July 27, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Marshall E. Miller, Chairman
Gustave A. Linenberger, Jr.
Dr. Cadet H. Hand, Jr.

In the Matter of	
UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPORATION TENNESSEE VALLEY AUTHORITY	Docket No. 50-537
(Clinch River Breeder Reactor Plant)	

MOTION TO RESCHEDULE HEARINGS

Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club (hereinafter "Intervenors) hereby move the Board to reschedule the evidentiary hearing, prehearing conference and remaining prehearing deadlines set forth in the Board's Prehearing Conference Order (Schedule), dated February 11, 1982,[1/] and the Notice of Evidentiary Hearing and

1/ This document will not be available for public and agency comment until July 30, 1982.

Prehearing Conference, dated July 19, 1982. As demonstrated below, such a rescheduling is required by the Staffs' issuance on July 19, 1982 of a Draft Supplement to the Final Environmental Statement related to construction and operation of the Clinch River Breeder Reactor Plant (NUREG-0139, Supplement No. 1, Draft Report) (hereinafter "Draft FES Supplement").

I. Statement of Facts

On February 9-10, 1982 the Board held a prehearing conference in Oak Ridge, Tennessee to develop a schedule governing the course of this proceeding for evidentiary hearings on the application for issuance of a limited work authorization ("LWA") for the Clinch River Breeder Reactor Plant (the "CRBR"). During that conference, the Staff set June 22, 1982 as the scheduled date for release of either a final environmental update document or a draft supplement to the 1977 CRBR Final Environmental Statement (Transcript of Feb. 9, 1982 Prehearing Conference at 1009). Counsel for Staff, Mr. Swanson, stated that

> In the staff's view, in the event that significant changes have occurred that would necessitate filing a supplement, of course, that would shift the schedule back considerably because then there would have to be built in a comment period on the supplement and it would probably shift the schedule back a period of perhaps as much as five, five-and-a-half months.

Transcript at 1011. Mr. Swanson also noted that

> [I]n fact, the schedule that you have before you submitted by Applicants is based on the, I guess the faster of the two tracks, planning for the possibility that in fact a supplement will not be issued.

Transcript at 1009.

Counsel for Applicants Mr. Edgar agreed that issuance of a Draft FES Supplement would also shift the hearing schedule:

> If in fact there is significant new information which has substantial environmental implications, then that would be mirrored in the staff's update document and they would have to recirculate and once you have gone the recirculation path, then you're going to have a void in time where you can pick up pleading and contentions.

Transcript at 1014.

The Board decided to set a schedule based on the assumption that no draft FES Supplement would be issued, but explicitly agreed to substantially reconsider the schedule if a supplement were issued and recirculated:

> I am only pointing out that if there is a decision at that time, recirculate or whatever it may be, if it is not consistent with the schedule that we are now developing, obviously it is going to be a series, as matter of months, five or six, it doesn't make that much difference. We will just have to sit down and re-evaluate the whole thing, a prehearing conference or whatever, but very obviously all of the material, the situation with regard to timing, the schedule, the deadlines of discovery, the commencement of another entry and all of that, but we prefer to develop a schedule which contemplates the ability to proceed reasonably along those lines.

Transcript at 1132. All the parties and the Board, therefore, were in agreement that recirculation of the FES would trigger an entirely new schedule for hearings and discovery.

The schedule published by the Board on February 14, 1982 set June 22 as the deadline for issuance of the Staff's environmental update, August 6 as the deadline for discovery on that environmental update, and August 24 for commencement of the LWA evidentiary hearings. On July 19 the Board issued a Notice of Evidentiary Hearing and Prehearing Conference setting August 23 for commencement of the Evidentiary Hearing, which would "continue until completion of taking evidence on the issues and contentions admitted for the purpose of a limited work authorization (LWA-1) hearing, pursuant to 10 CFR 50.10(e)."

Later that same day, and one month after the scheduled deadline, Intervenors received a xeroxed copy of the 390-page Draft Supplement to the Final Environmental Statement Related to Construction and Operation of the Clinch River Breeder Reactor Plant (the "Draft FES Supplement"). An attached Staff letter to the Board indicated that printed copies of the statement would be available "in about a week," then circulated for public and agency comment. Letter from Geary S. Mizuno, Counsel for NRC Staff, to Administrative Judges, dated July 19, 1982. The letter also stated the Staff's new position that issuance of the Draft FES Supplement would not prohibit

Applicants or Intervenors from "going forward with their presentations on environmental matters nor with any party going forward with its presentations on matters relating to the suitability of the site at the scheduled August hearing." Id.

