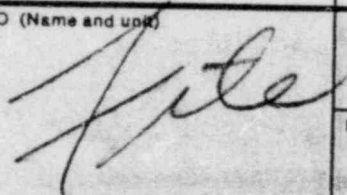
MEMO ROUTE SLIP

Form AEC-93 (Rev. May 14, 1947) AECM-0240

See me about this.
Note and return.

For concurrence.
For signature.

For action.
For information.

TO (Name and unit) Harold L. Price Director of Regulation	INITIALS	REMARKS 
	DATE 4/1	
TO (Name and unit) cc: P. A. Morris D. R. Muller	INITIALS	REMARKS
	DATE	
TO (Name and unit) 	INITIALS	REMARKS
	DATE	
FROM (Name and unit) T. F. Engelhardt OGC	REMARKS	Attached is an answer to a motion which we propose to file in the Midland proceeding. It is identical, with some minor variations, to a pleading recently filed in Indian Point. <u>The deadline for filing is Tuesday, April 6.</u>
PHONE NO. 7503	DATE 4-1-71	

USE OTHER SIDE FOR ADDITIONAL REMARKS

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
CONSUMERS POWER COMPANY) Docket Nos. 50-329 ✓
) 50-330
(Midland Plant, Units 1 and 2))

AEC REGULATORY STAFF ANSWER TO MOTION OF ENVIRONMENTAL
DEFENSE FUND, INC., AND SAGINAW VALLEY NUCLEAR STUDY
GROUP ET AL. FOR DETERMINATION OF ENVIRONMENTAL ISSUES

Introduction

On March 3, 1971, intervenors Environmental Defense Fund, Inc., and Saginaw Valley Nuclear Study Group et al. (intervenors) filed a joint "Motion...for Determination of Environmental Issues" and a supporting memorandum. The motion requested, principally, that the presiding atomic safety and licensing board (board) include consideration of all environmental issues in the hearing in this matter, regardless of whether these issues are raised by the intervenors and regardless of whether Federal, State or regional environmental compliance certificates have been submitted by Consumers Power Company (applicant). In addition, the intervenors requested a determination by the board that "the applicant, the staff or any intervenor supporting the application" shall have the burden of proof with respect to such issues. Finally, the intervenors requested that, in the event the motion is granted, the intervenors be allowed

a reasonable period for prehearing discovery following receipt by them of the staff's detailed statement on environmental considerations.

In the memorandum in support of their motion, the intervenors identify two questions for decision by the board: (1) "Does the board have authority to review the validity of Appendix D of 10 CFR, Part 50?" and (2) "If so, what parts if any of Appendix D are invalid?" In response to the first question the intervenors contend that the board has authority under the Commission's Memorandum in the Calvert Cliffs proceeding ^{1/} to challenge the validity of Appendix D of 10 CFR Part 50 since, as the intervenors allege, the Commission has failed, in implementing Appendix D, to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA). According to the intervenors, the response to the second question depends upon an analysis of NEPA as applied to the Commission contained 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. A copy of this brief was attached to the intervenors' memorandum and incorporated therein by reference.

^{1/} In the Matter of Baltimore Gas and Electric Company (Calvert Cliffs) Nuclear Power Plant, Units 1 and 2, Docket Nos. 50-317 and 318.
2 CCH Atomic Energy Law Reporter (AELR) Par 11,578 (1969).

Discussion

A. Authority to Challenge a Commission Regulation

In a Memorandum issued by the Commission on August 8, 1969, at the conclusion of its review of an Initial Decision in the Calvert Cliffs proceeding^{2/} the Commission pointed out that the Commission's licensing regulations, which are general in their application and which are considered and adopted in public rule making proceedings, are not subject to amendment by atomic safety and licensing boards in individual cases. The Commission did, however, recognize in this Memorandum that a challenge could be made in a licensing proceeding to the validity of a Commission regulation on limited grounds. In the Calvert Cliffs proceeding, the question of a challenge to a Commission regulation arose in connection with 10 CFR Part 20. The Commission defined these limited grounds as follows:

"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."

