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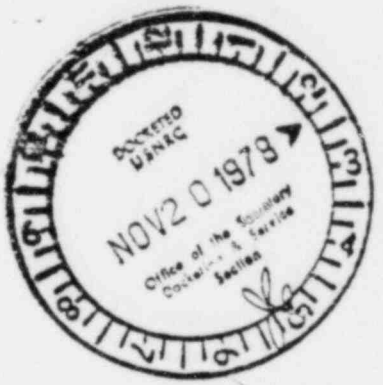
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Richard S. Salzman

In the Matter of	)	
ROCHESTER GAS AND ELECTRIC CORPORATION, et al.	)	Docket No. STN 50-485
(Sterling Power Project Nuclear Unit No. 1)	)	

Mr. Dirk S. Adams, Rochester, New York, for Ecology Action of Oswego, intervenor.

Mr. Lex K. Larson, Washington, D. C., for Rochester Gas and Electric Corporation, et al., applicants.

Mr. Stephen M. Sohinki for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

November 17, 1978

(ALAB-507)

1. Introductory. Intervenor Ecology Action of Oswego moves, for the second time, to have us "stay" Rochester Gas and Electric Corporation and certain other public utilities "from contracting for the purchase of the uranium to be used at the proposed Sterling nuclear power plant". The motion arises in the following context.

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A consortium of public utilities led by Rochester Gas and Electric has sought NRC permission to build a large, nuclear-powered electric generating facility at "Sterling", a site in upstate New York near Oswego. Ecology Action intervened in the construction permit proceeding before the Licensing Board to oppose the plant. That Board, however, approved the Sterling application and authorized issuance of the necessary licenses. LBP-77-53, 6 NRC 350 (August 26, 1977). After noting an appeal from that decision, Ecology Action filed its first "stay motion" on April 28, 1978, asking us, inter alia, to bar applicants' purchase of uranium fuel for the Sterling plant pending our disposition of the appeal. On May 5, 1978, we denied that request because intervenor had not demonstrated that the relief was warranted.[1/] The Commission declined to review our May 5th order, thereby rendering it the agency's final action.[2/]

1/ Intervenor also asked us to suspend the Sterling construction permit. We declined to do so on applicants' express representation that work at Sterling would not commence for a considerable time. We did order no work undertaken at Sterling without ten days prior written notice to all parties. Applicants have represented most recently that work at Sterling will not start before the fall of 1980. See ALAB-502, 8 NRC ___, ___ (October 19, 1978) (slip opinion at 3).

2/ See 10 C.F.R. §§2.785(c) and 2.786(b).

On August 18, 1978, Ecology Action petitioned the Court of Appeals for the District of Columbia Circuit for review of the May 5th order.[3] The motion now before us -- intervenor's second stay motion, dated October 18, 1978 -- is for an order barring applicants from purchasing uranium fuel for Sterling pending completion of judicial review of our refusal on May 5th to grant similar relief.

(In the interim, we completed appellate review of the Sterling application and affirmed the Licensing Board's decision on all points except two. ALAB-502, 8 NRC ___ (October 19, 1978). For reasons there explained, disposition of the remaining points must abide the outcome of future proceedings. Ecology Action's petition for review of ALAB-502, filed on November 6, 1978, is pending before the Commission.)

2. NRC jurisdiction over nuclear fuel acquisition.

(a). Intervenor's motion for relief is met at the outset by challenges to our authority to "stay" a utility from contracting for nuclear fuel.[4] Applicants tell us

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3/ Case No. 78-1855.

4/ In denying intervenor's first stay motion on May 5th, we did not find it necessary to reach (and did not pass on) the question of our jurisdiction to grant it.

flatly:

> No statute gives NRC jurisdiction to grant the requested relief. The Atomic Energy Act of 1954 authorizes the NRC to license the construction and operation of nuclear facilities, but this does not extend to private uranium contracting activities. Authorization is not and never has been required from the NRC to undertake uranium procurement. 5/

They further assert that the National Environmental Policy Act of 1969 (NEPA) does not broaden this agency's substantive regulatory jurisdiction and that intervenor's motion should therefore be denied on jurisdictional grounds alone.—6/

The short answer to applicants' arguments is that they are mistaken. "The production, processing and sale of uranium and uranium ore are controlled by the Atomic Energy Act of 1954, as amended. After removal from its place in nature, uranium ore may be disposed of only to a licensee of the [Nuclear Regulatory] Commission, * * *". Homestake Mining Co. v. Mid-Continent Exploration Co., 282 F.2d 787, 791 (10th Cir. 1960).—7/ More specifically, natural uranium

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5/ Applicants Brief at 1-2 (footnote omitted).

