UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Michael C. Farrar, Chairman
Richard S. Salzman
Dr. W. Reed Johnson

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

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Mr. Michael I. Miller, Chicago, Illinois, with whom Ms. Caryl A. Bartelman and Mr. Ronald G. Zamarin were on the briefs, for Consumers Power Company.

Mr. Milton J. Grossman, with whom Messrs. William J. Olmstead and Richard K. Hoefling were on the briefs, for the Nuclear Regulatory Commission staff.

Mr. Milton R. Wessel, White Plains, New York, argued the cause for the intervenor Dow Chemical Company.

DECISION

February 14 , 1978

(ALAB-458)

A. Background and Summary

1. In late 1972, the Licensing Board awarded Consumers Power Company construction permits for the two-unit Midland facility; we affirmed that award several months

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later.[1] Certain individual citizens and groups who had intervened in our proceeding sought judicial review in the District of Columbia Circuit but did not ask for an interim stay of construction. Consequently, construction of the plant went forward while the court of appeals deliberated.

In mid-1976, that court held that the administrative proceedings had been defective in certain respects.[2] As a remedial measure, the court remanded the matter to the Commission for further proceedings.[3] The Commission in turn assigned the matter to a licensing board, telling it to explore not only the merits of the remanded issues but also whether the construction permits should be suspended in the interim.[4]

1/ ALAB-123, 6 AEC 331 (1973), affirming LBP-72-34, 5 AEC 214 (1972). Construction had actually begun in 1970 under a special exemption the applicant had obtained from the Commission.

2/ Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976), certiorari granted sub. nom. Consumers Power Co. v. Aeschliman, 429 U.S. 1090 (1977).

3/ 547 F.2d at 632.

4/ See CLI-76-11, 4 NRC 65 (1976); CLI-76-14, 4 NRC 163 (1976).

2. The court's remand order covered a variety of topics. To begin with, the court found two defects in this agency's appraisal of the environmental impact of constructing and operating the Midland plant. First, that appraisal had failed to take account of the environmental impact of the nuclear fuel cycle.[5/] Second, it had not adequately considered an alternative to incurring the adverse environmental impact attributable to the plant, i.e., the possibility that energy conservation might reduce or eliminate the need for a plant of this size.[6/]

In light of the need for a remand on these two subjects, the court added that it expected us also to consider whether changed circumstances had affected the Dow Chemical Company's need for the process steam which, according to existing contract, it was to receive from one of the units.[7/] This issue is

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5/ The fuel cycle refers to the gamut of steps -- from the mining of uranium ore to the handling of radioactive waste -- involved in the creation, use and disposal of reactor fuel. On this count the court simply incorporated (see 547 F.2d at 632) its decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 547 F.2d 633 (decided the same day), certiorari granted sub. nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 429 U.S. 1090 (1977).

6/ 547 F.2d at 625-30.

7/ 547 F.2d at 632.

significant in that the applicant originally selected the Midland site and decided to build two units instead of one there because of its plans to supply steam to Dow (which also purchases large amounts of electricity from the applicant).[8]

The court's decision went beyond environmental matters; it also called for further consideration of a safety issue. Specifically, it held that the report the Commission had received from its Advisory Committee on Reactor Safeguards (ACRS) -- required by statute for every nuclear power plant[9] -- was unacceptably vague in indicating a need to resolve for the Midland facility "other problems" (not there further identified) common to reactors of the Midland type generally.[10]

3. After taking evidence for some thirty hearing days (spread over the period from November 1976 to May 1977), the Board below issued a decision on September 23, 1977, declining to suspend the permits pending its decision on the merits.[11] That decision is now before us for review, with the intervenors

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8/ 547 F.2d at 624; Final Environmental Statement (March 1972), p. XI-3.

9/ 42 U.S.C. 2039, 2232(b).

10/ 547 F.2d at 630-32.

11/ LBP-77-57, 6 NRC 462 (1977).

asking us to reverse it and to order the permits suspended.[12/]

Having heard oral argument and fully considered the matter, we conclude that the circumstances did not warrant suspension of the permits pending the outcome of the reopened hearing. This conclusion rests mainly on our judgment that the environmental issues being explored on the remand, although important in principle, are proving to be of little practical consequence in this case -- particularly as there does not appear to be any environmentally-preferable alternative to the proposed Midland project. For that reason and the others set out below, we affirm the Licensing Board's decision not to suspend construction.

B. Applicable Standards.

At the outset, we note our agreement with the Licensing Board (6 NRC at 484-85) that the suspension question is not controlled by the familiar criteria enunciated in Virginia Petroleum Jobbers v. FPC.[13/] For example, the first of those criteria, applicable when an unsuccessful litigant seeks a stay of a decision in his opponent's favor, is whether the

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12/ The intervenors filed exceptions with us and then sought summary reversal or suspension of the permits pending their appeal from the decision below; they then briefed their appeal, which seeks suspension of the permits pending the outcome of the merits of the remanded hearing. Our decision today disposes of all the matters put before us.

13/ 259 F.2d 921, 925 (D.C. Cir. 1958).

movants have made a strong showing of their probability of success on the merits. Here, when the intervenors sought relief from the Licensing Board, they were past that point and in a far stronger position -- they had already been successful in exposing defects in the prior proceedings, leaving the applicant without presumptively valid permits in hand.

This did not mean, however, as the intervenors would have it, that the relief they sought -- suspension of the permits -- was required "as a matter of law" by virtue of the court's decision alone. The Commission, in this very case, squarely rejected that approach in favor of requiring that all relevant equitable considerations be taken into account. CLI-76-11, 4 NRC 65 (1976) (referring to the General Statement of Policy, 41 F.R. 34707, 34709 (August 16, 1976)) and CLI-76-14, 4 NRC 163, 167 (1976).[14/] And the Commission's method of analysis seems to have at least the tacit approval of the court of appeals. For if the rule were as inflexible as the intervenors say, that court would hardly have (1) said nothing about a halt to construction in its original decision (it simply

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14/ See also Public Service Co. of New Hampshire (Seabrook Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977), focusing on "(1) traditional balancing of equities and (2) consideration of any likely prejudice to further decisions that might be called for by the remand."

remanded the "orders granting construction permits" to the Commission for further proceedings)[15] and (2) denied the intervenors' motion for suspension more than a year later.[16] Indeed, on the latter occasion the court reaffirmed that its mandate "has not itself required a cessation of construction" and that that decision is for this agency to make. The decision whether to suspend thus turns upon the peculiar circumstances of this case.