Intervenors have been unable to reach any agreement with Staff and Applicants regarding a revised hearing and discovery schedule. Staff counsel refuses to consider any extension of the deadline for discovery on the Draft FES Supplement, despite the fact that the Staff was one month late in issuing the document, the document contains 390 pages of new material, and despite the fact that, since the document is issued as a draft FES Supplement, Intervenors will now also be preparing extensive public comments on the document, in addition to interrogatories and testimony based on its contents. See letter, dated July 23, 1982, from Bradley Jones to Barbara Finamore. Applicants would agree to nothing more than "several days" extension of the schedule. See Applicants' Motion to Enforce the Hearing Schedule, July 26, 1982, at 7.

For reasons stated below, Intervenors hereby move that the Board reschedule the Evidentiary Hearing and associated prehearing deadlines to account for the delay in issuance of the draft FES Supplement, and the absolute legal requirement that the NRC Staff complete a final FES Supplement before the LWA hearings begin.

II. The LWA Evidentiary Hearings Must Await Completion of the Final FES Supplement

It is clear from the outset that the Board has the general authority to regulate the timing and course of evidentiary hearings. 10 C.F.R. §2.718(e). Yet it is also clear that, when the hearing in question is for purposes of deciding on a limited work authorization, the Board's authority to conduct and regulate that hearing arises only after a final environmental impact statement has been made available.

Section 50.10(e), the Commission's LWA regulations, require compliance with sections 51.52(b) and (c), which in turn provides that parties must take positions and offer evidence on the aspects of the proposed action covered by NEPA (and its implementing regulations) in accordance with the provisions of Subpart G of 10 CFR Part 2. That Subpart contains Section 2.761a, which specifically refers to hearings on LWA issues. Section 2.761a clearly prohibits the commencement of any LWA hearings before a final environmental impact statement is issued. It provides that:

> [T]he presiding officer shall, unless the parties agree otherwise or the rights of any part would be prejudiced thereby, commence a hearing on issues covered by §50.10(e)(2)(ii) [site suitability findings] and Part 51 [NEPA findings] as soon as practicable after issuance by the staff of its final environmental impact statement, but no later than 30 days after issuance of such statement.

10 CFR §2761a (emphasis added). That this section contains the specific mandatory procedures for LWA hearings is reinforced by another portion of 10 CFR, Part 2, which states that:

> In any proceeding relating to the issuance of a construction permit for a facility, which is subject to the environmental impact statement requirements of [NEPA] and which is a utilization facility for industrial or commercial purposes or is a testing facility, separate hearings may be held and decisions may be issued on National Environmental Policy Act and site suitability issues and other specified issues as provided by Subpart F and §2.761a.

10 CFR Part 2, Appendix A, par. I.(c)(2) (emphasis added).

It seems clear that both Applicants and Staff had the Section 2.761 prohibition in mind during the February 9, 1982 prehearing conference, when both parties admitted that issuance of a draft FES Supplement would shift the hearing schedule on both NEPA and site suitability issues back several months. The NEPA regulations of the Council on Environmental Quality ("CEQ"), which are binding on the NRC, also prohibit commencement of adjudicatory hearings prior to issuance of the final EIS. 40 CFR § 1502.5(c) states:

> For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements (emphasis added).

The CEQ regulations make it clear that the only time a final

EIS need not precede an adjudicatory hearing is when the hearing is a preliminary one for the purpose of gathering information for the EIS itself. That is obviously not the purpose of the upcoming LWA hearing.

The CEQ regulations also make it clear that this EIS cannot be treated differently because it is a supplement:

> Agencies ... [s]hall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

40 C.F.R. §1502.9(c)(4). Thus, issuance of this supplemental EIS in final form must precede commencement of the adjudicatory hearings. See also Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320, 95 S. Ct. 2336, 2356 (1975).