6/ Id. at 304, citing, inter alia, Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973).

7/ Citations omitted. The Atomic Energy Commission's jurisdiction in this area was transferred to the NRC on January 19, 1975 by the Energy Reorganization Act of 1974, 42 U.S.C. §5841(f). As the quoted observation indicates, the Commission's authority over uranium ore and other "source material" attaches only "after removal from its place of deposit in nature", and not when the ore is mined. 42 U.S.C. §2092 (emphasis supplied).

and ores bearing it in sufficient concentration constitute "source material" and, when enriched for fabrication into fuel for nuclear power plants, become "special nuclear material" within the meaning of the Atomic Energy Act of 1954.[8] Both are expressly made subject to Commission regulation by the 1954 Act;[9] and (with limited exceptions not relevant here) "no person may transfer or receive in interstate commerce, transfer, deliver, acquire, own, possess, receive possession of or title to or import into or export from the United States" any special nuclear material or source material unless authorized by a license from this Commission.[10] The applicants' objection to our granting the relief sought by intervenor on the ground that NRC lacks jurisdiction over the procurement of uranium is thus not well taken.

(b). The staff's objection rests on an entirely different footing. It contends not that the Commission lacks jurisdiction over fuel contracting activities but rather that this authority has been exercised to grant general licenses to acquire title to nuclear fuel without first

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8/ See 42 U.S.C. §§2014(z) and (aa), 2071 and 2091.

9/ 42 U.S.C. §§2073 and 2093.

10/ 42 U.S.C. §§2077 and 2092.

obtaining a specific NRC license. The staff calls attention to section 70.20 of the Commission regulations, which provides in pertinent part that: "A general license is hereby issued to receive title to and own special nuclear material without regard to quantity."[11/] The staff reasons that, if persons may obtain title to and own uranium fuel without a specific license from the Commission, a fortiori they are free to contract for that fuel as well -- and this Board may not "stay" activities the Commission's regulations authorize. We agree.

The NRC rules in this area do not abrogate effective supervision of nuclear fuel. The Commission has merely disengaged itself from concern with paper transactions which -- though of legal significance -- do not directly affect the physical control, location or use of special nuclear material. The regulation cited by the staff (10 C.F.R. §70.20) goes on to provide that:

> A general licensee under this section is not authorized to acquire, deliver, receive, possess, use, transfer, import or export special nuclear material, except as authorized in a specific license.

11/ 10 C.F.R. §70.20. Such "general licenses" are authorized by the Atomic Energy Act. See 42 U.S.C. §2077.

Put another way, the licensing regime which the Commission has administered under the Atomic Energy Act for many years is geared to insuring Commission scrutiny of circumstances or conditions involving a possibility of danger to the public health and safety. Contracting for legal title to fuel is simply not one of them. When, as and if the applicants seek to reduce their contractual ownership rights to actual possession -- for example, by taking delivery of the uranium fuel (for use at Sterling or elsewhere) -- then they must obtain a specific "materials license" from the Commission.[12/] At that time they will have to demonstrate that they meet the governing Commission requirements[13/] and satisfy the Commission that granting them the materials license would not "be inimical to the common defense and security" or "constitute an unreasonable risk to the health and safety of the public".[14/]

This leads directly to the result we are constrained to reach. Nuclear power plant licensing proceedings are conducted in two discrete stages: first for permission to

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12/ See, e.g., Pacific Gas and Electric Company (Diablo Canyon Plant, Units 1 and 2), ALAB-334, 3 NRC 809, 811 (1976).

