Midland

MYRON M. CHERRY
SUITE 1005
109 NORTH DEARBORN STREET
CHICAGO, ILLINOIS 60602
312.641.5575

DOCKET NUMBER
PROD. & UTIL. FAC.

Art. 50-329 50-330
50-329
50-330

August 10, 1971

Arthur W. Murphy, Esq., Chairman
Atomic Safety and Licensing Board
Columbia University School of Law
435 West 116th Street, Box 38
New York, New York 10027

Dear Mr. Chairman:

We have now reviewed the recent Court of Appeals decision striking down the AEC's invalid implementation of the National Enviornmental Policy Act (NEPA), Calvert Cliffs' Coordinating Comm. et al. v. United States Atomic Energy Commission et al., No. 24,839 and 24,871 (D.C. Cir. July 23, 1971) (hereafter referred to as "Calvert-NEPA" case). In addition, we have reviewed Dow Chemical's suggestions for further scheduling filed with the Board on July 21, 1971 and similar suggestions of Applicant and Staff which appear at pages 4640 through 4678 of the transcript of proceedings on Friday, July 23, 1971.

We have not, however, had the benefit of considering written submissions as to scheduling which are to be filed later by the Staff (Tr. 4653).

Generally, we do not see any support for the notion that the record of the proceedings be closed as of Friday, July 23, 1971. The hearing has not been concluded and that simple fact should suffice to end any discussion about closing of the record or having interim findings of any kind. Moreover, since 10 C.F.R. §2,754 permits a party to file proposed findings twenty days after the record is closed, the imposition of interim findings will eliminate the right a party now has, that is, to wait until all the evidence has been received before he is forced to take a position on the evidence.

Additionally, now that all environmental issues must be considered not only by the Board but also prior thereto by the Staff in its safety evaluation, it makes no sense to proceed with decision making until the Staff has taken a position with respect to the siting of the proposed units. Certainly no one should foreclose the real possibility that, upon a review of all available environmental submissions and an independent review thereof by the Staff, the Staff may oppose

7-1-77
NDN

NM
7-1-77

N-plant's progress outlined by officials

By SANDRA L. DICKEY
Daily News staff writer

The race to construct Midland's $1.87 billion nuclear plant is one-quarter complete, with an all-time high work force of 2,700 heading toward the 1981-82 finish line.

As construction proceeds at its fastest pace since beginning in 1972, plant-owner Consumers Power Company is spending more than $1 million to prevent federal officials from blowing the whistle on the controversial project.

At a news conference Thursday, Consumers' officials outlined the plant's progress since March and explained the status of a legal battle to retain the plant's construction license.

Construction control supervisor Bruce H. Peck said more than 500 workers were hired in the last three months, boosting the total labor force to its peak.

The work force comprises Michigan's largest and most expensive construction project, and includes 2,000 manual workers, 400 non-manual employes, more than 100 sub-contractors and 25 of Consumers' staff.

More than $600 million – almost one-third of the project budget – has been spent to date, with expenses totaling about $15 million per month.

Peck said the peak labor force will work through the summer and fall, and then be reduced by about 500 for the winter. Employment will peak again next spring at about 2,300 workers.

Construction is focusing on placement of concrete and steel in the reactor buildings, which will be 90 per cent complete by the end of this year, Peck said.

The 900-acre cooling pond and an underground tunnel which will carry process steam to Dow Chemical Company were other construction areas cited by Peck.

Project manager Gilbert S. Keeley told reporters "great progress" has been made in the last couple of months.

"Labor productivity has been excellent," he said. "The weather has cooperated and we are able to receive needed building materials and supplies on time."

Reactor II, the all-electric unit, is scheduled for completion in March 1981, while the electric and steam unit is scheduled for operation in March 1982.

Keeley said construction is on schedule so far and Consumers hopes to avoid labor strikes next year which could affect the current schedule. Union contracts expire in 1978.

The project manager was not so optimistic about the ongoing legal fight against local intervenors, who are trying to stop the plant's construction.

He said a six-month hearing on continued construction lasted much longer than Consumers expected, pushing back the schedule for environmental hearings ordered by the U.S. Court of Appeals.

The appellate court ordered reopened hearings on energy conservation as a partial or complete alternative to the plant, reactor safety, environmental effects of waste disposal and reprocessing, cost-benefit analysis and Dow's need for steam.

Keeley said Consumers hopes to start those hearings in October, the same month the U.S. Supreme Court will review the appellate decision.

A high court reversal of the decision would halt further hearings as well as negate the Atomic Safety and Licensing Board's (ASLB) decision permitting continued construction. That decision is expected in mid-August.