The first of those circumstances is that the proceedings leading to the award of the permits were defective. But we ought to take into account just how serious those defects are or might prove to be. Many times, such an assessment may involve highly theoretical considerations. In this case, for example, both of the defects the court found involve, on their face, matters that could be extremely serious; and absent any other information, we would view them that way. Indeed, those opposing suspension -- on whom the burden of proof rested throughout the construction permit proceeding -- must shoulder a doubly heavy burden if they would dispel the negative impact of the court's holding. But we need not

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15/ 547 F.2d at 632.

16/ Aeschliman v. NRC, unpublished order of October 27, 1977 (Docket Nos. 73-1776 and 73-1867).

operate here on theory alone -- we have the benefit both of supervening events and of the evidence thus far introduced before the Board below.[17] We turn, then, to an analysis of the gravity of the questions being litigated.

C. The Seriousness of the Defects.

Although in theory the remand hearings have dealt only with the question of interim suspension, the merits of the remanded issues have naturally received considerable attention. Indeed, there has been no clear demarcation between the evidence relevant to the one and that bearing on the other of these questions -- as demonstrated by the fact that, after it issued its order declining to suspend the permits, the Board below suggested that little additional evidence might be necessary on the remanded issues.[18] Because not all the parties accept this assessment, our comments can be only tentative. Although we would certainly prefer not

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17/ We do not suggest that a decision on interim suspension can always be postponed long enough to allow the trial board to amass an evidentiary record of the size compiled here. Circumstances will more often demand that at least a tentative decision be made more quickly and that it remain in effect while the full-dress suspension hearing is held (just as the courts most often pass quickly on a request for a temporary restraining order and consider then in less rapid fashion whether a preliminary injunction is in order). At intervals during the suspension hearing, the intervenors complained of the lack of a speedy decision -- but when we invited them to detail their complaint (see ALAB-395, 5 NRC 772, 784-86 (1977)), they did not do so.

18/ See one of its unpublished orders of November 4, 1977.

to delve deeply into the merits at this juncture,[19] we must consider in any decision on suspension how the violation that prompted the remand will affect the ultimate outcome of the proceeding; and we should use all the information available to us in making that appraisal.

We approach that information in a different manner than did the Board below. At the suspension hearing and in that Board's decision, extraordinary attention was paid to the relative financial costs of various alternatives. But there was no serious suggestion that any of those alternatives was preferable to Midland from an environmental standpoint. In other words, no evidence was adduced discrediting the earlier findings that the Midland project will not degrade any areas that either are particularly attractive or otherwise need to be sheltered from a project such as this; that its overall environmental impact is relatively small; and that, in any event, its impact would not be lessened were the nuclear facility built elsewhere or a coal plant substituted for it.[20]

19/ Cf. Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 844 (D.C. Cir. 1977), referring, in a somewhat different context, to the desirability of avoiding "an exaggeratedly refined analysis of the merits at an early stage in the litigation."

20/ 5 AEC at 223-28.

This being so, we do not perceive that financial matters are as crucial as the Board below thought they were. Unless the proposed nuclear plant has environmental disadvantages in comparison to possible alternatives, differences in financial cost are of little concern to us. Because a line of our earlier decisions leads us directly to this proposition,[21] we need record our underlying reasoning only briefly here.

In the Atomic Energy Act, Congress did not make this agency responsible for assessing whether a proposed nuclear plant would be the most financially advantageous way for a utility to satisfy its customers' need for power. Such matters remained the province of the utility and its supervising state regulatory commission. Antitrust issues to one side, our involvement in financial matters was limited to determining whether, if we license the plant, the company will be able to build and then to operate it without compromising safety because of pressing financial needs.[22]

The passage of the National Environmental Policy Act increased our concern with the economics of nuclear power plants, but only in a limited way. That Act requires us to

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21/ Northern States Power Company (Prairie Island Units 1 and 2), ALAB-244, 8 AEC 857, 862 (1974); Illinois Power Company (Clinton Units 1 and 2), ALAB-340, 4 NRC 27, 48 (1976); cf. Tennessee Valley Authority (Hartsville Units 1A, 2A, 1B and 2B), ALAB-367, 5 NRC 92, 102-03 (1977).

22/ See Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-78-1, 7 NRC __ (January 6, 1978)(slip opinion, p. 23).

consider whether there are environmentally preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place. Manifestly, nothing in NEPA calls upon us to sift through environmentally inferior alternatives to find a cheaper (but dirtier) way of handling the matter at hand.[24] In the scheme

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23/ If the alternatives involve a different way of constructing a portion of the nuclear plant in order to deal with a particular environmental problem, we can condition the permit to require the optimum alternative. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-179, 7 AEC 159, 175 (1974); Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-77-8, 5 NRC 503, 528 fn. 25 (1977). If the alternative involves a different site or a non-nuclear facility, we cannot directly require the applicant to adopt that alternative -- but we can deny permission to proceed with the proposal submitted to us. See Seabrook, CLI-77-8, supra, 5 NRC at 529-30.

24/ Although we have not been directed to, and have not found, any judicial decisions squarely on point, the emphasis in the NEPA cases is invariably upon the need for federal agencies to investigate and to discuss alternatives which would result in lesser adverse environmental impact than the proposed project. See, e.g., Sierra Club v. Morton, 510 F.2d 813, 825 (5th Cir. 1975): "federal exploration would present substantially the same environmental hazards as permitting private developers to explore the tracts sold. An alternative which would result in similar or greater harm need not be discussed." (emphasis added);
(FOOTNOTE CONTINUED ON NEXT PAGE)

of things, we leave such matters to the business judgment of the utility companies and to the wisdom of the state regulatory agencies responsible for scrutinizing the purely economic aspects of proposals to build new generating facilities.[25] In short, as far as NEPA is concerned, cost is important only to the extent it results in an environmentally superior alternative. If the "cure" is worse than the disease, that it is cheap is hardly impressive.

With this understanding we have examined the potential significance of the issues being heard on remand. We conclude, on the basis of what was before the Board below, that they are of little practical importance.

