

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. John H. Buck
Thomas S. Moore

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In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 & 2))

Docket Nos. 50-329 OM & OL
50-330 OM & OL

Ms. Barbara Stamiris, Freeland, Michigan, intervenor
pro se.

Mr. Michael I. Miller, Chicago, Illinois, for the
licensee-applicant Consumers Power Company.

Mr. Michael N. Wilcove for the Nuclear Regulatory
Commission staff.

MEMORANDUM AND ORDER

July 27, 1982

(ALAB-684)

1. Intervenor Barbara Stamiris purports to appeal the Licensing Board's April 30, 1982, memorandum and order, which authorized, pending subsequent issuance of the Board's partial initial decision, certain interim amendments to the construction permits for the two-unit Midland facility. See LBP-82-35, 15 NRC ___ (1982). Exceptions to the Board's memorandum and order were due May 18, 1982. Id.

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at __ (slip opinion at 22); 10 CFR 2.762(a), 2.710. -^{1/}
Ms. Stamiris' appeal was dated June 7, 1982, and, by her own admission, was untimely. In one letter accompanying her appeal and another dated June 14, she asserts that there is good cause for our consideration of her late appeal. We treated Ms. Stamiris' letters as a motion for leave to file an appeal out of time and requested responses from the other parties. Order of June 22, 1982 (unpublished). Consumers Power and the NRC staff each replied, opposing intervenor's request. Consumers Power also moved to strike the appeal, but Ms. Stamiris did not respond. We grant the motion and dismiss the appeal for the reasons discussed in point 3 below.

2. We need not repeat the Licensing Board's thorough discussion of the background and events leading to its authorization of interim amendments to the Midland construction permits. See 15 NRC at __ - __ (slip opinion at 1-19). Suffice it to say that the Board felt compelled to impose short-term conditions now, before completion of hearings and issuance of its initial decision, on the ongoing soil-remedial activities by Consumers Power under its existing permits. Essentially these conditions require Consumers Power to obtain explicit staff approval before

^{1/} Our unpublished order of June 22, 1982, incorrectly stated that exceptions were due May 13, 1982.

undertaking specified soil-related activities. Id. at ___ (slip opinion at 21-22). But for the Board's order, Consumers Power would have been free under its original permits to engage in these activities, without any form of staff approval, while the soil settlement matter is still being litigated. Id. at ___ (slip opinion at 5). In ordering this increased staff oversight of the construction at Midland, the Board expressly refrained from "dictat[ing] the manner in which the Staff may exercise its review" and excluded those construction activities already approved by the staff but apparently not yet undertaken. Id. at ___ (slip opinion at 19).

On May 26, 1982, the staff issued the amendments to the Midland construction permits. Their terms track almost verbatim the conditions imposed by the Board's order. See Construction Permit No. CPPR-81, Amendment No. 3, and Construction Permit No. CPPR-82, Amendment No. 3 (May 26, 1982); 15 NRC at ___ (slip opinion at 21-22). On the preceding day, the staff notified Consumers Power that it was discontinuing its prior practice (with which the utility had voluntarily complied) of approving each individual construction step in favor of "review . . . as an integrated package." The staff also indicated, however, that "those [activities] for which staff review was substantially completed as of April 1, 1982, are . . . approved," and identified Phase 2 underpinning activities as falling within

that category. Letter from Darrell G. Eisenhut, Director, NRC Division of Licensing, to J. W. Cook, Vice President, Consumers Power Company (May 25, 1982) at 1. It is apparently this staff letter and the May 26 permit amendments that have triggered Ms. Stamiris' appeal.

3. After considering the pleadings in this matter, including Ms. Stamiris' letters and tendered brief, we believe the real issue at hand is not whether intervenor has satisfied the standard for our acceptance of an untimely appeal, but rather whether intervenor, in fact, appeals any Licensing Board action. To be sure, Ms. Stamiris states in her June 14 letter that this "is an appeal against the Board's 4/30/82 Memorandum." She also gives the reasons in her June 7 and June 14 letters why she believes she has established "good cause" for the tardiness of her appeal. But those reasons, as well as the accompanying brief on the merits of her appeal, convince us that intervenor's complaints are not really directed against the Licensing Board's April 30 decision. Rather, the alleged harm she seeks to redress by appeal is certain staff action that has occurred since the Board's order.