The legal battle, which began about eight years ago, has cost more than $1 million, Keeley said. He did not know an exact figure.

When pressed by the Daily News for a more specific outline of costs, Consumers Midland district manager D. Wayne MacDonald said it would take several days to compile the figures.

He also said the cost information was not available because the utility has not been billed for some of the legal fees from its Chicago and Washington counsel.

The legal bill would include attorney fees, hundreds of hours of preparation by consumers' personnel, travel expenses, volumes of document reproduction and other paperwork.

In response to another question, Keeley said he was not in favor of federal funding of intervenors because it would set a legal precedent and allow citizens to intervene in "everything going on in every industry."

the siting of the proposed Units, or at least require further information before it can even take a position. See e.g., Department of Commerce NEPA comments on proposed units introduced as Mapleton Intervenors' Exhibit.

Accordingly, the most prudent course to follow is to determine the effect of Calvert-NEPA case upon already received evidence, the scope of its impact upon future submissions and then set down a specific schedule. For example it does no good to set a date for Intervenors' witnesses or evidence on so-called synergistic matters until the Board has determined the scope of the synergistic matters to be considered and the Staff has taken a position thereto in its evaluation and the detailed environmental statement required under NEPA.

Of course, due consideration should be given to the fact that a hearing cannot, for example, conflict with a discovery procedure (e.g., depositions or document review) or else both purposes will be dealt a disservice.

Additionally, and probably of first priority, the Board should address itself to the legal effect (as opposed to the factual effect) of the Calvert-NEPA case. Thus, does the decision require a new or supplemental notice of hearing? Does the decision require a new Safety Evaluation? Does Applicant have to amend its PSAR? What documents must now be recirculated by the AEC in connection with the NEPA statement? etc.

For example, the failure of Applicant and Staff to have considered fully environmental matters obviously means that applicant has not made out a prima facie case; accordingly, to require intervenors now to produce evidence on the assumption that applicant and the staff will be able to make out a prima facie case is the kind of presumption which leads to an erosion of intervenors' rights in connection with burden of proof.

Below we set forth in more detail our suggestions as to the most orderly, efficient and fair way to proceed.

LEGAL EFFECT OF CALVERT-NEPA CASE

Although we are sure that attempts will be made by the Regulatory Staff, the Applicant and Dow Chemical to divide the hearing into environmental and non-environmental issues, we do not believe that such a procedure makes judicial sense or is permitted by the Calvert-NEPA case.

Accordingly, and perhaps recognizing that possibility, the Court of Appeals said at pages 7-8 of its opinion:

> "The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2) (A) and (B). In general, all agencies must use a 'systematic, interdisciplinary approach' to environmental planning and evaluation 'in decision making which may have an impact on man's environment.'... 'Environmental amenities' will often be in conflict with 'economic and technical considerations.' To 'consider' the former 'along with' the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA maintains a rather fine tone and 'systematic' balancing analysis in each instance.
>
> "To ensure that the balancing analysis is carried out and given full effect, [NEPA]... requires that responsible officials of all agencies prepare a 'detailed statement' covering the impact of particular actions on the environment, the environmental costs wich might be avoided, and alternative measures which might alter the cost-benefit equation."

The Court of Appeals in the remainder of its decision criticized the Atomic Energy Commission for not adhering to the inter-disciplinary approach required by NEPA. To suggest now after the obviously forceful mandate of the Court of Appeals that the Safety and Licensing Board hearings may somehow proceed as usual with the additional overview that environmental considerations be tacked on at the end is to belie the very first obligation of the Commission and the Regulatory Staff; that is to evaluate the technical and economic factors along with environmental factors. Accordingly, we see no savings in carving out certain issues in the hearing and more importantly we see no judicial precedent which would permit such a carving out.

As the Court of Appeals states at pages 10-11 of its opinion:

> "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section [Section 102 of NEPA] of its fundamental importance" (Emphasis added)

Since the notice of hearing was issued pursuant to a rule restricting environmental considerations, a rule now held invalid, there is some question as to whether a new or supplemental notice of hearing must be issued in connection with this proceeding. Thus, persons who may have intervened if the Commission's Midland notice of hearing had permitted them to raise environmental questions may have been deterred by the fact of the Commission's public statements. This is not to suggest, however, that a new notice of hearing could not also take into account the some four thousand pages of testimony which has been thus far elicited; but to the extent that such testimony must be subjected to environmental cross-examination, it appears that NEPA requires it to be done.

This will not create any additional burden since it is obvious that the intervenors and the other parties are entitled to another crack at all witnesses whose testimony in radiological-safety areas has environmental overtones.