24/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972): "We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."; State of Alabama ex rel. Baxley v. Corps of Engineers, 411 F. Supp. 1261, 1274 (N.D. Ala. 1976): NEPA requires an agency to consider "those alternatives reasonably calculated to reduce environmental harm * * *.

25/ In other words, neither NEPA nor any other statute gives us the authority to reject an applicant's proposal solely because an alternative might prove less costly financially. Monetary considerations come into play in only the opposite fashion -- i.e., if an alternative to the applicant's proposal is environmentally preferable, then we must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them.

1. Fuel Cycle.

Developments since the court's decision, culminating in the Commission's promulgation of an interim amended rule on the subject,[26] have rendered the fuel cycle issue inconsequential.[27] As we have recognized in other cases, the Commission's interim rule embodies the view that, insofar as particular nuclear plants are concerned, the environmental effects attributable to the existence and need for storage of nuclear waste bring only negligible weight to the cost benefit balance.[28] And in its original rule the Commission had determined that other aspects of the fuel cycle similarly

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26/ 42 F.R. 13803 (March 14, 1977).

27/ The initial licensing of Midland was done without any consideration of fuel cycle impacts. After that, but before the court of appeals' remand order, the Commission adopted a fuel cycle rule which was designed to summarize those impacts for use in each licensing proceeding. The court held, however, not only that Midland could not be licensed without consideration of fuel cycle impacts but also that gaps existed in the Commission's original rule. See Aeschliman, supra, 547 F.2d at 632; NRDC v. NRC (supra, fn. 5). The interim amended rule adopted since then was meant to fill those gaps. Taken in conjunction with the original rule which it modifies, it furnishes a statement of the environmental impacts of the fuel cycle which must be taken into account here.

28/ Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-421, 6 NRC 25, 30-32 (concurring opinion) (1977); Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-422, 6 NRC 33, 102-04 (majority opinion), 113-14 (concurring opinion) (1977); Public Service Electric & Gas Company (Salem Units 1 and 2), ALAB-426, 6 NRC 206 (1977).

involved little environmental impact.[29] Consideration of all the impacts reflected in the amended fuel cycle rule thus does not materially alter the cost-benefit balance originally struck for Midland with any such consideration.

Like the Board below, we are bound by and must give effect to the judgments made by the Commission in this regard. Absent any change mandated by either the Commission (as a result of the rulemaking proceeding now underway to formulate a permanent rule) or the courts, the environmental effects of the fuel cycle must be taken as insubstantial.[30]

29/ See 39 F.R. 14188-91 (April 22, 1974); see also Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-349, 4 NRC 235, 238-39 (1976).

30/ There is no merit to the intervenors' complaint that the Board below evaluated the fuel cycle matter without giving them sufficient opportunity to be heard. To be sure, little attention was paid to this topic during the hearing. This was natural because, as circumstances changed, the Commission -- which had at first told the Board below to consider fuel cycle matters (CLI-76-11, supra, 4 NRC at 65, and CLI-76-14, supra, 4 NRC at 167) -- directed that Board to "defer its consideration pending anticipated adoption of an interim fuel cycle rule", which was expected to "be in place by the time the Board is prepared to render a decision on the reopened record." CLI-76-19, 4 NRC 474, 475 (1976). Once that rule was in place, we (acting for the Commission in the absence of a quorum) told the Board below to take it into account. ALAB-396, 5 NRC 1141 (1977). That Board did so; by the time it rendered its decision, there was nothing raised on which the parties needed to be heard (see the decisions cited in fn. 28, supra).
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Thus, while this issue was potentially of crucial importance, it is no longer a significant factor in this proceeding.[31]

2. Conservation.

The other environmentally-related defect found in the earlier administrative proceedings was the failure to

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30/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
In this regard, the intervenors seem to press only two points which they believe should have been considered. As to the first, they are mistaken in asserting (Brief, p. 27) that there is a connection between the values in the fuel-cycle rule and the testimony concerning how possible increases in the monetary cost of fuel might affect Dow's interest in adhering to its contract with the applicant. The rule deals with only the environmental impacts of the fuel cycle and has nothing to do with the price a utility may have to pay to purchase fuel for a proposed reactor.

The intervenors' second point is also not well taken. They claim (Brief, p. 27) that the rule "rests upon the assumption that plutonium recycling will be available" (which assumption they say has now been discredited). Although we would be bound by the rule in any event, we note that this claim is simply wrong. In adopting the rule, the Commission explained that each of its values reflects the particular recycling assumption -- no recycle at all or uranium recycle only -- which would lead to the maximum adverse environmental impact. See 42 F.R. at 13807 fn. 1. The assumption that plutonium as well as uranium would be recycled was therefore not the basis for the rule.

31/ We hasten to add that, contrary to what the applicant suggests (Brief, p. 53), it is entirely inappropriate to rely for licensing purposes on the fact that " * * * the impacts of fuel cycle issues do not come into play until after plant operation begins * * *." Those adverse environmental impacts -- small though the rule states them to be -- will inexorably flow from plant operation. Consequently, they must be taken into account at whatever point a comparison to other alternatives is being drawn

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look specifically into the possible effects of conservation, the supposition being that conservation might obviate the need for any plant at all, or at least the need for a plant of the size proposed. Of course, efficacious conservation measures would tend to lower the projected demand figures. But because power demand has historically risen, conservation might reasonably be expected only to decrease or delay growth, and not to lead to reductions in absolute demand. Thus its effect could be merely to postpone the time when a generating plant's capacity would be needed to meet energy demand or reserve requirements, rather than to obviate that need entirely. In any event, conservation does not give rise to a separate issue -- it is just one factor which must be considered along with many others in connection with need-for-power projections.

The intervenors tell us that thus far (in the suspension phase of the remand) they have not attempted to present their own need-for-power projections (although they propose to do so in the next phase, when the merits are addressed). Instead, as their witness put it, he decided to take "most if not all of the Applicant's information as given and examine it for

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31/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
to avoid the risk that, by ignoring them until operation begins, other alternatives will be unjustifiably foreclosed.

correctness, accuracy, and suitability to support the position urged by applicant", rather than to conduct "an independent study".[32/] On this basis, he advanced the thesis that, leaving aside the steam and electricity intended for Dow,[33/] the applicant could meet anticipated demand with one 800-megawatt facility -- which he believed should be coal-fired -- in lieu of the two-unit nuclear facility under construction.[34/] In other words, the intervenors' witness concluded from the applicant's own evidence that at least one-quarter of the projected Midland generating capacity is unneeded.