For example, in urging acceptance of her late-filed appeal, intervenor states that she viewed the Licensing Board's decision as "an attempt to strengthen the controls on Consumer[s'] soils remedial work" and "trusted" the NRC

staff to abide by an earlier "commitment" to refrain from a piecemeal review of the utility's soil-remedial work. But after she received copies of the permit amendments and the staff's May 25 letter "granting concurrence for Phase [2] remedial work," intervenor "realized that the hearing process and its ultimate outcome [were] being prejudged by the actions that were taking place under the terms of the [amendments,]" and she "began work on this appeal immediately." Stamiris Letter to Appeal Board (June 7, 1982). See also Stamiris Letter to Appeal Board (June 14, 1982). Moreover, intervenor's brief contains no argument directed to the Licensing Board's April 30 decision. Instead, it is devoted principally to her concerns about the permit amendments themselves "as already implemented by the NRC in their recent approval of Phase [2] underpinning work." Intervenor Appeal (June 7, 1982) at 2. See also id. at 4, 7, 10, 11.

Thus, intervenor's appeal raises issues relating to staff compliance with and implementation of the Board's order, rather than the order itself. We believe that these are matters best left to the Licensing Board's judgment in the first instance. This is particularly so, given Ms.

Stamiris' concern that the staff's actions may have prejudiced the future soil-related hearings to be conducted by the Board and foreclosed consideration of some Board members' questions. Id. at 2, 3, 7, 10; Stamiris Letter (June 7, 1982).^{2/} Intervenor has erroneously brought her arguments to us instead of the Licensing Board. Accordingly, the appeal is dismissed without prejudice to intervenor's presentation of these same arguments to the

^{2/} We note in passing, however, that many of intervenor's arguments are not very persuasive. For instance, Ms. Stamiris fails to explain how the future Board hearings will be compromised, particularly given the Board's many references to the future evidentiary hearings and the following statement:

[w]e stress that in our forthcoming Partial Initial Decision we will reexamine the terms and conditions which we are here imposing on an interim basis. At that time, however, we may reaffirm, expand or remove them.

15 NRC at ___ (emphasis added) (slip opinion at 20). Further, to the extent that intervenor objects to the manner in which the staff is conducting its review, (1) the Board expressly gave the staff discretion in that regard, as Ms. Stamiris acknowledges in her letter of June 7, and (2) at least for future remedial activities, the staff nonetheless appears to have committed itself to the integrated review intervenor wants. See id. at ___ (slip opinion at 19); Eisenhut Letter, supra, at 1.

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3/ If we have misperceived the nature of intervenor's appeal and it is, in fact, directed to the Board's April 30 decision, we then dismiss it for failure to demonstrate the "extraordinary and unanticipated circumstances" that warrant acceptance of an untimely appeal. See 10 CFR Part 2, Appendix A, IX(d)(3). See also Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980), where we held that, [a]lthough the time limits established by the Rules of Practice with regard to appeals from Licensing Board decisions and orders are not jurisdictional, our general policy has been to enforce them strictly." See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638 (1979); Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195 (1973).

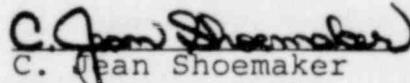
The reasons intervenor gives (see pp. 4 - 5, supra) do not present the extraordinary and unanticipated circumstances necessary for us to entertain her late appeal from the Board's order. Further, there could be no misunderstanding as to intervenor's right to appeal or the time for doing so, because the order itself clearly stated that any party could file exceptions within 10 days of service. 15 NRC at ___ (slip opinion at 22). Compare Sheffield, supra, 12 NRC at 159-160. We share intervenor's interest that the soil-related problems at Midland be fully explored and agree that issues of public health and safety must be of "paramount" concern. Stamiris Letter (June 7, 1982). But she has failed to convince us that the Board's April 30 order somehow puts those goals in jeopardy so as to warrant acceptance of her late appeal.

Finally, we do not decide whether Ms. Stamiris' appeal and brief should also be stricken for failure to conform to the requirements of 10 CFR 2.762(a), (c), and (d). See 10 CFR 2.762(f).

The motion to strike of Consumers Power is granted, and the appeal of Barbara Stamiris from the Licensing Board's April 30, 1982, memorandum and order is dismissed.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board