INTERVENORS' SUGGESTIONS

Intervenors have the following suggestions:

1. The Regulatory Staff should be required to make the cost-benefit evaluation pursuant to NEPA to determine if it still supports the issuance of a construction permit. Only after a positive decision by the Staff is there any need for a hearing. The Board should not presume that the Regulatory Staff will opt for a construction permit by continuing the hearing upon issues which will become moot if the Regulatory Staff withdraws its approval.

   If the Regulatory Staff's revised evaluation is in favor of the site, then:

2. The regulatory staff should be required to submit to the Board and other parties a list of those areas of radiological-safety matters which it believes requires a re-evaluation under NEPA. After those areas have been identified, the Applicant and the other parties should comment and then the Board should rule which areas of radiological and safety areas must be reopened subsequent to a staff evaluation to submit further evidence in the hearing. Examples of such areas that come to mind immediately are the siting testimony of the staff and the Applicant, the iodine release testimony and the meteorlogical data.

3. The Regulatory Staff should submit to the Board as soon as is practicable a statement as to all of the environmental issues which it believes should be raised. Thereafter, the Applicant and other parties should comment to determine whether the Regulatory Staff's initial analysis has been broad enough and the Board should order the issues to be considered. Thereafter, the Board should take the initiative and order a free and open dis-

covery of the Applicant, the Regulatory Staff and Dow Chemical with respect to all of these issues.

Some of the issues which come to mind immediately are whether the plant is needed at all in terms of generation of electricity, whether the Applicant should be required to buy electricity rather than build and whether or not Dow Chemical can solve its pollution and steam problems in a way which does not require the building of an additional power plant.

Of course, if Dow Chemical or the Applicant assert the issue that a nuclear power plant is essential to the growth of Midland, Michigan, this Board would also have to consider whether under all the facts and circumstances industry should be told to expand elsewhere rather than in Midland, Michigan. Obviously, in connection with this issue relative costs of producing energy and steam are important.

Finally, the NEPA statement has to seriously consider not only abandoning the nuclear project but substituting in its stead an alternative type of energy production facility, such as, for example, a gas fired fossil plant.

4. Intervenors believe that it is impossible to finalize discovery on environmental issues and nuclear safety issues which have environmental overtones until a reasonable period of time after the Regulatory Staff has completed its detailed NEPA statement, the Applicant has reviewed and perhaps amended its submission in the PSAR, the Regulatory Staff has revised its Safety Evaluation and the dockets have been submitted once again to the ACRS (to the extent that environmental retrofitting may require a new safety analysis). Intervenors are, however, willing to sketch out fundamental areas in which voluntary discovery by the parties can begin now. This good faith effort, however, does not disturb our beliefs that any reconvening or the hearing must await a reasonable period of time after discovery has been completed and the Regulatory Staff completes its statutory obligations, and that discovery cannot be completed until the NEPA statement has been prepared.

Thus, although an Intervenor, as a party, has all rights to discovery and participation, which are accorded him by Rules of Practice, Intervenors' discovery can not replace, but is only in addition to, the statutory obligation of the Regulatory Staff to proceed with an environmental review initially.

If, for example, the Regulatory Staff review results in opposition by the Atomic Energy Commission to the site, there may be, realistically, no hearing as to which Intervenor will participate. On the other hand, prior Regulatory Staff review is also important to call to the attention of the Board and Intervenors the existence of environmental issues which either of them may not have independently discovered. Therefore, although we encourage the parties to participate in voluntary discovery with respect to the matters to be listed later, we do not think the Board should construe Intervenors' good faith in pursuing informal discovery now as an admission against their rights as to discovery of relevant information or to the raising of any questions after the Commission has executed its statutory obligation and subjected the proposed Midland Units to a thorough environmental review.

The categories listed below obviously will be more general than could be provided at a time when the Applicant and the Regulatory Staff have completed the NEPA statement and other environmental submissions have been made including but not limited to comments by agencies pursuant to NEPA. Objections by a party as to the broadness of the category of documents called for will obviously be an indication of that party's willingness to proceed informally. Accordingly in the event the Regulatory Staff, Dow or the Applicant objects to producing these documents informally, then Intervenors will await their later right to file a more specific and more formal motion. Intervenors intend to file Interrogatories but do not believe that they are in a position to do so until a substantial amount of documentary information has been produced and the NEPA statement has been prepared.