Other evidence points a different way. The staff's testimony, similar to the material contained in its January 1977 Draft Supplement to the Midland Final Environmental Statement, provides an extensive review of power demand projections for the Consumers Power and Michigan Electric Coordi-

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32/ Testimony of Richard J. Timm, p. 14 (fol. Tr. 16A), March 23, 1977.

33/ He would have Dow produce its own. But see fn.46 , infra.

34/ Id. at 83; but see fn. 70, infra.

nated System service areas.[35] Projections made by several other organizations are compared with those of the applicant, and explicit consideration is given to the effect that conservation might have upon demand projections.

For present purposes we need not engage in an exhaustive recitation of the staff's conclusions. Briefly, however, the staff observes that the applicant's figures are very close to the demand projections of the Michigan Public Service Commission and the Michigan Governor's Advisory Commission on Electric Power Alternatives for the applicant's service area, as well as those of the Federal Energy Administration for the East North Central Region of the United States.[36] With respect to conservation, the staff notes that certain measures commonly used to promote conservation, such as advertisements encouraging conservation[37] and a flat rate structure,[38] are already in effect in the applicant's area.

35/ The MECS service area consists of that of Consumers Power plus that of Detroit Edison Company.

36/ Testimony of staff witness Feld (fol. Tr. 4375), pp. 9-23; Draft Supp. FES, pp. 4-15 -- 4-20.

37/ Feld testimony, p. 23; Draft Supp. FES, p. 4-6.

38/ Draft Supp. FES, p. 4-8.

In addition, the staff refers us to an opinion of the Public Service Commission suggesting that the applicant's forecasts have tended, if anything, to overstate the possible effect of conservation on future growth.[39] With respect to such forecasts, the staff discusses at length the difficulties of attempting to predict the effect of conservation measures[40] and the competing effects that might result as users of scarce fossil fuels conserve by switching to electricity to meet their power needs.[41]

This material, taken with other portions of the record related to conservation and the need for the Midland units, strongly suggests to us that the neglect to identify and consider specifically the effects of conservation in striking the original NEPA balance was an error of small magnitude. The upshot is that, although this NEPA violation, too, was theoretically serious, its actual impact is likely not to be.[42] Nothing advanced so far indicates that conser-

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39/ Feld testimony, p. 25; Draft Supp. FES, p. 4-10.

40/ Feld testimony, pp. 23-28; Draft Supp. FES, pp. 4-7 -- 4-8.

41/ Feld testimony, pp. 29-35; Draft Supp. FES, pp. 4-11 -- 4-13.

42/ In discussing the extent of the energy conservation NEPA violation, the Board below stated only that "[s]ubstantially less demand could result in the construction of a plant not now needed." 6 NRC at 488, ¶25. We take it that the Board was simply describing the nature of the issue rather than furnishing its view of the evidence thus far adduced.

vation will so decrease projected demand that any substantial portion of Midland's capacity will be superfluous. 43/

43/ After reaching and fashioning this conclusion, we received a letter from applicant's counsel, dated January 31, 1978, informing us that the utility had just adopted a "new long-term electric forecast for the years 1978 through 1992." That forecast reflects a downward revision of projected demand, and intervenors' counsel has, by letter of February 2, 1978, argued, inter alia, that it "destroys Consumers' entire case."

We do not think so. At the suspension hearing, the applicant relied upon a 8.2% annual growth rate in electric power demand. The annual growth rate contained in the new forecast is as follows: 4.4% for the years 1978-82; 2.8% from 1983-87; and 2.1% for 1988-92. The effect of this, for the years that the Midland units are scheduled to go into operation, is to decrease projected demand 210 megawatts in 1981 (from 5560 to 5350 megawatts) and 261 megawatts in 1982 (from 5841 to 5580 megawatts). As may be seen, this means that peak demand figures for this period will lag about a year behind what was previously anticipated -- instead of a 5560 megawatt peak in 1981, the projection is for a 5580 peak in 1982. This error reflects no more than the normal "substantial margin of uncertainty" inherent in any forecast of future electric power demands. See Niagara Mohawk Power Corporation (Nine Mile Point Unit 2), ALAB-264, 1 NRC 347, 365-66 (1975). And it does not give us cause to alter the opinion reflected in the text.

3. The Dow-Consumers Contract.

The current status of the contractual relationship between Dow and the applicant was examined at great length at the suspension hearing. Although this is as it should be, we should repeat that no NEPA violation occurred here; rather, the court suggested that the record be brought up-to-date on this count only because the case was remanded on other grounds.[44] The evidence adduced thus far, which appears to be unusually comprehensive, can be fairly summarized as follows: some officials in the local Dow management view Midland as a losing proposition and would abandon it, but the senior corporate officers have decided, subject to reconsideration if circumstances change, that Dow will honor the contract to buy steam from Midland, notwithstanding that intervening events have rendered its terms far less attractive to Dow than they originally were.[45]

For our purposes, then, that portion of the demand for Midland power attributable to Dow is a given.[46] To

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44/ Apparently inadvertently, the Licensing Board referred to this as the "second NEPA violation." 6 NRC at 486, ¶14.

45/ The Board below seemed to share this appraisal, but it concluded by stating that "whether Dow will ever buy steam from that plant is, on the record, speculative." 6 NRC at 488, ¶23. The intervenors make much of this finding. But our judgment is that we must take Dow's present intention as controlling, so long as there has been sufficient probing to determine what that intention truly is.

