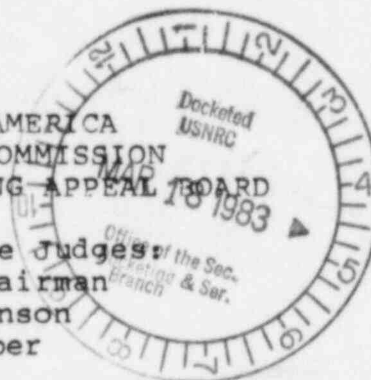
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD



Before Administrative Judges:
Gary J. Edles, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

In the Matter of UNITED STATES DEPARTMENT OF ENERGY PROJECT MANAGEMENT CORPORATION TENNESSEE VALLEY AUTHORITY (Clinch River Breeder Reactor Plant)	Docket No. 50-537 ASLBP Docket No. 75-291-12

APPLICATION OF THE NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB FOR STAY OF THE EFFECTIVENESS OF THE ASLB PARTIAL INITIAL DECISION (LIMITED WORK AUTHORIZATION) OF FEBRUARY 28, 1983

Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club, respectfully apply to the Appeal Board, pursuant to 10 CFR §§ 2.764 and 2.788, for a stay of the effectiveness of the February 28, 1983 Partial Initial Decision (Limited Work Authorization) of the Atomic Safety and Licensing Board, pending a decision on appeal of the merits.1/

In its Partial Initial Decision, the Licensing Board concluded that the Clinch River site is suitable under 10 CFR Part 100 for a reactor of the general size and type proposed;

1/ Intervenors are also filing with the Appeal Board on this date, pursuant to 10 CFR § 2.762, a list of exceptions to the Partial Initial Decison for purposes of appeal.

8303220212 830318
PDR ADOCK 05000537
G PDR

D503

affirmed the contents of the CRBR Final Environmental Statement and Supplement; found that the requirements of NEPA, 42 USC § 4321 *et seq.*, and 10 CFR Part 51 have been complied with; and concluded that a limited work authorization should be issued for the CRBRP.

This limited work authorization (LWA-1) permits the conduct of all site preparation activities described in 10 CFR § 50.10(e)(1), including excavation and quarry operations, construction of roadways, transmission lines, and sewage treatment facilities; and installation of a concrete batch plant, docking and unloading facilities, and construction support facilities. Although commencement of these site preparation activities for Applicants prior to a limited work authorization was permitted by the Commission under 10 CFR § 50.12 (Memorandum and Order, CLI-82-23, __ NRC __, Aug. 17, 1982),2/ a decision by the Licensing Board to deny a limited work authorization would necessarily require such activities to cease. Thus, this Partial Initial Decision, in effect, authorizes the *continuation* of CRBR site preparation activities, of which some 9 months of work remain. *See* Applicants' Motion Concerning Schedule for Construction Permit Hearings at 2, Docket No. 50-537 (March 7, 1983).

2/ The U.S. Court of Appeals for the District of Columbia Circuit still has the merits of the CRBR Section 50.12 exemption under review. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, No. 82-1962 (D.C. Cir., March 17, 1982) (order requesting respondents to file with the Clerk of the Court the ASLB Partial Initial Decision and a description as to how and when that decision will become effective).

This Partial Initial Decision represents the first time that a liquid metal fast breeder reactor (LMFBR) has been subjected to licensing scrutiny under NEPA and the Commission's own regulations. Many of the crucial issues raised in this proceeding are of first impression, and will serve as precedent for all future LMFBR licensing decisions. This situation is thus one which plainly warrants grant of a stay pending full Commission review on the merits.

Discussion

The rules with respect to the grant of a stay are well established. Four factors must be considered:

1. whether the moving party is likely to prevail on the merits;
2. whether the moving party will be irreparably injured unless a stay is granted;
3. whether the granting of a stay would harm other parties; and
4. whether the public interest supports a stay.

10 CFR § 2.788; In re Fire Protection for Operating Nuclear Power Plants (10 C.F.R. § 50.48), CLI-81-11, 13 NRC 778, 784 (1981).