Commission precedent is clear that despite the Licensing Board's discretion in scheduling hearings, LWA hearings cannot begin until after a final FES is issued. In Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), a case cited by Applicants, the Appeal Board acknowledged the Licensing Board's authority to schedule an LWA evidentiary hearing in the manner and time frame it thought appropriate, but only after the FES was made available. Discussing whether LWA hearings should proceed notwithstanding the applicant's postponement of construction and operation of the Douglas Point facility for several years, the Appeal Board held:

> Once the Final Environmental Statement has been released, however, it may well be possible both to pinpoint and to measure, with reasonable precision and certainty, many of the environmental costs which will be involved in constructing and operating the reactor. When this can be done, a useful purpose conceivably would be served by having those costs considered at an early hearing....

Id. at 546 (emphasis added). To underscore the importance which the Appeal Board placed upon having a final, up-to-date impact statement, one which has been reviewed by the public and other agencies, in place before any LWA hearing commences, the Appeal Board added a second requirement. It held that before any second LWA hearing was held to consider remaining or reopened issues, the NRC Staff must recirculate the final impact statement (in normal circumstances, only the draft statement is circulated) together with (1) any adjudicatory environmental determinations made on the basis of the early hearing and (2) the supplement which the staff had volunteered to prepare. Id. at 552. The Appeal Board noted that "[t]hat supplement, according to the staff, will bring up to date and assess the continuing validity of the information contained in the FES (as modified by disclosures at the early hearing)." Id. The Appeal Board required circulation of the FES and its supplement before the hearing began because:

> This procedure will insure that interested agencies and the public will have the opportunity to reassess the environmental impacts of the facility in the light of any augmentation of data or changed

> circumstances--which, in turn, should minimize the risk that stale information will be used in striking the final NEPA balance.

Id. at 553. Thus, the Douglas Point case demonstrates that a final, up-to-date environmental impact statement must be in place before any LWA hearing can begin--whether it be an early hearing on site-related issues or a second hearing on reopened or remaining issues.

Both Applicants and Staff have developed a novel theory which attempts to avoid those clear LWA requirements, as set forth in the regulations and Commission precedent. They claim that 10 C.F.R. §51.52(a) allows various parties to present their case at an LWA evidentiary hearing before issuance of a final, updated EIS. That regulation provides:

> (a) In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft environmental impact statement will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the [EPA] and commenting agencies and made available to the public. Any other party to the proceeding may present its case on NEPA matters as well as on radiological health and safety matters prior to the end of the fifteen (15) day period.

It is apparent that §51.52(a) is not intended to apply to an LWA proceeding. The LWA rule explicitly requires complete compliance with subsections (b) and (c) of §51.52, but conspicuously does not mention subsection (a). And, as noted

above, Section 51.52(b) provides that proceedings under it shall be conducted "in accordance with the provisions of Subpart G of Part 2 of this chapter", which includes §2.761a, proscribing commencement of LWA hearings prior to issuance of the final EIS. Furthermore, the Douglas Point Appeal Board explicitly cited Part 2, Appendix A, par. I.(c) as controlling in the LWA hearing situation, but completely failed to mention §51.52(a). And Part 2, Appendix A, par. I.(c)(2), itself specifically requires LWA hearings to be held in accordance with §2.761a, rather than §51.52(a).

Whereas Section 2.761a specifically applies to LWA hearings, Section 51.52(a) applies to every NRC action for which a draft environmental impact statement is prepared, whether or not a formal adjudicatory hearing is held. It is clearly modelled after a CEQ regulation concerning informal public hearings, 40 C.F.R. §1506(c)(2), which states, in pertinent part:

> If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft [EIS]).

See also Statement of Consideration for 10 C.F.R. Part 51, 39 Fed. Reg. 26279 (July 18, 1974) (intent of regulations is to implement the revised CEQ regulations on preparation of environmental impact statements).

In resolving any apparent contradiction between §2.761a and §51.52(a), the Board must be guided by the specific provisions

of §2.761a, which prevail over the more general provisions of §51.52(a). Sun Ins. Co. of New York v. Diversified Engineers, Inc., 240 F. Supp. 606 (D.C. Mont. 1965), In re Brown, 329 F. Supp. 422 (D.C. Iowa 1971). Section §51.52(a) has never been applied to an LWA hearing, is not required to be applied, and if applied to an adjudicatory hearing such as the LWA, is internally inconsistent.[2/] To rely on Section §51.52(a) rather than §2.761a would violate the specific requirements of the LWA rule itself.[3/]

2/ There is an apparent conflict between the last and first sentences of §51.52(a). The first sentence requires that the EIS be issued at least 15 days prior to any relevant hearing, yet the last sentence purports to allow presentation of a party's case prior to the expiration of that 15 day period. It is not explained how a party is to present its case before the hearing begins.

