



April 19, 1983

SECY-83-142A

ADJUDICATORY ISSUE

(Commission Meeting)

For: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB -721
(UNITED STATES DEPARTMENT OF ENERGY,
ET AL.)

Facility: Clinch River Breeder Reactor

Petition
For Review: None

Review
Time Expires: May 18, 1983

Purpose: To inform the Commission of an Appeal
Board decision which, in OGC's opinion, E15

Discussion: In ALAB-721 the Appeal Board denied the motion by intervenors Natural Resources Defense Council, Inc. and the Sierra Club to stay the Licensing Board's Partial Initial Decision authorizing the issuance of a limited work authorization ("LWA-1") for the Clinch River Breeder Reactor ("CRBR"). OGC has previously prepared an analysis of the stay motion and the answers to it for the purposes of the Commission's effectiveness review. See SECY-83-142. |

Accordingly, we believe that EX 5

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Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

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EX-5

Sheldon Trubatch (ELC)

Sheldon L. Trubatch
Acting Assistant General
Counsel

Attachment: ALAB-721

This topic is presently scheduled for discussion at a Closed Meeting on Friday, April 22, 1983.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

03 100-1 02:21

Administrative Judges:

Gary J. Edles, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

APR 11 1983

UNITED STATES DEPARTMENT OF ENERGY)
PROJECT MANAGEMENT CORPORATION)
TENNESSEE VALLEY AUTHORITY)
)
(Clinch River Breeder Reactor)
Plant))

Docket No. 50-537 CP

Barbara A. Finamore and S. Jacob Scherr, Washington, D.C., for the intervenors Natural Resources Defense Council and the Sierra Club.

George L. Edgar, Washington, D.C., for Project Management Corporation, and William D. Luck, for the United States Department of Energy, applicants.

Stuart A. Treby for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

April 8, 1983

(ALAB-721)

Intervenors Natural Resources Defense Council and the Sierra Club have asked us to stay the Licensing Board's partial initial decision served March 2, 1983, which authorized the issuance of a limited work authorization in connection with the construction of the Clinch River Breeder Reactor. The applicants and the NRC Staff oppose grant of the stay. As explained below, we deny the request.

I.

The Department of Energy, the Project Management Corporation and the Tennessee Valley Authority (collectively referred to as the applicants) have proposed to construct a demonstration liquid metal fast breeder reactor, to be known as the Clinch River Breeder Reactor (CRBR), on a site adjacent to the Clinch River Industrial Park near Oak Ridge, Tennessee. A "breeder" reactor is one that produces more nuclear fuel than it consumes and involves a technology somewhat different from that employed in the conventional nuclear power plant.

On October 11, 1974, the applicants applied to the Atomic Energy Commission, predecessor to the Nuclear Regulatory Commission, for a construction permit under section 104b of the Atomic Energy Act, 42 U.S.C. §2134b. The Commission began prehearing activity in connection with the adjudicatory proceeding on the application. Applicants requested, as a first step in that proceeding, that the presiding Atomic Safety and Licensing Board schedule hearings and issue a partial initial decision on environmental and site suitability issues in support of issuance of a limited work authorization for site

preparation activities (a so-called "LWA-1"). ^{1/} However, in 1977, before the case progressed to the hearing stage, all proceedings were suspended at the applicants' request following an announcement by the Carter Administration that it was opposed to the Clinch River project.

The change in administrations in 1981 led to a reversal of that position. As a result, the applicants asked that the suspended adjudicatory proceedings on the construction permit and limited work authorization resume. At about the same time, the applicants also asked the Commission to grant an exemption from its regulations to permit initiation of certain site preparation activities for the CRBR prior to the issuance of a construction permit or a limited work authorization. ^{2/} The proposed activities include site

1/ Under the Commission's regulations, an applicant for a construction permit may seek early approval of certain types of site preparation activity, such as the construction of temporary access roads, sewage treatment facilities, or systems, structures or components that will not eventually be involved with accident prevention or mitigation. See 10 CFR §50.10(e)(1), (2), authorizing issuance of an LWA-1. Thereafter, an applicant may seek early approval for the installation of structural foundations. See 10 CFR §50.10(e)(3), authorizing issuance of a so-called "LWA-2".

2/ 10 CFR §50.10(c) generally prohibits any person from clearing or excavating a site or otherwise commencing construction of a nuclear power reactor until either a construction permit or an LWA has been obtained following an adjudicatory hearing. However, 10 CFR §50.12(b) provides for the case-by-case granting of exemptions from this prohibition if specified criteria are met.

clearing and grading; excavation and quarry operations; the construction of temporary construction-related facilities, a barge facility, an access road and a railroad spur; and the installation of services including power, water, sewerage, and fire protection.

Following an initial denial, ^{3/} the Commission granted the requested exemption on August 17, 1982. CLI-82-23, 16 NRC _____. ^{4/} The exemption was challenged in court by the Natural Resources Defense Council and the Sierra Club, and the Commission's decision was reversed and remanded by the court for a further explanation of why site preparation activities justified invocation of the Commission's exemption procedures. ^{5/} Site preparation went forward, however, because the court declined to grant a stay of the Commission's exemption decision. The Commission clarified its earlier decision and reaffirmed its grant of the exemption in an opinion issued on January 6, 1983. CLI-83-1, 17 NRC _____. On March 2, 1983, the Licensing Board served its partial initial decision authorizing the Director

^{3/} CLI-82-4, 15 NRC 362, reconsideration denied, CLI-82-8, 15 NRC 1095 (1982).

^{4/} The applicant also sought permission to install some emergency plant service water piping that is part of the safety-related emergency service water system for the plant but that portion of the exemption request was denied.