46/ Although the intervenors would eliminate that demand by having Dow construct its own fossil fueled generating facility, we are not told of any environmental advantages that would accrue from Dow's following that course (see pp. 10-12, supra).

be sure, financial and other considerations might result in Dow's being unwilling to enter into a similar arrangement if the choice were before it today. But that is true of many contracts viewed in the perspective hindsight affords. Whether or not it is in Dow's best financial interests to honor its contract is not for us but for Dow to determine. And, to repeat, extensive probing on this point at the suspension hearing yielded convincing evidence that Dow's present intention is to adhere to the contract's terms.[47/]

4. The ACRS Letter.

This topic would ordinarily be thought of as raising safety, rather than environmental, concerns. But the intervenors perceive environmental overtones: they point out that if the "unresolved safety problems" prove sufficiently intractable, other methods of meeting demand will become more desirable than a nuclear plant. In other words, the potential additional financial cost involved in resolving those

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47/ Thus, the situation here is unlike that presented in Seabrook, where two participants in the project had announced they intended to sell their interests in the facility and there had been no investigation into whether they nonetheless intended to honor their commitment to support the project financially until purchasers were found. See Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-422, 6 NRC 33, 80 (majority opinion), 110-11 (dissenting opinion) (1977). Thus, even before the majority's decision was upheld (CLI-78-1, 7 NRC __, January 6, 1978, slip opinion, pp. 31-32), nothing in the Seabrook dissent would aid the intervenors here.

problems, they say, should be taken into account in considering whether the plant is justified.

This point is not entirely devoid of merit. But absent an environmentally-preferable alternative, it overemphasizes the economic cost of the nuclear facility. As we explained earlier, NEPA requires us to look for environmentally-preferable alternatives, not cheaper ones. Put another way, once it has been shown that the power to be produced by a plant is needed and that no environmentally-preferable way exists of obtaining it, the acceptability of the "cost" of the plant in dollars is a question for the utility and the state regulatory agencies, the true experts in this area.

This principle must be applied here. When the first environmental analysis was done, the plant's cost was projected at $554 million;[48/] the latest estimate is that it will cost $1.67 billion. Such a drastic increase might be expected to tip the cost-benefit balance against the plant, but this is not the case. For, as we have said before, genuinely needed electricity can be viewed as "priceless"[49/] -- or, at least, of increasing value in proportion to the cost of building the

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48/ Final Environmental Statement (March 1972), p. XI-6.

49/ Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-179, 7 AEC 159, 173 (1974).

plants and providing the fuel to produce it. Thus, an increase in monetary costs may well not alter the plant's cost-benefit balance at all, for the benefit side will increase correspondingly. In short, once it has been determined that a generating facility is needed to meet real demand, that no environmentally preferable type of facility or site exists, and that all cost-beneficial environmentally-protective auxiliary equipment has been employed, the final cost-benefit balance will almost always favor the plant, simply because the benefit of meeting real demand is enormous[50/] -- and the adverse consequences of not meeting that demand are serious.[51/]

The environmental overtones of the issues referred to in the ACRS letter are therefore not of great importance here. We stress, however, that the safety aspects may well be. As far as we can tell, the Board below has been pursuing the right course in that regard.[52/] Nonetheless, it should find

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50/ Id. at 175-76.

51/ See Nine Mile Point, supra, 1 NRC at 364, fn. 57.

52/ At one point (January 28, 1977), that Board wrote to the ACRS indicating that the supplemental report from that body had not alleviated all its concerns. We assume that, although its decision did not refer to that letter, the Board will not without explanation drop the concerns it had.

our recent River Bend decision[53] -- rendered after it completed the suspension hearings and issued its decision -- instructive as to what further steps are prerequisite to a final decision on whether, and on what conditions, the applicant is entitled to retain the Midland construction permits.[54]

53/ Gulf States Utilities Company (River Bend Units 1 and 2), ALAB-444, 6 NRC 760 (1977).

54/ We reject outright any suggestion by the parties that once the ACRS identifies the "unresolved safety issues" it had in mind, no more need be done at the hearing. Regardless of how they might think they can parse the court's opinion, there must be at least an explanation of why -- if this is the case -- each safety problem is well enough in hand for this plant so that construction should be allowed to continue. See River Bend, supra; compare Applicant's Brief, p. 48. (It is, of course, no answer that the problem is "generic." That a safety problem is common to many reactors furnishes no reason to treat it differently than if it were peculiar to one.) Of course, the intervenors are entitled to question any such explanations, as they would have been able to at the original hearings.

D. Other Equitable Considerations.

As the Licensing Board recognized, a number of other equitable considerations come into play in suspension decisions.[55/] What is involved is a "traditional balancing of equities" coupled with consideration of whether our decision is likely to result in any "prejudice to further decisions."[56/] In most respects, there is no need to repeat what the Board below said about the individual factors it considered.[57/] But two points do deserve further discussion.

55/ 6 NRC at 484-85.

56/ See fn. 14, supra, and 6 NRC at 484. We have stressed both in this proceeding and in other cases that the "prejudice" factor can be an extremely important one. ALAB-395, 5 NRC 772, 779, 786 fn. 44 (1977); Public Service Company of Indiana (Marble Hill Units 1 and 2), 6 NRC 630, 634 (1977); Florida Power & Light Company (St. Lucie Unit 2), ALAB-404, 5 NRC 1185, 1188-89 (1977).

57/ In light of the balance of its opinion, we do have difficulty with the Board's concluding summary to the effect that "there are substantial equities favoring * * * suspension." 6 NRC at 498, ¶70. As the remainder of its summary, as well as other portions of its opinion, make clear, all that the Board found in the intervenors' favor was that they raised their arguments on the merits in timely fashion and that the defects in the proceedings "were significant enough" to require a remand. (As we have seen, those defects have paled into insignificance.). In the same vein, the intervenors have absolutely no basis for telling us that the Board below found for them on "virtually every contested issue" other than "sunk costs" (Brief, p. 1).

1. Applicant's Investment in Midland.

Much controversy has centered on the significance of the considerable time and money the applicant had invested in the construction of the facility by the time of the court-ordered remand. Some $370 million dollars had been put into the plant by then; construction of the units was 16% complete. The Licensing Board believed this to be of overwhelming significance. The intervenors argue, on the other hand, that the investment must be ignored.

Under this agency's rules (10 C.F.R. §2.764), a decision authorizing the issuance of a construction permit is effective when issued, unless stayed.[58/] In this case, neither we nor the court of appeals were asked for a stay pending review.[59/]

58/ 10 C.F.R. §2.788 (as added by 42 F.R. 22128, May 2, 1977, effective June 1, 1977). The substantive stay provision appeared only recently in the regulations. It merely codifies long-standing agency stay practice which parallels that of the courts. See, e.g., Northern Indiana Public Service Company (Bailly Nuclear-1), ALAB-192, 7 AEC 420 and cases there cited (1974); Florida Power & Light Company (St. Lucie Unit 2), ALAB-415, 5 NRC 1435, 1436 (1977).