The decision to grant a stay depends upon a "flexible interplay" among all the factors considered. Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977). Thus, under a balancing of the above factors, even a "possible" irreparable injury has been held to suffice if there is a strong probability of success on the merits. Blackwelder Furniture Co., supra; Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 577 (5th Cir. 1974);

Gonzalez v. Chasen, 506 F. Supp. 990, 1000 (D. Puerto Rico 1980); Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923 (D.C. Cal. 1970); appeal dismissed, 443 F.2d 1364 (9th Cir. 1971). Consideration and balancing of the above four factors leads to the conclusion that a stay should be granted in this case.

I. Intervenors are Likely to Prevail on the Merits

In this case, not only is there, as pointed out below, a substantial showing with respect to the other factors in determining whether a stay is appropriate, but Intervenor's case on appeal demonstrates a very strong probability of success on the merits. The Partial Initial Decision simply fails to resolve one of the two major issues to be decided under 10 CFR § 50.10(e) before an LWA may be issued; namely, whether the site is suitable under 10 CFR Part 100 for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations. On the second major issue, whether the Staff's review of the environmental impacts of plant construction and operation complies with the requirements of NEPA, the decision below fails to consider meaningfully all reasonable alternatives to the proposed project and its associated fuel cycle and fails to disclose and consider several significant environmental impacts of the CRBR project.

A. Site Suitability

The Commission's regulations require that a limited work authorization

> shall be granted only after the presiding officer...has determined that, based upon the

> available information and review to date there is reasonable assurance that the proposed site is a suitable location for a reactor of the general size and type proposed from the standpoint of radiological health and safety considerations under the Act and rules and regulations promulgated by the Commission pursuant thereto. 10 CFR § 50.10(3)(2).

The major criteria for evaluating site suitability are found in 10 CFR Part 100, which requires that the site location and the engineered safety features included as safeguards against the hazardous consequences of an accident, should one occur, should insure a low risk of public exposure. 10 CFR § 100.10. Where unfavorable physical characteristics of the site exist, the proposed site may nevertheless be found to be acceptable if the design of the facility includes appropriate and adequate compensating engineered safeguards to reduce accident doses below guideline values. 10 CFR §§ 100.10(d), 100.11(a).

The Licensing Board has simply failed to make the required findings and conclusions under 10 CFR §§ 50.10(e) and 100. The Board found that "[t]he containment/confinement design of the CRBR has been shown capable of performing its intended function to accomodate all credible <u>design basis threats</u> and hold doses to the general public below guideline values, without requiring any technological innovations." (PID 22) (emphasis added). Yet the Board never resolved the most hotly contested issue in the whole CRBR proceeding -- whether in fact the Applicants have included all credible accidents in their list of design basis threats; or whether, as Intervenors contend, core disruptive accidents ("CDAs") must also be considered as credible design basis accidents ("DBAs"). Rather, the Board put off the entire issue

until the construction permit proceedings. It held, without further explanation:

> The Board is not persuaded by the evidence of record to date -- nor at this juncture do we need to so find -- that the CRBR will be built and operated in a manner that precludes the necessity for considering CDAs within the design basis. It is our opinion, consistent with the preceding discussion, that Applicants, Staff and Intervenors have identified no threshold matters that would prevent attaining such an objective. However, we foresee a heavy burden upon these parties at the construction permit phase of evidentiary hearings to provide sufficient evidence to permit a resolution of this question. (PID 22).

This conclusion by the Board is clearly erroneous. Without a decision on whether core disruptive accidents should be considered credible DBAs, the Board cannot resolve the question whether the containment/confinement system is adequate to reduce the doses from DBAs to sufficiently low levels. Nor can the Board resolve another question that must be decided at the LWA-1 stage; whether the site suitability source term (SSST) chosen by the Staff assumes a fission product release "based upon a major accident, hypothesized for purposes of site analyses or postulated from consideration of possible accidental events, that would result in potential hazards not exceeded by those from any accident considered credible." 10 CFR § 100.11(a), fn. 1. (emphasis added).

