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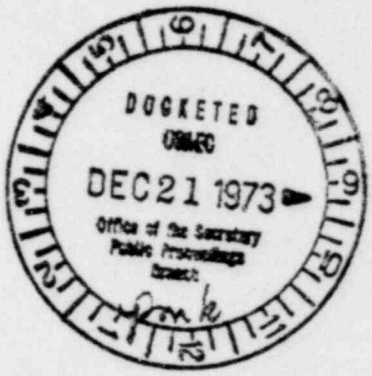
ATOMIC ENERGY COMMISSION



COMMISSIONERS:

Dixy Lee Ray, Chairman
Clarence E. Larson
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William A. Anders

In the Matter of

CONSUMERS POWER CO.

(Midland Plant, Units 1 and 2)

Construction Permit Nos. 81
82

Mr. Myron Cherry, for the Sierra Club Petitioners.

Messrs. Harold F. Reis and Judd L. Bacon, for the applicant.

Mr. James P. Murray, Jr., for the AEC Regulatory Staff.

MEMORANDUM AND ORDER

Pending before us is an "Emergency Petition" filed by the Sierra Club and other petitioners in this proceeding on December 18, 1973, asking us to set aside "illegal action" by the Director of Regulation. Responses in opposition to the Sierra Club petition have been filed by Consumers Power Company and the AEC regulatory staff. The petition arises out of the following circumstances.

Construction of the Midland facility has been proceeding since December of 1972 under duly issued construction permits. Reviews conducted by the Directorate of Regulatory Operations of various activities performed under the permits revealed significant deficiencies in implementation of the licensee's quality assurance program, particularly in relation to cadwelding

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operations at the site. Cadwelding is a process whereby metal reinforcing bars used in concrete construction for the facility are fused together. In a memorandum to the Director of Regulation dated November 26, 1973, the Atomic Safety and Licensing Appeal Board, which had earlier affirmed issuance of the construction permits, referred to some of these quality assurance deficiencies occurring after its decision, and urged that vigorous enforcement action be taken against the licensee.

On December 3, 1973, the Director of Regulation issued an order requiring the licensee to show cause why all activities under the construction permits should not be suspended pending a showing by the licensee that it is in compliance with the Commission's regulations pertaining to quality assurance, and that there is a reasonable assurance that such compliance will continue throughout the construction process. The order granted the licensee twenty days to answer, and, within the same period, allowed the licensee or any interested person to request a hearing. In addition, it was found that "pending a further order and determination by the Director of Regulation, the public health, interest or safety requires continued suspension of the cadwelding activities" at the site.

On December 6-7, 1973, representatives of the Directorate of Regulatory Operations conducted a reinspection of activities at the Midland site, with particular reference to corrective actions concerning cadwelding activities. The written report of this inspection, dated December 11, 1973, stated that "no violations of AEC requirements were identified during the inspection." The report dealt in detail with corrective actions taken by the licensee with respect to cadwelding.

On December 17, 1973, the Director of Regulation determined, on the basis of the inspection of December 6-7, that "the licensee now has appropriate procedures for cadwelding operations and that all cadweld inspection personnel have been appropriately trained." The Director further determined that "the public health, interest or safety does not require the continued suspension of cadwelding activities at the plant site." Accordingly, the order to show cause was modified to allow resumption of cadwelding, leaving other provisions of the order in full force and effect. It is these modifications of the initial order to show cause which the petitioners ask us to hold invalid and set aside. For the reasons that follow, we decline to do so.

The petitioners' legal theory appears to be that the Director's subsequent modification of his initial show cause order "violated" the initial order. Thus, we are told that the modification was "contrary to the show cause order." Petition, p. 4. Petitioners argue that the initial order "restricted the Director of Regulation's freedom," depriving him of discretion to take subsequent action prior to the hearing. Petition, p. 5. The statement that, because of the modification, "petitioners will be deprived of their rights in connection with the safety finding underlying the show cause order" indicates petitioners' view that they acquired "vested rights" in the status established by the initial order, pending hearing and decision of the issues it raised. There is no merit in these contentions.

To begin with, the rule pursuant to which the suspension order was issued (10 CFR 2.202(f)) contemplates possible modification prior to hearing. Consistent with the rule, the show cause order directed that "no cadwelding operations at the site shall be resumed pending a further order and determination by the Director of Regulation." (Emphasis added.) The Director's finding that the public health, interest or safety required suspension of cadwelding was also qualified by the same phrase -- "pending a further order and determination by the Director of Regulation." Thus the possibility of the very modification in issue was twice expressly recognized in the initial order. Under petitioners' theory that the modification was "contrary to the show cause order," we would be required to ignore our own regulation as well as the quoted language in the order. We decline to rewrite the order to fit petitioners' legal theory.