13/ See generally 10 C.F.R. Part 70.

14/ 10 C.F.R. §70.31(d).

construct the plant and then for a license to operate the completed facility. A construction permit does not ripen automatically into an operating license. Power Reactor Co. v. Electricians, 367 U.S. 396 (1961); Vermont Yankee Power Corp. v. NRDC, 435 U.S. 519 (1978). Because construction of these complex power stations takes several years, operating license proceedings commence well after a construction permit has been awarded. And an application for a materials license -- the specific license needed to take possession of uranium fuel -- is normally considered in conjunction with the proceeding to license operation of the completed plant. It is ordinarily only at that late stage that the utility needs to take possession of the fuel to load the reactors.15/

The case before us concerns an application for a construction permit, the earlier of the two licensing stages. Not surprisingly, therefore, applicants made no request for a specific license to use, transfer, or store nuclear fuel; the Licensing Board did not consider the matter; and it did not come before us on appeal. The staff is accordingly correct in its assertion that intervenor's "motion should be denied because there is nothing for this Board

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15/ See Diablo Canyon, supra fn. 12.

to stay; there has been no decision or order either permitting or prohibiting [the applicants from contracting for] uranium."[16/]

In short, intervenor's request to bar the applicants from contracting for uranium fuel amounts to an application for an injunction. But we may not forbid what Commission regulations permit. There are channels open whereby those regulations may be challenged;[17/] intervenor, however, has not pursued them. The motion must therefore be denied.

3. A stay is not justified in any event. Even were we to assume for argument's sake that we could "stay" the applicants from contracting for uranium fuel, that relief is unwarranted. Commission regulations place the burden on one moving for a stay to demonstrate, inter alia, that it will be irremediably harmed unless that relief is forthcoming. 10 C.F.R. §2.788(e). The regulations reflect "the established rule that a party is not ordinarily granted a

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16/ Staff Brief at 1-2.

17/ See 10 C.F.R. §§2.802, 2.803 and 2.758; Public Service Co. v. NRC, 582 F.2d 77, 83 (1st Cir. 1978); Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1080-94 (D.C. Cir. 1974); Metropolitan Edison Co. (Three Mile Island Station, Unit No. 2), ALAB-456, 7 NRC 63, 67 (1978), and cases there cited.

stay of an administrative order without an appropriate showing of irreparable injury. See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925." Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968) 18/

In the initial motion for a stay, intervenor's claim of injury rested on danger perceived from the seepage of radioactive radon gases from tailings remaining after uranium has been mined and milled. In denying that motion, our order of May 5th pointed out to intervenor that it had "proffered no evidence to suggest that radon is generated in quantities sufficient to have possibly serious health or environmental consequences." Shortly thereafter, another Licensing Board, having held an evidentiary hearing on this precise question, determined that radon releases associated with the mining and milling of fuel for one nuclear facility are so small compared to naturally-occurring releases of that element "as to be completely undetectable" against the normal background radiation and therefore "insignificant" in striking the cost-benefit balance for the plant. Duke Power Co. (Perkins Nuclear

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18/ The Commission's rules are modeled on the Virginia Petroleum Jobbers decision. See, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC ___ (slip opinion at 4) (November 2, 1978).

Station, Units 1, 2 and 3), LBP-78-25, 8 NRC 87, 100 (July 14, 1978) (appeal pending).

Given the requisites for a stay set out in the Rules, our express observations on May 5th and the Perkins decision,[19] we would have expected intervenor, in renewing its stay motion, to point to some concrete injury to itself (or its members) that we had overlooked. This is not the case, however. Intervenor's second stay motion rests solely on the theory that it will be deprived of its day in court unless we grant that relief because applicants may purchase the fuel needed for Sterling before intervenor can be heard and thereby moot the appeal. Apart from the fact that this is a "bootstrap" argument -- it boils down to the assertion that our determination that a stay pending appeal is not warranted cannot be tested unless we grant a stay pending appeal[20] -- it will not withstand analysis.

19/ We cite Perkins solely for the reason stated and not for the correctness of its conclusions. Review of that case is pending before us and is not complete.