Accordingly and without limitation or waiver of any right as to the scope of information which shall be produced, the Interrogatories which shall be served or the depositions which may be taken, Intervenors request the parties to cooperate in informal discovery by answering earlier filed Interrogatories now relevant and by producing the following documents.*

---

* The documents listed below are required to be produced by each party to this proceeding who has such documents in its possession or in its control, whether such production is duplicative or not. The word "document" as used in this letter should be interpreted in the same manner as that word was defined in the last of each set of Intervenors' Interrogatories earlier addressed to each of the parties.

A. All parties should review Interrogatories previously filed and not answered and to the extent that such unanswered Interrogatories are now proper, they should be answered;

B. All documents which fairly fall within or have reference to Sections 101(b) and 102 of the National Environmental Policy Act or the Atomic Energy Commission's Draft Guide to the Preparation of Environmental Reports issued in February, 1971;

C. All documents dealing with currently available or to be available within the next five years anti-pollution equipment capable of being installed in conventional power plants, i.e., any power plant other than a nuclear power plant;

D. All documents dealing with the need over the next ten years for electricity in Applicant's franchised territory. This category also calls for all documents dealing with the basis for any such need, including but not limited to, amounts of money spent to promote use of electricity and/or to create a need;

E. All documents dealing with the availability of alternatives to any need for electricity including, but not limited to the opportunity to Applicant to purchase all or part of said needed electricity from utilities which have a peak period different from Applicant or have or will have electricity available for sale. This category also calls for any documents dealing with costs of interconnection with utilities from whom electricity could be purchased in the event an interconnection with Applicant were accomplished;

F. All documents dealing with the determination to site the proposed Midland Units including documents dealing with alternative sites and alternative types of power plants, including all costs and projected completion dates;

G. All documents dealing with short and long range supplies of coal, oil and gas in the possession and control of or purchaseable by Applicant over the next ten years for use in conventional power plants;

H. All documents dealing with short and long range supplies of uranium in the possession or control of or purchaseable by Applicant for use in nuclear power plants. This category fairly calls for information dealing with the fast breeder program to the extent that the fast breeder is to be relied upon for the production of uranium(or nuclear fuel) to be used in nuclear power plants;

I. All documents dealing with the projected construction of power plants, of any kind, for the generation of electricity by any utility from whom Applicant would purchase, or is capable of purchasing by reason of interconnection, electricity over the next ten years;

J. All documents dealing with arrangements with utilities or others, to whom or from whom Applicant sells or purchases electricity or is, under certain conditions obligated by contract to sell or purchase electricity. This category fairly calls for copies of all contracts, setting forth Applicant's interconnection agreements as well as, for example, agreements with municipalities;

K. All documents dealing with analyses of the balancing and rationalization, both long and short term, of natural resources which are or can be used in any kind of power plant;

L. All documents dealing with Dow's present facilities for the production of process steam and electricity in Midland, insofar as they reflect analyses, studies or determinations dealing with the retrofitting of such facilities with anti-pollution equipment, including the specifics and costs thereof;

M. All documents dealing with Dow's need for process steam and electricity, assuming first that it shuts down its current Midland electricity and steam facilities and then that it does not, specifying all alternatives, including costs and projected completion dates available to it, (whether such alternatives include the availability of gas or other natural resources to use as a power supply) including but not limited to the ability of Dow to expand elsewhere than Midland, Michigan. This category fairly calls for documents, studies and economic statistics dealing with the growth or inhibition of growth of Midland, Michigan to the extent that Dow's desire for process steam effects a decision to expand in Midland, Michigan rather than, for example, in Freeport, Texas; and documents dealing with the relative cost of electricity and process steam in each geographic area of possible Dow expansion;

N. All documents dealing with chemical explosions at Dow's Midland complex and elsewhere, whether at a Dow facility or not, within the past 20 years. This category fairly calls for the source of each such explosion, the character of the explosion, the chemicals or other explosives involved, the damages incurred and the physical characteristics of the explosion such as the direction of the blast and the geographical area effected by the blast;

O. All documents dealing with the type and character of the expansion Dow intends to make in Midland, including the products which will be produced in and the pollution which will be generated by such expanded plants;

P. All documents dealing with or showing the reliability, in terms of maintenance and forced outage, of each nuclear power plant in the United States and for each fossil fuel plant in the United States. There is no time limitation with respect to nuclear power plants, but with respect to fossil fuel plants, documents reflecting information earlier than 1955 are not called for;

Q. All documents dealing with the Applicant's plans for the next ten years for power production by any means, that is, whether by nuclear power or more conventional means, such as fossil fuel facilities;

R. All documents dealing with releases by Dow Chemical in normal and abnormal circumstances of any chemical, solid or substance, to the atmosphere or to the rivers and streams over the last ten years. This category calls for a specific description of each such chemical, solid or substance, whether released normally or abnormally, how such chemical was released, what steps were taken to prevent any such future release and whether such steps have been successful. This category of documents also fairly calls for the concentration of such releases and the effects it has had upon rivers and streams and the atmosphere;