^{5/} Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 695 F.2d 623 (D.C. Cir. 1982).

of Nuclear Reactor Regulation to issue the LWA-1. LBP-83-8, 17 NRC ____.

The intervenors have filed numerous exceptions to the partial initial decision, accompanied by a motion for a stay of the decision pending our appellate review. Although recognizing that site preparation activities have proceeded under the Commission's exemption authorization, the intervenors urge us to bring those activities to a halt by granting a stay of the Board's decision pending review. We deny the motion.

II.

In determining whether a stay should be granted, we ordinarily apply 10 CFR §2.788(e), which calls upon us to consider --

- (1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) whether the party will be irreparably injured unless a stay is granted;
- (3) whether the granting of a stay would harm other parties; and
- (4) where the public interest lies.

Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795 (1981); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC ____ (July 16, 1982). The criteria embodied in 10 CFR §2.788(e) are those traditionally applied by the courts. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6

NRC 630, 631 (1977), citing Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). ^{6/}

The intervenors have not demonstrated that a stay is justified. The possibility that one party may be irreparably injured in the absence of a stay has often proven to be the most critical element in determining whether a stay is warranted. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977), Marble Hill, supra, 6 NRC at 632. Yet the stay petition includes no evidence that direct and irreparable harm will result if site preparation activities are allowed to go forward pending appellate review. Rather, the petitioners simply assert, in conclusory terms, that

^{6/} The intervenors seek a stay pursuant to both 10 CFR §2.788 and 10 CFR §2.764. In certain situations an appeal board may review a stay request under the criteria embodied in the Commission's "immediate effectiveness" rule, 10 CFR §2.764. When doing so, we look at two additional factors: whether effectiveness of the initial decision will create novel safety or environmental issues in light of the Three Mile Island accident or prejudice review of significant safety or environmental issues. 10 CFR §2.764(e)(2)(ii). We need not decide whether our review of the stay request should be conducted under these provisions because, in an unpublished order issued on March 28, 1983, the Commission determined to conduct the effectiveness review of the Licensing Board's decision itself. We therefore review the stay request pursuant to 10 CFR §2.788. Section 2.764(g) stipulates that, in the absence of Commission directions to the contrary, Commission immediate effectiveness review is without prejudice to Appeal Board decisions, including stay decisions under 10 CFR §2.788. Cf: Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-647, 14 NRC 27, 29-30 (1981).

continuation of excavation and construction can have a direct and significant effect on the surrounding environment and the nearby aquatic and terrestrial biota, and create "additional project momentum" so as to foreclose effective appellate review. ^{7/} Such general assertions are insufficient to demonstrate entitlement to a stay. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 785 (1977). In the instant case, moreover, the Commission's earlier decisions granting the exemption expressly concluded that site preparation would not cause significant environmental effects. The Commission found that the site improvements would be consistent with any future use of the site; that any possible adverse environmental effects could be effectively redressed if that should ultimately be required; and that site preparation will not result in any irreversible or irretrievable commitment to the remaining segments of the project. ^{8/} Although we may not be bound by those earlier determinations in ruling on the instant request, we believe the petitioners had some obligation to explain what factors the Commission may have overlooked or

^{7/} See Application for Stay (March 18, 1983) at 8-9.

^{8/} See CLI-82-23, supra, 16 NRC at ____ (slip opinion at 15) and CLI-83-1, supra, 17 NRC at ____ (slip opinion at 6-9).

why circumstances have changed since the Commission reached its conclusions.

As far as we can tell from the initial decision and the stay papers, moreover, the petitioners' principal substantive concerns regarding the Board's result involve issues affecting eventual construction of the reactor at the Clinch River site rather than the preparatory work to be done in connection with the exemption or the limited work authorization. ^{9/} But, apart from the generalized allegations discussed above that failure to stop the project now will increase its momentum and compromise appellate review, the petitioners do not explain why their concerns cannot be examined in an orderly fashion on appeal and any necessary remedial action taken in due course.

We have also considered the petitioners' arguments that issuance of a stay would not substantially harm other parties and that the overall public interest favors grant of the stay. As with their argument concerning irreparable injury, the petitioners' assertions are simply conclusory and thus insufficient to justify issuance of the stay. We again take note that the Commission, as recently as last January, carefully evaluated many of these same arguments in reaching its determination that exigent circumstances

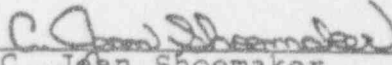
^{9/} Petitioners claim, for example, that the Board failed to resolve what they describe as "the most hotly contested issue in the . . . proceeding," i.e., whether the applicants have included all credible accidents in their list of design basis threats. Application for Stay, supra, at 5-7.

existed to warrant issuance of an exemption to begin site preparation activities immediately. The petitioners do not discuss the Commission's findings in this regard, let alone demonstrate that circumstances have changed.

The petitioners place heavy emphasis on their likelihood of success in overturning the Board's decision. We have considered the petitioners' arguments in this connection and find it impossible at this early stage of the appellate process, before briefs have been filed, to gauge the likelihood that the Board's decision will eventually be overturned. The Board was confronted with a substantial number of sharply contested and complex issues and resolved them in a partial initial decision in excess of 200 pages. We are satisfied that, in light of our findings with respect to the other three factors to be considered in deciding the stay request, the petitioners' arguments regarding the merits of the Board's decision are not sufficient to tip the balance in favor of a stay. ^{10/}

The application for a stay pending appeal is denied.

It is so ORDERED.


C. Jean Shoemaker
Secretary to the
Appeal Board

^{10/} The petitioners claim that, because they have demonstrated a substantial likelihood of success on the merits, their burden of showing irreparable injury is substantially reduced. We find that the petitioners have failed to demonstrate irreparable injury, whether perceived as a heavy or a light burden.