20/ We note that intervenor is not simply asking for time to go to the court of appeals for relief. (Its petition for judicial review is dated August 18, 1978, and presumably filed two months ago.) Rather, it seeks a stay until the court hears and decides the case on the merits, which intervenor represents will take nine months at a minimum.

This is not a proceeding to license a uranium mining, milling or fuel fabricating establishment (the closest of which is a thousand miles from intervenor). What is before us is an application to construct a nuclear power plant in upstate New York. The relevance of radon is confined to the National Environmental Policy Act issue whether its adverse effects fairly attributable to this plant (together with all the other environmental costs of building it) outweigh the plant's benefits. That question is still open before us and intervenor has been assured of and will be afforded opportunity to be heard on it.[21/] We have not approved construction of the Sterling facility, and -- as we noted earlier -- applicants have represented that they will not commence work on it for some time. Moreover, they are under express instructions from us not to do so without giving all concerned advance notice. In these circumstances, no matter what quantity of uranium fuel applicants may contract for, we can perceive no possibility that intervenor will be deprived of the opportunity to challenge the correctness of the determination we have yet to make about the effect of radon emissions on the plant's cost/benefit balance -- assuming that, when our decision is rendered, intervenor disagrees with our conclusions.

21/ See ALAB-480, 7 NRC 796 (May 30, 1978).

Intervenor's reliance on Kepford v. NRC, ___ F.2d ___, 2 CCH Nuc.Reg.Rep ¶20,075 (D.C. Cir. 1978), as authority to the contrary is not well placed. Indeed, that case supports the result we reach here. Kepford concerned a challenge to a Commission license to operate a nuclear power plant in Pennsylvania pending completion of necessary further proceedings on the environmental effects of radon releases from uranium tailings, essentially the issue involved in this case. In denying a stay in Kepford, the court of appeals -- consistent with our analysis here -- described the radon problem as "a merits issue which may be explored on appellate review within the agency or in the courts". Id. at p. 16,427. It was thus made clear that the purchase of uranium fuel for the plant would not deprive those opposing the facility of their day in court. The court did not refuse a stay simply because the fuel had been acquired -- as intervenor here asserts. Rather, relief was denied because movant in Kepford was unable to show any irreparable injury from the uranium tailings which, as the court correctly observed, were situated "not at the nuclear power plant site but at the mills operated at various unspecified sites in the Western United States." Ibid.[22/]

22/ Senior Circuit Judge Fahy dissented in Kepford on the ground that the agency's failure to consider adequately
(FOOTNOTE CONTINUED ON NEXT PAGE)

Finally, our conclusion that no stay is in order is buttressed by a recent Congressional enactment attacking the radon emission problem at its source. The Uranium Mill Tailings Radiation Control Act of 1978, P.L. No. 95-604, ___ Stat. ___ (November 8, 1978), apportions responsibilities in this area not only to the Commission, but to the Secretary of Energy, the Environmental Protection Agency and several states as well. Without attempting to detail the complexities of that lengthy enactment, it suffices to state that Congress did not deem it appropriate to stop the mining and

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22/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) the radon question meant that its impact statement was incomplete and, under NEPA, a court "may" enjoin major federal action in these circumstances without a showing of irreparable injury, citing Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974). We are not prepared to take issue with the views of one of the most distinguished sitting federal judges on the powers of the court of appeals. With all deference, however, we suggest that neither we nor the courts are compelled to disregard the Virginia Petroleum Jobbers standards in passing on stay applications where NEPA is involved. Recent cases indicate that, where departure from that Act's requirements are not egregious, the traditional tests for a stay continue to obtain. See, e.g., Fund for Animals v. Frizzell, 530 F.2d 982, 986 (D.C. Cir. 1975); and Environmental Defense Fund v. Froehlke, 477 F.2d 1033 (D.C. Cir. 1974). In our judgment, the circumstances of this case do not warrant dispensing with the usual requirements for entitlement to injunctive relief.

milling of uranium pending completion of the remedial steps there called for.

Motion for stay denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Roxayne M. Skrutski

Roxayne M. Skrutski
Secretary to the
Appeal Board