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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION '82 JUL 20 P3:29

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In the Matter of	)	
	)	
UNITED STATES DEPARTMENT OF ENERGY	)	
	)	Docket No. 50-537
PROJECT MANAGEMENT CORPORATION	)	(Section 50.12
	)	Request)
TENNESSEE VALLEY AUTHORITY	)	
	)	
(Clinch River Breeder Reactor Plant)	)	
	)	

APPLICANTS' RESPONSE TO
NRDC'S MOTION FOR SUMMARY DENIAL
OF APPLICANTS' SECTION 50.12 REQUEST,
OR ALTERNATIVELY
REQUEST FOR ADJUDICATORY HEARING

The United States Department of Energy and Project Management Corporation, acting for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby respond to NRDC's Motion for Summary Denial of Applicants' Section 50.12 Request, or Altenatively Request for Adjudicatory Hearing.

INTRODUCTION

In requesting summary denial of Applicants' Section 50.12 request, NRDC would have the Commission believe that the principle of res judicata is a strict and unwavering bar to consideration of Applicants' request. In fact, res judicata as applied by administrative agencies is not an inflexible and unyielding doctrine. Where, as here, the NRC's decision is

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controlled by public interest considerations, it must have the flexibility to consider the request. To conclude otherwise would be contrary to sound regulatory policy.

NRDC's alternative request that the Commission convene a hearing prior to deciding the Department of Energy's request is also without merit. Contrary to NRDC's contention, a hearing in this proceeding is not required by any relevant statute or by Commission precedent. Accordingly, for the reasons which follow, Applicants respectfully request that NRDC's Motion be denied.

ARGUMENT

I. RES JUDICATA DOES NOT BAR THE COMMISSION'S CONSIDERATION OF APPLICANTS' REQUEST

Although NRDC cites a number of authorities for the proposition that res judicata applies to the administrative process, NRDC neglects to point out that virtually all courts, as well as administrative agencies, are in agreement that res judicata is not an inflexible bar when applied to the administrative process. Sound regulatory policy requires that a regulatory agency be free to control its own docket. As the court stated in Grose v. Cohen, 406 F.2d 823, 824 (4th Cir. 1969):

> Res judicata of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. See Farley v. Gardner, 276 F. Supp. 270, 272 (S.D. W. Va. 1967). Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); but practical reasons may exist

> for refusing to apply it, e.g., United States v. Stone & Downer Co., 274 U.S. 225, 47 S. Ct. 616, 71 L. Ed. 1013 (1927). And in any event, when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958).

See also, United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973); Borough of Lansdale v. Federal Power Commission, 494 F.2d 1104, 1114-15 (D.C. Cir. 1974).

Professor Davis has similarly noted this same flexible approach.

> The sound view is ... to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in favor.

2 Davis, Administrative Law Treatise § 18.02 at 548 (1958). Quoted with approval in Borough of Lansdale v. Federal Power Commission, supra.

In considering the application of res judicata to the administrative process, the courts have recognized that administrative agencies act in the public interest, and cannot be rigidly prohibited from revisiting their previous decisions. As the court stated in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1971), "an agency's view of what is in the public interest may change either with or without a change in circumstances." See also Borough of Lansdale v. Federal Power Commission, supra.

The Nuclear Regulatory Commission case law similarly recognizes that, in light of the Commission's continuing public interest responsibilities, the doctrine of res judicata should

not be rigidly applied. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 215 (1974); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563 (1979).

In this case there clearly are special public interest and policy factors which militate against res judicata. A federal agency, the Department of Energy, which by statute is charged with the primary responsibility for energy research and development, and energy policy, has determined that the public interest is best served by the commencement of site preparation activities as soon as possible. This conclusion is buttressed by the Department's recent reevaluation of the LMFBR Program in the Final Supplement to the LMFBR Program Environmental Statement. The DOE program called for in the Statement is construction of CRBRP as expeditiously as possible.

The determination by the Department of Energy that the commencement of CRBRP site preparation activities will enhance the Department's ability to carry out its public interest responsibilities for energy research and development should not be ignored by the Commission through an inflexible application of res judicata. The Site Preparation Activities Report details the informational benefits which will accrue to the LMFBR Program if the request is granted. Moreover, as the Report demonstrates, grant of the request will have a substantial, positive impact on a number of international policies of vital importance

to the United States. Surely the Commission, which has a continuing public interest mandate, cannot disregard these informational benefits and national policy considerations by a wooden adherence to res judicata. Because the request presents matters of significant public interest, it will require careful consideration on the merits and is singularly inappropriate for summary denial. Accordingly, NRDC's Motion for Summary Denial should be denied.

II. AN ADJUDICATORY HEARING IS NOT REQUIRED BY STATUTE OR REGULATION

NRDC requests, in the event Applicants' Section 50.12 request is not summarily denied, that a full adjudicatory hearing be completed prior to a Commission decision on the request. NRDC contends that such a hearing is required as a matter of "established Commission precedent" and further contends "that such a hearing is statutorily required."

NRDC argues that as a matter of Commission precedent a Section 50.12 request must first be considered at an adjudicatory hearing. This argument has been expressly rejected by the Commission. United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-81-35, Memorandum and Order of December 24, 1981. In that decision, the Commission stated:

> We cannot agree that a formal adjudicatory hearing will prove to be the only way for adequate ventilation and resolution of these issues, or that formal adjudicatory hearings are dictated by past Commission practice. It is quite common for such issues to be resolved by informal procedures falling short of formal examination and cross-examination of sworn witnesses.