59/ See App. Bd. Tr. 30-31; 54-56. At argument, we were initially under the impression that stays had been requested (but denied) pending appeal board and judicial review of the initial licensing decision; as it turns out, no stay was ever requested.

That review took longer than usual.[60/] Thus, when the court's remand order came down, the applicant had made substantial progress in constructing the facility.

No rule of law or equity of which we are aware forbids taking that fact into account.[61/] Up to the point of remand, the applicant had invested in the Midland project under the color of construction permits which, though subject to

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60/ See pp. 1-2, supra.

61/ Indeed, there are judicial decisions which recognize that, in deciding whether to halt a project pending further NEPA review, it is permissible to consider the amount of construction already undertaken. Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F.2d 927, 936-37 (2d Cir. 1974), vacated on other grounds and remanded, 423 U.S. 809 (1975); Sierra Club v. Morton, 514 F.2d 856, 878 fn. 29 (D.C. Cir. 1975), reversed on other grounds sub nom. Kleppe v. Sierra Club, 427 U.S. 390 (1976); Chick v. Hills, 528 F.2d 445, 448 (1st Cir. 1976). Moreover, a line of decisions recognizes that additional investment prior to a final decision can tilt the balance against alternatives or against environmental concerns. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971); Coalition for Safe Nuclear Power v. Atomic Energy Commission, 463 F.2d 954, 956 (D.C. Cir. 1972); Union of Concerned Scientists v. Atomic Energy Commission, 499 F.2d 1069, 1084 fn. 37 (D.C. Cir. 1974); see ALAB-395, supra, 5 NRC at 779. As we explained on another occasion, implicit in these decisions is the principle that if no stay of construction is granted pending a final ruling, the investment made can legitimately be taken into account in determining whether to stop the project at later stages. Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-349, 4 NRC 235, 261 (1976).

further review, were fully in effect.[62] Given that background, the length of time it takes to build a major nuclear power plant, and the utility's belief that it would need Midland's output to satisfy power demands including its contractual commitment to Dow, it had little choice other than to proceed with construction while the reviewing tribunals deliberated. Put another way, the utility can hardly be faulted for exercising its rights under presumptively valid construction permits which the opposing parties had not even asked be stayed pendente lite.

Nor is there any other reason to say the utility enters the arena with unclean hands. The defects that the court found involved neither a failure of the applicant to disclose relevant information nor any other censurable

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62/ The same cannot be said of the investment made since then. By way of information, in a one-year period roughly coinciding with the period between the issuance of the court's mandate and the Licensing Board's decision, the amount expended on Midland went from $381.6 million (September 30, 1976) to $593.4 million (September 30, 1977). This investment is projected to reach $732.1 million by March 31, 1978 -- putting construction at 42.5% complete. (These figures are from the November 11, 1977 Keeley affidavit, furnished at our request prior to oral argument.)

conduct on its part -- thus there is no warrant for us to say that the NEPA review was lacking in integrity[63] or that the applicant had proceeded with the project in bad faith.[64] Nothing that occurred prior to the remand suggests that we ought to ignore the applicant's investment in order either to prevent it from taking unfair advantage or to discourage future applicants from engaging in similar conduct.[65]

63/ See Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-77-8, 5 NRC 503, 532-33 (1977); Florida Power & Light Company (St. Lucie Unit 2), ALAB-335, 3 NRC 830, 840 (majority opinion), 844-46 (dissenting opinion) (1976), reversed, Hodder v. NRC (D.C. Cir. No. 76-1709, October 21, 1976) (unpublished).

64/ Although the allegedly improper conduct during the course of the suspension hearing (see p. 43, fn. 87, infra) must be analyzed further for other purposes, it is immaterial insofar as our treatment of the investment made prior to the court's remand is concerned.

In this same connection, we cannot agree with the intervenors (October 18th "Further Statement * * *", p. 4) that it was in any way deserving of condemnation for the applicant to have successfully pressed upon this agency in the initial licensing proceeding legal arguments which the court of appeals later determined to be lacking in merit. Insofar as the integrity of the proceedings or the good faith of the parties is concerned, there is no parallel between zealous advocacy in support of an arguable legal position and, e.g., the withholding of relevant factual information. We note that in the latter regard we fully expect both clients and lawyers to adhere to the highest standards. See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 533 (1973).

65/ See Seabrook, CLI-77-8, supra, 5 NRC at 533.

We recognize that in the final analysis an applicant invests in a nuclear project at its own risk.[66] What this means is that for any number of reasons a construction permit may be revoked, or an operating license withheld, and the investment lost.[67] But it does not mean that when it comes to comparing a proposed project with possible alternatives to it, no consideration may be given to the amount of progress made in circumstances where the agency and the applicant have proceeded in good faith.[68] The only purpose such a rule would serve would be to discourage applicants from beginning work on a project until all

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66/ This has been the rule from the beginning. Power Reactor Company v. Electricians, 367 U.S. 396, 414-15 (1961); Coalition for Safe Nuclear Power, supra, 463 F.2d at 956, fn. 1; Union of Concerned Scientists v. Atomic Energy Commission, supra, 499 F.2d at 1084, fn. 37; Aeschliman v. AEC, supra (October 27, 1977 order).

67/ This may result, for example, from safety-related defects or from the belated discovery of serious substantive environmental concerns. Or it might be revealed that the environmental analysis was not performed in good faith.

68/ Of course, if the intervenors can make good on their promise to establish that Midland is simply not needed (rather than that another facility should be substituted for it), the cost of abandoning it will not be considered in deciding whether to revoke the permits for one or both units. Union of Concerned Scientists v. Atomic Energy Commission, supra, 499 F.2d at 1084, fn. 37; Aeschliman, supra, 547 F.2d at 632, fn. 20.

administrative and judicial review was exhausted. We do not perceive any reason why that should be the general rule. It certainly is not the policy the Commission has instructed us to implement. To repeat, its rules, like those of the courts, provide for the granting of stays in appropriate cases.[69/] But where a stay is not justified by the particular circumstances, no legitimate purpose is served by delaying the start of construction for several years.