Although the Commission's Memorandum in Calvert Cliffs dealt specifically with the matter of challenging the validity of 10 CFR Part 20, the general guidelines set forth in the Memorandum must be considered

^{2/}
See n. 1, supra.

equally applicable to a challenge of the validity of any relevant Commission regulation, including Appendix D to 10 CFR Part 50.

It is clear from Calvert Cliffs that an atomic safety and licensing board cannot itself amend the Commission's regulations or determine the validity of a challenged regulation. As the Commission stated in Calvert Cliffs:

"It bears statement at the outset, and the board itself recognized, that the Commission's licensing regulations establish the standards for reactor construction permit determinations; and that the findings in proceedings such as the instant one must be made in accordance with those regulations. Further, it should be clear that our licensing regulations - which are general in their application and which are considered and adopted in public rule making proceedings wherein the Commission can draw on the views of all interested persons - are not subject to amendment by boards in individual adjudicatory proceedings.

* * *

We would couple the above comments with the enjoinder that, if a board believes there is a substantial question presented on the record as to the validity of a challenged regulation, the board should certify that question to the Commission for guidance prior to rendering an initial decision. In the subject proceeding, as the initial decision makes clear, the record did not present such a substantial question."

The board is required, however, to determine whether "there is a substantial question presented on the record as to the validity of a challenged regulation." We believe that such a determination should be made on the basis of the entire record after all the

evidence with respect to the challenged regulation has been received from all of the parties. If the board finds upon a review of the entire record that a "substantial question" is presented, then it is required under Calvert Cliffs to certify that question to the Atomic Safety and Licensing Appeal Board for guidance prior to rendering any initial decision.^{3/} If the board finds on the basis of a review of the entire record that no "substantial question" is presented, it must consider itself bound by the regulation in reaching any decision. In deciding the issue whether a "substantial question" is presented, we believe that the board should be mindful that "[t]he law provides a strong presumption of validity and regularity when administrative officials decide weighty issues within the specific area of their authority and the burden is on the plaintiffs to overcome this presumption."^{4/}

In the memorandum in support of their motion, the intervenors are mistaken in their interpretation of the Calvert Cliffs' Memorandum in that they appear to assume that the board has been vested with the authority to challenge the validity of a Commission regulation.

^{3/} Calvert Cliffs refers to certification to the Commission itself because no Atomic Safety and Licensing Appeal Board had been designated in that proceeding.

^{4/} Crowther v. Seaborg, 1 AELR Par 4088 (D.C. Colo. 1970). (See also NLRB v. Erie Resistor Corp., 373 US 221 (1963); Board of Trade v. U.S. 314 U.S. 534 (1942); NLRB v. Standard Oil Co., 138 F. 2d 885 (2d Cir. 1943).

As the above discussion makes clear, this is n.t correct. Any challenge to the validity of Appendix D to 10 CFR Part 50 must be made by the proponent of the contention that Appendix D is invalid. Furthermore, any such challenge must be made pursuant to the guidelines specified in the Calvert Cliffs' Memorandum.

B. Intervenors' Challenge of the Validity of Appendix D to 10 CFR Part 50

In support of their allegation that Appendix D to 10 CFR Part 50 is in whole or in part invalid the intervenors rely upon the arguments presented by the petitioners in Calvert Cliffs Coordinating Committee v. AEC (CA D.C. No. 24,871). In our opinion the arguments presented in that brief in support of the intervenors' contention have no merit. Our views with respect to the intervenors' arguments are set forth in considerable detail in the Government's brief in the same case. In accordance with our letter of March 15, 1971, to the board, a copy of the Government's brief is attached hereto and incorporated herein by reference.

C. Burden of Proof and Discovery with Respect to Environmental Issues

As the foregoing discussion would indicate, we do not believe that the board need decide whether the intervenors should or should not have the burden of proof with respect to environmental issues, or whether the intervenors should or should not be afforded a period for discovery

in this area. In our view, Appendix D renders these questions moot insofar as this proceeding is concerned.

Conclusion

For the reasons stated above and in the Government's brief in Calvert Cliffs Coordinating Committee v. AEC, we are opposed to the intervenors' motion and request that it be denied in all respects.

Respectfully submitted,

David E. Kartalia
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this day of April, 1971