3/ Since we believe §51.52(a) is inapplicable to LWA hearings, we do not reach Staff's argument that it may also present its case under §51.52(a) before the final FES Supplement is issued in light of the Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order), Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352, 50-353 (July 14, 1982). We submit, however, that such an argument flies in the face of the clear language of §51.52(a) that "[a]t any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public." In any case, the Limerick Licensing Board's only support for proposing early hearings is the Douglas Point case, which, as noted above, allows early hearings only after a final and up-to-date FES is issued.

Applicants also cite Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility) ALAB-296, 2 NRC 671 (1975) as providing support for their argument that LWA hearings may commence before the final impact statement and supplement are issued. This reliance is misplaced. To begin with, the Final FES for the Barnwell facility had already been issued, before the hearings were scheduled, and the only contentions of Intervenors concerned its adequacy, not its existence. Id. at 674-75. The Appeal Board permitted the hearings to commence since one major purpose of those hearings was to investigate the merits of Intervenors' claims that the FES was inadequate. Id. at 679. The Appeal Board made it clear, however, that if it became apparent recirculation of a FES supplement was required, the licensing board could give "no further consideration to the subjects involved" until a final supplement was issued. Id. at 680 (emphasis added). The Appeal Board also noted that in certain cases, hearings on issues related to the ones being supplemented should also await the final supplement. Id. at 681.

Since the Barnwell hearing was not an LWA evidentiary hearing, and was therefore covered by §51.52(a) rather than §2.761a, the Appeal Board found no bar to proceeding with certain FES subjects while others were being redone in a draft FES Supplement. Id. at 681. Yet there is no indication that

the same result would obtain if the LWA rule, Section 2.761a, had been controlling, and in fact the Douglas Point Appeal Board reached an opposite result. This case therefore provides no support whatsoever for Applicants' argument that LWA hearings may proceed absent a final FES. To the contrary, the Barnwell case demonstrates that even under §51.52(a), no party may proceed with its case on issues that are being supplemented, or on issues sufficiently related to the ones being supplemented.[4/]

Intervenors therefore submit that Applicants and Staff have no basis in law, regulation, or Commission precedent for departing from their earlier position that issuance of a draft FES Supplement for the CRBR would necessarily require postponement of the LWA hearings until the final supplement is issued.

Every case cited by Applicants in its Motion to Enforce the Hearing Schedule underscores this proposition -- that the Board's discretion to schedule hearings and reduce delay arises only in "the absence of any limitation on a relevant statute or regulation." Public Service Company of New Hampshire (Seabrook

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4/ The Barnwell Appeal Board's application of certain balancing factors to determine whether hearings should proceed on several issues absent a final programmatic impact statement is irrelevant here. Id. at 681-83. Such balancing is explicitly allowed by the CEQ Regulations, 40 C.F.R. §1506.1(c), as long as a final, adequate impact statement on the individual project is in place. In the instant case, the project FES is not yet final, whereas the programmatic LMFBR is complete and up-to-date.

Station, Units 1 and 2), AVAB-293, 2 NRC 660, 661 (1975). Where a bar exists to commencement of hearings, as it does in this case, no amount of exhortation by Applicants can erase it.

III. LWA Hearings May Not Commence on Intervenors' Contentions, Which Are Based on FES Sections Now Being Updated

Since §51.52(a) does not apply to LWA hearings, the Board may not segment the hearings by allowing certain parties to present their case even though other parties must await a final impact statement. If any segmentation at all is permissible (a proposition with which we totally disagree) such segmentation must be by issue, rather than by party. See Barnwell, supra, and cases cited by Applicants in Motion to Enforce Hearing Schedule at 9. And, as the cases cited by Applicant make clear, the Board may only hear an issue when it is entirely independent and unrelated to other issues for which hearing is postponed. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-371, 5 NRC 409 (1977).