More fundamentally, petitioners misconceive the nature and legal consequences of the authority exercised by the Director of Regulation in his order -- entered without notice and an opportunity for hearing -- directing that cadwelding activities be suspended pending a hearing. The norm for administrative action modifying outstanding licenses embraces a prior opportunity to be heard. In exceptional circumstances, however, the Director is authorized to take summary action. See 10 CFR 2.202(f); section 9(b), Administrative Procedure Act, 5 U.S.C. 558(c); section 181, Atomic Energy Act of 1954, as amended, 42 U.S.C. 2231. But it has always been recognized that summary administrative action substantially curtailing

existing rights -- here, the right to construct a nuclear power plant pursuant to a validly issued construction permit -- is a "drastic procedure." Fahey v. Mallonee, 332 U.S. 245, 253 (1947). See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950); Davis, Administrative Law § 7.08.

Such action, unless warranted by compelling safety considerations, can have serious consequences. Unwarranted suspension of construction of a needed generating plant is contrary to the public interest. Moreover, a period of enforced suspension of construction may result in layoffs and consequent hardship for employees at the site. And, obviously, an extended suspension may generate substantial additional costs which the consumer may ultimately bear through increased electricity rates.

In view of the potentially serious consequences of summary suspension orders contemplating a later hearing, the Director of Regulation has discretion to modify such orders on the basis of subsequent developments warranting such action, prior to the hearing. If the rule were otherwise, the Director might well be reluctant to issue summary orders, knowing that (under petitioners' theory) they must remain unchanged and in effect for substantial periods of time, regardless of changed circumstances. Such a rule would be inimical to the public interest.

Contrary to petitioners' contentions, the modification of the show cause order did not foreclose consideration at the hearing of any of the issues framed by the initial show cause order. As stated in the initial

order, the issues at that hearing (if one is requested) shall be -- "(1) whether the licensee is implementing its quality assurance program in compliance with Commission regulations, and (2) whether there is reasonable assurance that such implementation will continue throughout the construction process." This formulation plainly includes, but is not limited to, cadwelding. The ultimate quality assurance issues are much broader. The Director has merely determined that pending a hearing, and on the basis of information now available to him, cadwelding may be resumed consistent with the public health, interest and safety.

Should the licensee or any interested person request a hearing, the matter will be heard and determined not by the Director, but by a licensing board. If the petitioners nevertheless believe that the Director has prejudged this matter, they can, by requesting a hearing, transfer the decisional authority from him to a licensing board.

The petition appears to rest exclusively on the theory that the Director of Regulation had no authority to modify the cadwelding suspension order after it was entered, a theory we have rejected. Apart from procedure, petitioners have not attacked the merits of the Director's determination. Nevertheless, we have reviewed the inspection report upon which the lifting of the suspension order was based.

We, of course, make no determination on the merits of the issues in the show cause proceeding, including cadwelding issues. Our review at this juncture is limited to whether the Director, on the basis of information

then available to him, abused his discretion in lifting the cadwelding suspension. The report of the December 6-7, 1973 inspection reflects that previously identified quality assurance deficiencies relating to cadwelding have been corrected. Report, pp. 3-4, 11-14. The report shows that four AEC inspectors visited the site. The inspection included personal evaluation of forty-seven cadwelds, selected at random in reactor base slabs. All were found to be "conforming, in all respects, to the requirements." The inspectors also state that they witnessed a satisfactory demonstration of current methods of cadweld inspection by the architect-engineer's inspectors. Additional evidence may be adduced in the show cause proceeding concerning cadwelding as well as the broader quality assurance issues. However the matter may then appear, on this record, we find that the Director did not abuse his discretion.

Petitioners' reliance on Brooks v. AEC, 476 F.2d 924 (C.A.D.C. 1973) is misplaced. The show cause proceeding, unlike Brooks, does not involve denial of an opportunity for hearing; the order expressly grants a hearing upon the request of any interested person. Aside from the fact that the Brooks court, like the Director here, declined to suspend construction pending the hearing, the case has no relevance.

The petition is denied.

It is so ORDERED.

By the Commission

Gordon M. Grant
Acting Secretary of the Commission

Dated at Germantown, Maryland
this 20th day of December, 1973.