S. All documents dealing with the interaction, synergistically or otherwise, of chemicals with radiation;

T. All documents dealing with each analysis, in connection with the proposed Midland Units, for each section of the National Environmental Policy Act required to be so analyzed, including but not limited to review or analysis pursuant to Section 102(2)(D) of the National Environmental Policy Act;

U. All documents dealing with thermal or other effects of any kind which are created, aided or abetted by the proposed cooling towers and cooling pond;

V. All documents, analyses and studies dealing with the effects, if any, as a result of Applicant's proposed use of water from the Tittabawassee River, upon users of water from the Tittabawassee River, other than Applicant and for any purpose, whether industrial or not;

W. All documents earlier called by each of the Intervenors' Interrogatories which were not produced upon the grounds that production was not relevant because the Interrogatories or documents related to environmental matters;

X. All documents dealing with storage, transportation and disposal of radioactive waste products and spent fuel used or created by operation of the proposed Midland Units. This category fairly calls for information dealing with the entire question of radioactive waste disposal including what provisions will be made for off-site storage. We are aware that the Commission has taken the position that its jurisdiction does not include this subject as appropriate in a licensing hearing. However, we believe that this issue, in any event, is a proper one under NEPA and accordingly must be considered as a result of the Calvert-NEPA decision.

Y. All documents showing the status of procurement and manufacture of each component or system to be used or installed at the proposed Midland Units. This category fairly calls for all information dealing with how far anyone has gone in building or commiting to build a facility not yet authorized by law in order to determine whether NEPA or this Board's authority is being infringed upon by the expenditure of funds and efforts.

The above list of documents is not intended to be complete, but is made as part of a good faith attempt to begin the process of discovery at a time when the requirements of the Calvert-NEPA case have not yet been fully explored.

5. Intervenors finally suggest that after a substantial amount of the work required by this letter has been accomplished, the Board order a prehearing conference at a time and date convenient to the parties to discuss all future phases of these hearings, and attempt to resolve legal issues insofar as possible in advance.

Intervenors are willing to discuss the contents of this letter as well as other informal or formal discovery proceedings in order to expedite proceedings; but by this letter, Intervenors do not intend to waive any right or legal position, including the position that the hearings on these dockets, having been commenced pursuant to an illegal notice of hearing and illegal regulations (e.g. 10CFR, Part 50, Appendix D and 10 CFR, Part 2, Appendix A) are invalid from their inception.

Since Intervenors believe that it is neither legally permissible, nor judicially prudent to reconvene a hearing on any issue until the matters raised by this letter have been resolved, we are making no comment specifically upon the proposed schedules submitted by Applicant. Moreover, since those schedules were made prior to any consideration of the Calvert-NEPA case, it does not appear sensible to comment upon them until such time as they have been revised.

CERTIFICATION

Intervenors have reviewed the recent submission of the Regulatory Staff under date of August 6, 1971 dealing with certification. We urge the Board to certify questions as Intervenors framed them The framing of certified questions by the other parties have so narrowed the issue that with such other parties' questions, it will be unlikely that the Appeals Board could issue a decision which would be of use to this proceeding. Thus, we once again call attention to the fact that Intervenors intend to make comparative analyses of the emergency core cooling system and in that context compare the B & W ECCS with like systems of Westinghouse, General Electric and Combustion Engineering.

MOTION FOR SUBPOENAS

Accordingly and in order to pose the issue more directly, Intervenors herewith move the Board, pursuant to the Rules of Practice, for an Order issuing Subpoenas to Westinghouse Electric Corporation, General Electric Corporation and Combustion Engineering requiring each of them to produce, for use in connection with these dockets, all documents and reports, including patent applications and patent filings,whether claimed proprietary or not, dealing with each of their emergency core cooling systems, including but not limited to documents which make comparative analyses of any ECCS system with another.

If the Board rules favorably upon this motion, we shall prepare and serve the Subpoenas.

Finally, by this letter, we urge other parties to the proceedings, including all Intervenors, to prepare and submit to the Board a statement of their views, without prejudice, regarding the matters raised in this letter.

By this method, when Commission rules and regulations have been promulgated, this Board and the parties will have already taken significant steps toward analyzing the legality of such rules and regulations.

Respectfully,

Myron M. Cherry
Attorney for Saginaw Valley, et.al. Intervenors

MMC/dw
cc: ASLB Members
Secretary, AEC
All Counsel of Record