Applicants' attempts in its Motion to slice Intervenors' contentions into small pieces, force some parties to proceed on some of the subcontentions, and other parties to proceed on other subcontentions has no basis in law or precedent. The Board must instead examine each contention to determine if the FES Section it challenges is in the process of revision. If

so, hearings on that contention must be postponed until revision is complete, since no final impact statement exists relating to that contention. See National Indian Youth Council v. Watt, 501 F. Supp. 649 (D.N.M. 1980), aff'd _____F.2d _____, 12 ELR 20112 (No. 80-209, 10th Cir. Nov. 12, 1981).

A. The Issues Raised By Intervenors Contentions Are All Substantially Updated in the Draft FES Supplement

The Board's July 19, 1982 Notice of Evidentiary Hearing and Prehearing Conference stated that the CRBR LWA hearing will cover contentions 1(a), 2(a)-(d), (f)-(h), and 3(b)-(d), as limited in the Board's Order dated April 22, 1982, and contentions 4, 5, 6, 7, 8, and 11(b)-(d) as set out in the Order dated April 14, 1982. An examination of these contentions and the Draft FES Supplement indicates that every one of these contentions challenges the adequacy of some section of the FES, that every challenged FES section is now being revised in the Draft FES Supplement, and that further revisions will likely occur in the Final FES Supplement.

Contentions 1, 2 and 3

Contentions 1 through 3 all challenge the Staff's analysis and treatment of core disruptive accidents (CDAs) and their consequences for both NEPA and site suitability purposes. Applicants' argument that Contentions 1-3 are related only to site suitability issues is totally erroneous. Core disruptive accidents constitute the largest potential environmental impact

of the CRBR plant, and our challenge to the adequacy of Staff's discussion of those accidents in FES Chapter 7 is a major portion of Contentions 1, 2 and 3. The Board's Order Following Conference with Parties, dated April 14, 1982 makes it absolutely clear that those contentions are environmental ones. In that Order, the Board held that Intervenors' proposed Contention 20 was subsumed under Contentions 1, 2, and 3. Id. at 9. That proposed contention stated:

> 20. Neither Applicants nor staff have adequately described the risks and consequences associated with CRBR accidents beyond the design basis.
>
> a. The Staff concludes in the FES that CRBRP accident risks can be made acceptably low with the incorporation of certain features and design requirements, yet neither Applicants nor Staff have adequately described these additional features and requirements, nor demonstrated that they will sufficiently lower the risks of CRBR accidents.
>
> b. NRC policy, reflected in 45 Fed. Reg. 40401 (June 30, 1980), requires a discussion of consequences substantially greater in scope and detail than that contained.

Revised Statement of Contentions and Bases of Intervenors Natural Resources Defense Council, Inc. and the Sierra Club, March 5, 1982 at 22. Intervenors described that contention to the Board as "relat[ing] to the failure of the FEs adequately

to discuss risks and consequences associated with CRBR accidents beyond the design basis." Id. at 35.

Under the April 14, 1982 Order, it is clear that the Contentions 1, 2, and 3 relate to both NEPA and site suitability issues. It is also clear that the NEPA and site suitability issues on these contentions are inextricably intertwined, since every party would present the same evidence, use the same witnesses and make the same arguments regarding the probability, prevention, and mitigation of CDAs, to prove both ultimate NEPA and site suitability issues.

The new material in the Draft FES Supplement further reveals the overlap between Staff's FES and Site Suitability Report discussions of CDAs. The Draft FES Supplement not only revises Chapter 7, but adds as an Addendum to Section 7.1 an entire new chapter, Appendix J, entitled "Plant Accidents Involving Radioactive Materials." This lengthy chapter contains completely new material regarding the Staff's analysis of the proper CRBR design basis envelope, the frequency of CDA accidents and initiators, the response of the primary coolant system and the containment, and the risks of radiological releases through atmospheric and liquid pathways. Much of the discussion is taken from the Site Suitability Report, although some analysis, such as the Staff's probabilistic risk assessment, appears for the first time in the FES and is extremely relevant to Intervenor's site suitability case.

Since there is no way that the evidence on core disruptive accidents can be divided into that relating to NEPA issues and that relating to site suitability, the extensive revisions and new material in the Draft FES Supplement preclude any hearing on Contentions 1, 2, and 3 absent a final FES Supplement.