2. Potential for Prejudicing Further Decisions

We have already held that the issues being litigated on remand do not appear to be of large practical significance. And we have observed (p. 9, supra) that there is no suggestion -- either in the evidence or by way of argument -- that there is an environmentally preferable alternative to Midland.[70/] Viewing these circumstances

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69/ See fns. 56, 58 and 61, supra.

70/ The alternative suggested is the substitution for most of Midland's proposed capacity of a utility-owned coal plant and Dow's own plant for production of the steam and electricity it needs. But there is no evidence even remotely suggesting that this approach is environmentally superior. Early on, this agency looked for better alternatives and found none (see 5 AEC at 226-28). Consequently, that holding, left undisturbed, still guides us.

against the background of a nuclear plant that was well on its way to completion at the time of the remand, we are unable to perceive how permitting construction to proceed could prejudice later decisions. In other cases, a need might arise to suspend construction at an early stage to preserve potential options that could prove preferable.[71] But here no such options are in sight. And should one belatedly be discovered, given the minimal adverse environmental impacts attributable to the Midland facility, the environmental advantages of the alternative would have to be substantial to justify adopting it as a substitute for Midland in the circumstances presented.

71/ Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-349, 4 NRC 235, 258-62 (1976). We have granted suspension of construction when we thought it appropriate to do so. Northern Indiana Public Service Company (Bailly Nuclear-1), ALAB-192, 7 AEC 420 (1974); Cleveland Electric Illuminating Company (Perry Units 1 and 2), unpublished order of November 6, 1975, explained in ALAB-298, 2 NRC 730 (1975); Seabrook, ALAB-349, supra (suspending on fuel cycle grounds when that matter was still potentially significant), reversed, CLI-76-17, 4 NRC 451 (1976); and ALAB-366, 5 NRC 39 (1977), affirmed, CLI-77-8, 5 NRC 503 (1977).

The short of it is that there are simply no equities favoring suspension. The record in this proceeding, measured against governing legal principles, compels denial of intervenors' requests for relief.

E. Additional Observations

One further topic deserves special attention at this juncture. The intervenors insist that this agency must listen to their complaint that Dow intends to employ steam and electricity from the Midland project to make certain products which the intervenors believe are not in the public interest.[72/] In this connection, they claim that the Board below erred in deciding the suspension question without inquiring into this matter, i.e., without examining the societal value of the end uses to which the applicant's industrial and residential customers will put the plant's output. And they have indicated that they fully intend to pursue this point at the hearing on the merits.[73/]

At an earlier stage of this proceeding, as well as in at least one other case, we have held that this "end-use" argument has no place in our proceedings.[74/] Ordinarily we would therefore simply cite our earlier decisions, particularly in view of the intervenors' failure on their original appeal to the courts to press their claim that our holding was

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72/ See, e.g., Brief in Support of Exceptions, p. 34.

73/ App. Bd. Tr. 165-67; Additional Brief (post-argument), p. 14.

74/ ALAB-123, 6 AEC 331, 351-52 (1973); Long Island Lighting Company (Shoreham Station), ALAB-156, 6 AEC 831, 852-54 (1973).

wrong.[75] We cannot be certain, however, that were the case to come before it again the court of appeals would deem the point to have been waived (see fn. 75, supra). Because the intervenors have made it clear they will pursue the matter both at the hearing on the merits and in the courts, lengthier exposition of our views will both avoid wasted time and effort at the Licensing Board level and facilitate Commission and judicial review of our decision.

a. We can perhaps best explain our reasoning by discussing first the class of Dow products that has prompted the intervenors' particular concern, namely, "chlorinated hydrocarbons."[76] We assume that they refer to pesticide products[77] and that they believe a thoughtful NEPA analysis would find those products environmentally harmful (with the

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75/ The court of appeals said in its opinion that the end-use argument "is not pressed on appeal." 547 F.2d at 626, fn. 8. This is somewhat different from the intervenors' recollection that the court said it "assumed [they] waived the argument because [they] did not press it in [their] oral argument." App. Bd. Tr. 165. They now say that, "contrary to the Court of Appeals' footnote," they have not abandoned the argument (Additional Brief, p. 14).

76/ See, e.g., 547 F.2d at 626, fn. 8; App. Bd. Tr. 165.

77/ See their February 6, 1972 Statement of Environmental Contentions, ¶34 (referring also to the pesticide chemical known as 2,4,5-T).

result, so their argument goes, that any electricity or steam to be used for their production should not be counted on the "need for power" side of the NEPA cost-benefit balance).

We cannot agree with the intervenors on the need or warrant for us to conduct the analysis they want. The sale of pesticide chemicals is regulated by the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[78] To obtain federal approval, a pesticide must be found by the EPA Administrator to confer benefits in excess of its risks.[79] In other words, that official must determine whether, considering all aspects of the product's potential for harm, it is in the public interest that it be marketed.

In short, Dow may produce pesticides for domestic use[80] only if they have already received approval under a comprehensive federal regulatory scheme. Insofar as pesticides are concerned, then, the intervenors are asking us to inquire into the correctness of EPA decisions -- made after full

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78/ 7 U.S.C. 135 et seq.

79/ Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971) (under FIFRA prior to its 1972 amendment); 7 U.S.C. 136a(c)(5), 136(bb) (under FIFRA as amended by the Federal Environmental Pesticide Control Act of 1972).

80/ Exports are essentially unregulated (7 U.S.C. 136(o)), on the theory that the foreign country in which the product will be used should determine whether its particular needs -- e.g., control of a disease-bearing pest not present in this country -- are such that on balance the product is beneficial there.

adjudicatory hearings in contested cases[81] -- that it is in the public interest to manufacture particular products. But Congress has charged the Administrator, not us, with the direct and primary responsibility for making those decisions, and has made his decisions subject to judicial review.[82] Therefore, once those decisions have been made with respect to Dow's products and have survived direct attack, they must be taken as embodying a sound federal judgment that a net societal benefit will flow from Dow's pesticide manufacturing activity. We see nothing in NEPA which gives us a warrant to second-guess that judgment.[83]

81/ 7 U.S.C. 136d(d).

82/ 7 U.S.C. 136d(e).