CLI-81-35 at 6-7. In light of this decision, there is obviously no basis for NRDC's argument that Commission precedent dictates that a full adjudicatory hearing must be held on the 50.12 exemption request.

Although NRDC originally acknowledged, as noted by the Commission in its December 24, 1981 Order, that a hearing is not compelled by any statute, 1/ NRDC now contends "that such a hearing is statutorily required." In making this argument, NRDC once again concedes, as it must, that neither the Atomic Energy Act ("AEA") nor the National Environmental Policy Act ("NEPA") require a hearing on Applicants' request. 2/ NRDC nonetheless contends that "when these laws are taken together, a different result obtains." According to NRDC, the net effect of NEPA is to impose a hearing requirement in this case pursuant to Section 189a of the Atomic Energy Act.

Contrary to NRDC's novel agrument, NEPA does not, indeed cannot, impose any procedural requirements on an agency which are not stated "in the plain language of the Act." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

1/ At the Oral Presentations on CRBR Exemption Request on December 16, 1981, counsel for NRDC, in discussing NRDC's request for a hearing, agreed that a hearing is not compelled by statute.

> MR. BICKWIT: I would like to get one point clear in my own mind. Are you saying that the Commission precedent is, or is not, compelled by statute?
>
> MR. GREENBERG: I do not think it is compelled by statute.

2/ See NRDC's Memorandum at 13-14.

And, as the Commission is aware, the "plain language" of NEPA does not contain any requirement for a hearing. As the court stated in Upper West Fork River Watershed Assoc. v. Corps of Engineers, 414 F. Supp. 908 (N.D. W. Va. 1976), aff'd, 556 F.2d 576 (4th Cir. 1977), cert. denied, 434 U.S. 1010 (1978):

> ... neither NEPA nor the CEQ Guidelines make public hearings a mandatory procedural requirement in the preparation of an environmental impact statement.

See also Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973).

NRDC's argument that NEPA somehow imposes additional procedural requirements under the AEA has been expressly repudiated by the Supreme Court in Vermont Yankee, supra. In that decision, the Supreme Court stated that "NEPA does not repeal by implication any other statute" and "cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications" contemplated by NRC's organic statutory authority. See also Pacific Legal Foundation v. Andrus, 657 F.2d 829, 836 (6th Cir. 1981).

Because NEPA cannot impose additional procedural requirements not provided for in the Act itself, NRDC's argument regarding the combined effect of NEPA and the AEA is clearly erroneous. If a statutory requirement for a formal adjudicatory hearing on a Section 50.12 request exists, it must be found in the clear language of either the AEA or NEPA. Yet, as NRDC concedes, neither statute provides for a hearing.

While acknowledging that the AEA does not require a hearing on Applicants' request, NRDC makes the somewhat contradictory assertion that a Section 50.12 exemption is a license under Section 189a of the AEA and thus a hearing is required. A proper reading of Section 189a clearly demonstrates that the term "license" relates to those licenses issued pursuant to Section 103 and 104 of the Act. It does not include non-safety related site preparation activities which are not regulated under the AEA. See Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1 (1977) and Applicants' Memorandum In Support of Request to Conduct Site Preparation Activities, July 1, 1982 at 10-11.

Neither of the cases cited by NRDC supports their contention that judicial precedent calls for an adjudicatory hearing for an exemption request. In Brooks v. Atomic Energy Comm'n, 476 F.2d 924 (D.C. Cir. 1973), the court was dealing with an amendment to a construction permit. In Sholly v. United States Nuclear Regulatory Comm'n, 651 F.2d 780 (D.C. Cir. 1980), rehearing en banc denied, 651 F.2d 792, cert. granted, 451 U.S. 1016 (1981), the court rules on what it considered to be an amendment to an operating license. 3/ Hence, in those

3/ See Statement on Denial of Rehearing En Banc of Judges Tamm, Mackinnon, Robb and Wilkey, 651 F.2d at 792 ("the panel has thrust upon the NRC the burden of holding full fledged hearings before even the most trivial amendments to NRC operating licenses may be adopted.") (emphasis added.) It should also be noted that because Sholly is now before the Supreme Court, it is not controlling.

cases, the court was concerned with the NRC amending an operating license or construction permit, i.e., issues within the scope of Section 189a.

Finally, the Administrative Procedure Act does not prescribe when formal adjudications will be held but rather establishes procedures to be followed, inter alia, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing ... " 5 U.S.C. § 554(a). Section 189a of the AEA, however, does not dictate the nature or the format of the hearing which the Commission must follow in any proceeding "for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees. ... " As the D.C. Circuit recognized in Siegel v. Atomic Energy Comm'n, 400 F.2d 778 (D.C. Cir. 1968), the formal adjudicatory procedures of the APA, 5 U.S.C. §§ 556 and 557, "obtain only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.' There is no such prescription in the Atomic Energy Act, either in terms or by clear implication. ... " Id. at 785. The provision for formal adjudicatory hearings for operating licenses and construction permits is thus based not on a statutory requirement, but rather on Commission regulations and precedent. As noted previously, the Commission has expressly ruled that

no regulation or precedent requires an adjudicatory hearing for an exepmtion request under 10 C.F.R. § 50.12. Consequently, NRDC's request for an adjudicatory hearing must be denied.

CONCLUSION

Accordingly, for the reasons stated above, Applicants respectfully request that NRDC's Motion be denied.

Respectfully submitted,

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Dated: July 20, 1982

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