Contention 4

Contention 4 challenges the FES discussion of the risks, costs, and benefits of CRBR safeguards in Section 7.3 and Appendix E. These sections have been completely replaced in the Draft FES Supplement (see Draft FES Supplement at 7-6) to take into account new information on fuel cycle facilities and new NRC physical security requirements. The Staff has also revised its safeguards cost/benefit analysis in Section 10.4. Applicants concede that revision of FES material on this contention is substantial. Applicants' Motion at 18.

Contention 5

Contention 5 questions the suitability of the proposed CRBR site, particularly its meteorology and population characteristics, and the presence of nearby facilities. Discussions of these parameters have been substantially updated in Sections 2.2, 2.6, 2.19, 6.13, 9.2, Appendix J, and an entirely new 50-page Appendix L. Applicants admit that Staff has added an entirely new alternative site to its discussion, and that much updated information has been included about previously considered sites. Id. at 16. Applicants' claim

that Contention 5(b) relates more closely to site suitability is erroneous since it specifically relates to the Contention 5 discussion of alternative sites.

Contention 6

Contention 6 challenges the FES analysis of the environmental impact of the fuel cycle associated with the CRBR in Appendix D, which has been completely replaced and expanded in the Draft FES Supplement. Applicants concede that the revisions to this material are substantial. Applicants' Motion at 18.

Contention 7

Contention 7 challenges the FES discussion of alternative sites (substantially updated by Section 9.2 and Appendix L), alternative design features (updated by the addition of Section 8.4.7, "Nonproliferation Alternatives") and the ability to meet LMFBR objectives (updated by Section 8.3).

Contention 8

Contention 8 questions the adequacy of the FES discussion on decommissioning, which has been replaced by new and updated information in Section 10.24. Applicants concede that the Draft FES Supplement contains much new information from generic studies of decommissioning.

Contention 11

Contention 11 challenges the discussion of radiological impacts on public and plant employees, which has been updated

in Sections 5.7, 10.4, and Appendix J. Applicants concede that a discussion of the radiological doses attributable to CRBRP operation "would be dependent upon the Final FES", Applicants Motion at 17, but attempt to disengage other portions of this contention for purposes of the hearing. As stated above, such "salami-slicing" of our contentions into smaller subparts is impermissible under the Commission's rules and would serve no purpose other than to prejudice Intervenors, who would be unable to engage expert witnesses willing to return repeatedly to Oak Ridge to testify on these subcontentions.

As this list demonstrates, the Staff has updated every FES section challenged by Intervenors, in several cases adding entire chapters in response to our contentions. Those sections can in no way be considered final for purposes of a hearing before the final FES is issued.

B. The Final FES Supplement May Differ Greatly From the Draft Version

Applicants have no legal or factual basis, other than speculation, for arguing that the final FES Supplement will not differ greatly from the Draft FES Supplement after the Staff receives and responds to public and agency comment.

The Draft FES Supplement contains 390 pages of new material reflecting five years of developments and new information regarding the environmental impacts, safety, and health effects

of breeder reactors and their supporting fuel cycle. Recent letters to the Commission indicate substantial public interest in and willingness to comment on the FES Supplement. The fact that Staff is aware of NRDC's position on the CRBR does in no way indicate that no further expert comments are forthcoming from agencies and the public. In fact, the Staff received comments on the Draft 1977 FES from eleven federal agencies, five state and local governments, and eight other groups or individuals. 1977 FES, Appendix A. 40 C.F.R. §1503.4(a) requires agencies to assess and consider each comment, responding in the final statement by one or more of the means listed below:

(1) modify alternatives including the proposed action;

(2) develop and evaluate alternatives not previously given serious consideration by the agency,

(3) supplement, improve, or modify its analyses,

(4) make factual corrections; or

(5) explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

The Staff is on record as acknowledging the importance of agency comment to its FES preparation efforts. Less than a month ago, the Staff argued to another Licensing Board that:

> Consideration of the role of other agencies in the review and approval of the Point Pleasant Diversion bears out the wisdom of the more deliberative approach which the regulations envision. It can be expected that the comments of such agencies as DRBC, the Corps, and DER will be of significant assistance to the Staff in the preparation of its Limerick FES. Additionally, the Staff's environmental review would be assisted by the consultations which the Corps has instituted in its permit proceeding.