83/ The cost-benefit test we would apply under NEPA is essentially no different from the test the Administrator applies under FIFRA. See 7 U.S.C. 136a(c)(5), 136(bb). Thus, the situation before us is not similar to that which was presented in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1124-27 (D.C. Cir. 1971), where the test applied by another agency in administering the then-effective provisions of the federal water pollution laws differed significantly from our charge under NEPA. Of course, Calvert Cliffs has since been legislatively overruled insofar as our water-related duties are concerned. Section 511(c)(2), Federal Water Pollution Control Act, 33 U.S.C. 1371(a)(2). In this connection, the Commission has just recently affirmed our decision that it is now inappropriate for us to review EPA's determinations regarding aquatic impacts. Public Service Company of New Hampshire (Seabrook Units 1 and 2), CLI-78-1, 7 NRC __ (January 6, 1978) (slip opinion pp. 33-42), affirming ALAB-422, 6 NRC 33, 69-72 (1977). See also ALAB-366, 5 NRC 39, 48-52 (1977).

Practical considerations reinforce our decision that we have no business intruding into another agency's regulatory realm. A pesticide registration proceeding involving only one product or family of products can involve extraordinarily long hearings because so much highly technical evidence must be adduced.[84/] Under the intervenors' proposal, we would have to duplicate EPA's effort for not just one but many such products. Even so, we would be considering only a relatively few of the products made by only one of many industrial users of the nuclear plant's output. The sheer magnitude of the task the intervenors would assign this agency -- threatening to increase many times the already gargantuan size of the records that are being compiled -- cautions against our undertaking it.

We are not implying that boards can shrink from inquiry into matters that are directly relevant to licensing decisions simply because the inquiry will be a tedious one. But that is

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84/ See, e.g., Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247, 1251 fn. 24 (D.C. Cir. 1973)(DDT hearing: seven months, 125 witnesses, 365 exhibits, over 9000 pages of transcript); Environmental Defense Fund v. Environmental Protection Agency, 510 F.2d 1292, 1297, 1304, 1306 (D.C. Cir. 1975):(aldrin/dieldrin hearing: twelve months into cancellation hearing, a fourteen-day expedited suspension hearing was held, resulting in a 4000 page transcript plus the incorporation of 11000 pages of transcript and 350 exhibits from the cancellation hearing, at which one party had already called 125 witnesses.)

not what is involved here. The intervenors would raise frankly collateral matters and take the proceeding on a lengthy detour for no purpose.

b. To be sure, not all products are, like pesticides, subject to pervasive federal regulation; those that are not cann t likewise be conclusively presumed beneficial to society. And the fact that there is a demand for these products is not determinative, because the forces of the marketplace are not infallible judges of the public interest. But practical considerations similar to those just mentioned in connection with pesticides preclude us from entertaining the "end-use" argument for other products as well. After all, NEPA does not require us to do more that what is reasonable; and it would be unreasonable even to attempt to ascertain whether each Dow product serves a useful or beneficial purpose, much less to pursue that inquiry into the myriad other uses to which the applicant's residential, commercial and industrial customers will put the electricity they consume.

In the first place, such an inquiry would be virtually interminable.[85/] And assuming our boards could muster the time, energy and resources to fill out an environmental report card covering each use, the grades they assigned would be of no practical importance. The Commission cannot ban the offending uses. Moreover, our expertise would in all likelihood be

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85/ See fn. 84, supra, with respect to one family of chemicals alone.

doubted, and our grading system ignored -- and not without some justification.[86/] Our judgments, lacking any force, would serve only to let us eliminate from the applicant's projected need-for-power curve so much of the steam and electricity that would fuel the "undesirable" uses. Using that altered curve for NEPA purposes, we might determine not to license a proposed facility (or agree only to license a smaller facility than the one proposed). But for two reasons this would not achieve the result sought, i.e., the elimination of the uses found wanting. First, the applicant could still use its own demand curve for its own purposes -- neither we nor any other federal agency could prevent it from building coal-fired plants to provide its customers with all the electricity they craved (thus fulfilling the obligation most States place upon public utilities). Second, even if the applicant followed our lead, nothing would insure that, if its customers' full demands were not met, they would use the electricity available to them only for the uses we have found most beneficial. For example, it does not malign Dow to suggest that, faced with a power shortage, it -- like other industrial

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86/ Decisions concerning the legitimacy of particular uses of electricity would be much more suitably made, it seems, by a legislative body than by an agency with our regulatory mission.

concerns -- might choose to produce the most profitable items, rather than those we happen to hold in highest regard. Moreover, as far as residential customers are concerned, any power shortage resulting from not meeting full demand would visit hardship indiscriminately upon all, cutting service not just to those guilty of putting electricity to ill use (as we might have defined it) but also to those who had adopted our decision as a guide.

In short, the intervenors' suggestion that the Licensing Board look into the end uses of the electricity and steam to be produced by the Midland facility is unreasonable, impractical and unwarranted. The Licensing Board is not required by NEPA to spend vast amounts of time and energy in such a fruitless pursuit.

We conclude that the Board below was correct in declining to order suspension of construction. In light of the absence of any potential environmentally preferable alternatives, the violations being considered on the merits simply do not appear to be of sufficient moment to warrant a halt of further

construction pending a decision on the merits.[87/]

Affirmed.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

87/ We have eschewed any comment on the significance of the events which led the Board below to include in paragraphs 9-11 of its decision (6 NRC at 485-86, as amended by order of November 4, 1977) comments relating to an alleged, albeit unsuccessful, attempt by the applicant to prevent full disclosure of the facts relating to Dow's intentions with regard to its contract. That matter was not put to rest by the November 4th order. Nor was it dealt with -- indeed it was specifically excluded from consideration -- in another order the Board issued that same day, referring certain attorney misconduct charges to a special licensing board pursuant to 10 C.F.R. §2.713(c). That board has since been told by the Commission to attempt to settle those charges, failing which it will be dissolved (January 30, 1978 letter from the Chairman of the Commission to the Chairman of the Special Licensing Board). The reasons the Commission gave for dissolving the special board do not apply to the entirely different type of charges involved here. And it is important that they be fully aired and resolved. Consequently, we fully expect both that matter and the merits of the ACRS's "unresolved safety issues" to be explored further at future hearings before the Licensing Board. This must be done whether or not the parties are themselves otherwise interested in pursuing these matters.