NRC Staff's Request for Reconsideration of Licensing Board's Special Prehearing Conference Order, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2). DOcket Nos. 50-352, 50-353 at 12 (June 28, 1982) (emphasis added). In the same way, comments on the Draft FES Supplement may cause the Staff to revise substantially portions of those documents related to Intervenors' contentions, possibly in a manner that will satisfy some or all of those contentions, and obviate altogether the need for a hearing on these issues.

The Supreme Court has recently stressed that the function of an impact statement is to inform the public that the agency has followed NEPA's mandate and considered environmental concerns in its decisionmaking process. Weinberger v. Catholic Action of Hawaii, ____US_____, 50 U.S.L.W. 4027, 4028 (Dec. 1, 1981). The commenting process allows public critique of the agency's performance in considering environmental values. See Essex County Preservation Ass'n v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976). If the agency performance as reflected in the

Draft Supplement has been inadequate, the commenting process guards against "objective error and excessive bias" that must otherwise go undetected. I-231 Why? Ass'n v. Burns, 372 F. Supp. 223, 245-46 (D. Conn. 1974), aff'd 517 F.2d 1044 (2d Cir. 1975).

The Staff and indeed the NRDC must have access to and consider the public's comments on the adequacy of NRC's consideration of environmental values before the hearing begins. It is wrong to assume that such comments would be frivolous; and it would be fundamentally unfair to deny Intervenors the benefit of comments which might highlight "objective error or excessive bias" in the draft.

C. Until the Final Draft Supplement is Issued, No Party Adequately Can Present Its Case on Intervenors' Contentions

Until the Final FES Supplement is issued, it would make a mockery of the LWA hearing process to permit or require any party to present its case on Intervenors' contentions. As stated above, every one of these contentions relates to the adequacy of the FES discussion of issues that are now being completely redone. There is no way that Intervenors can meaningfully challenge the adequacy of the final FES Supplement before it even exists. And since neither the 1977 FES nor the Draft FES Supplement represents the legal document at issue in this proceeding, see 10 C.F.R. §51.52(b) and (c), a challenge

by Intervenors to those documents would have no value whatsoever. Furthermore, to force Intervenors to present their case without the benefit of agency input and public comment on the Draft FES Supplement would work a substantial hardship on Intervenors, who have limited resources and depend heavily on the expertise of outside agencies and the public in developing their case.

Similarly, it would violate NEPA and the entire purpose of the supplement recirculation process to permit Staff to present its case before it reaches a final position in the FES Supplement. As stated above, the updated environmental information now being presented for public comment is massive and it is by no means certain that any of the information in the Draft FES Supplement will remain untouched by the recirculation process. To proceed on a contrary assumption would effectively shortcircuit the ability of agencies and members of the public, other than Intervenors, to participate in the environmental review process as required by NEPA.

Finally, to allow Applicants or Staff to present their case before the final FES Supplement is issued would deprive Intervenors of their full rights to cross-examination, based on the information contained in the final statement and the comments of expert agencies. See Giant Foods, Inc. v. FTC, 322 F.2d 977 (D.C. Cir.), cert. denied, 376 U.S. 967, 84 S.Ct. 1111 (1963). Intervenors would be denied procedural due process if the hearings commenced before we had an opportunity to evaluate

the comments received on the Draft FES Supplement in order to utilize those comments in our cross-examination of Applicants and Staff. Cf. Ralpho v. Bell 569 F.2d 607, 628 (D.C. Cir. 1977). We would be substantially prejudiced in our presentation of evidence and its ability to make compelling arguments if we were forced to operate in a vacuum, ignorant of the public's critique of the Draft Supplement. See Ka Fung Chan v. Immigration & Naturalization Service, 634 F.2d 248, 258 (5th Cir. 1981).

The mere assertion by Applicants that it is more "efficient" to proceed now rather than after the Draft FES Supplement has been circulated for comments should not outweigh Intervenors' right to a meaningful hearing. See Philadelphia Welfare Rights Org'n v. O'Bannon, 525 F.Supp. 1055, 1060 (E.D. Pa. 1981)

IV. The Need to Extend the Hearing and Discovery Schedule

Regardless of the order and timing of the LWA hearing on Intervenors' contentions, to require Intervenors to meet the February 14, 1982 schedule in light of the Staff's dilatoriness would cause us substantial prejudice. Intervenors have met every discovery deadline until this point, and the only reason they will not be able to meet the August 6, 1982 discovery deadline is because of Staff's one-month tardiness in meeting their own deadline. The SSS and FES dealines are not

interchangeable, since the FES Supplement is over six times longer than the SSR, and contains almost completely new information. The original schedule allowed for two rounds of discovery on the FES, and one round on the SSR. Furthermore, the FES requires us to prepare public comments on the Supplement in order to preserve our right to challenge its adequacy in court. We simply cannot prepare FES interrogatories, comments, and testimony in the time originally alloted, and should not be required to bear the burden of Staff's tardiness.

This case has proceeded on a schedule that has strained NRDC's resources to the breaking point. The Board's original schedule which did not contemplate one substantial alteration of the FES, and which was based on an FES update to be issued on June 22, represented the outer bounds of the possibl e. We have now been presented on 5:30 p.m. of July 19 with nearly 400 pages of new material. At least one section of that material, Appendix J of the Draft FES Supplement, contains the first attempt on the part of either the Staff or Applicant to predict the numerical probability of both the initiation and progression of CDA. This material has come as a complete surprise to NRDC, yet it is crucial to at least Contentions 1, 2 and 3.

We have endeavored in every conceivable way, including depositions, interrogatives and to determine whether either

party will be presenting such probability estimates, so that we could be prepared to respond and so that we might know how to prepare our case. The answer has consistently been "no". Both Staff and Applicant have resolutely refused up until today, throughout discovery, to associate themselves with any numerical estimates of either the probability that a CDA will occur or the probability that the CRBR systems designed to "accomodate" such an event will fail. Indeed, the Board's Order rejecting portions of Contentions 1 and 3 (see, particularly 1(b) and 3(a)) was based on the assertion that no such evidence would be presented.[5/] Yet that is precisely what the Staff has done in Appendix J. Moreover, it has explicitly relied on a WASH-1400 type analysis -- at least comparable to CRRBRP-1 -- the effort at probabilistic risk assessment that was ruled outside the scope of the LWA-1 hearing.[6/] -- to support the probability figures presented. See Appendix J at J-3 - J-7. In addition, NRDC has just discovered that the Staff's probability estimates were substantially prepared by Science Applications Inc., the same consulting firm that assisted in the preparation of CRBRP-1 and the PRA for the CRBR, part of the Applicant's "reliability

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5/ We are in the process of further detail and documenting this for the Board and will have a pleading in the Board's hands as soon as possible.

6/ See NRDC Contention 1(b) and the Order, Following Conference with Parties, April 22, 1982, Sl. Op. at 5.

program." We will argue to the Board in a forthcoming pleading that this 11th hour development requires reconsideration of the rulings on the scope of the LWA-1 hearing. However, whether or not that motion is successful, it is utterly unreasonable to expect NRDC to do discovery, prepare its case and file its testimony on this material as well as other issues by August 13. Even a ruling would make NRDC's effective participation impossible. It would also reward the Staff for sandbagging NRDC. The Board must also be aware that NRDC must in addition prepare comments on the FES in the next 45 days.

The Applicants ask the Board to do what is completely without precedent in NRC practice. They have cited no case where LWA hearings proceeded without a final FES, to do so would gravely prejudice NRDC and would on its face violate NRC regulations for no legitimate reason. There is no grave need for power that must be met. There is no event that will occur in the next few months that would otherwise not occur. THere is, moreover, no way that proceeding immediately would identify problems that need to be corrected the asserted rationale for such decisions as Douglas Point, since all parties concede that the Board cannot issue a decision until the FES is final.

Thus, the Applicants seek the most extraordinary relief from this Board on what amounts to the ground of convenience. This is no reason to deny NRDC a minimally reasonable amount of time to do discovery and to prepare its case on issues of central importance to NRDC contentions.

V. Conclusion

There is nothing sacrosanct about a hearing date of August 24, 1982 which was scheduled on the explicit assumption that the Staff would meet its milestone document deadlines and would not recirculate a FES supplement. Since Commission regulations and precedent prohibit commencement of LWA hearings before a final EIS is issued, and since Intervenors would be severely prejudiced by adherence to the original schedule, we respectfully submit that these hearings be rescheduled until after the final FES Supplement is issued.

Respectfully submitted,

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Dated July 27, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB MOTION TO RESCHEDULE HEARINGS were served this 27th day of July 1982 on the following:

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