The record is totally devoid of any indication that the site would still be considered suitable if a core disruptive accident were in fact considered credible. To the contrary; both Applicants and Staff concede that the site suitability analyses

would have to be completely redone in such a case. (Tr. 2274; 3067-68). Intervenors presented substantial evidence demonstrating that the site is in fact unsuitable whether or not core disruptive accidents are considered credible. (Intervenors' Proposed Findings of Fact, pp. 37-51). Although the Board failed completely to confront and discuss Intervenors' arguments, it nevertheless conceded that "accidents of higher severity [than DBAs] have been postulated for which containment failure occurs and dose guidelines exceeded," but went no further than to say "[t]he Staff's final position on the adequacy of the containment/confinement design will be presented when the SER is published." (PID 22). Yet without any findings that the changes in the containment/confinement design suggested by the Staff would still result in a "reactor of the general size and type proposed," the LWA requirements have not been met.

The Board thus admitted that the CDA/DBA issue is decisive in determining site suitability, but claimed that since no party had raised a "threshold issue," the matter need not be decided in order to grant an LWA. Yet the LWA regulations nowhere describe the "credible design basis accident" issue as a threshold matter. It is a crucial factor in determining whether the site is suitable for a breeder reactor, and it needs to be resolved before any decision is made to expend millions of additional dollars to prepare the site for construction.

B. Compliance With the National Environmental Policy Act

In its Partial Initial Decision, the Licensing Board also commits several major errors in determining compliance with

NEPA. It failed to analyze adequately the environmental impacts of reprocessing, managing, and disposing of CRBR spent fuel; failed to consider in detail the effects of a severe CRBR accident upon a nearby major weapons facility, and upon national security; failed to find that the Staff analysis of CRBR safeguards risks and consequences is inadequate; and failed to find that there exist substantially better alternative sites and design approaches to the present CRBR proposal. The failure to consider and disclose all significant risks of the proposed project is both arbitrary and capricious and a violation of NEPA. Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982).

II. Intervenors Will Be Irreparably Injured Unless a Stay is Granted

Intervenors have demonstrated above that there is a strong likelihood of their prevailing on the merits. Consequently, as shown above, the burden they carry in regard to showing irreparable injury, in order to secure a stay, is substantially reduced. In any event, it is clear, that, absent grant of a stay, Intervenors will be irreparably injured, first because of direct injury to the environment, and second because of injury to their NEPA rights.

As noted above, the Licensing Board's erroneous decision to grant Applicants a limited work authorization permits continuation of some 9 months of site preparation work. The remaining excavation and construction can have significant impacts upon the surrounding enviornment and the nearby aquatic and terrestrial biota. Impacts of this nature and scope often

have been found to constitute irreparable injury. See, e.g., Environmental Defense Fund, Inc., v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972); Scherr v. Volpe, 336 F. Supp. 882 (W.D. Wis. 1971), aff'd, 466 F.2d 1027 (7th Cir. 1972).

Moreover, as demonstrated above, the continuation of these activities will create additional project "momentum" and thus risk foreclosing a decision on appeal regarding future alternatives, particularly the choice of future, alternative sites. There is, in other words, a real risk of prejudice to the NEPA appeal process (and thereby to Intervenors' rights under that process) if the contemplated work is permitted to proceed. That this kind of risk constitutes irreparable injury has been made crystal clear. See, e.g., Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

C. Issuance of a Stay Would Not Substantially Harm Other Interested Parties

Should Intervenors' application be granted, Applicants may experience some delay and expense in the eventual construction of the CRBR, if a construction permit is eventually issues. However,

> [S]ome delay is inherent whenever the NEPA consideration is conducted....It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible. Calvert Cliffs, supra, at 1128.

The modest cost of delay for a month or so, when contrasted with the irreparable harm done to Intervenors if construction is allowed to proceed, clearly weighs in favor of a stay.

D. The Public Interest Favors Grant of a Stay

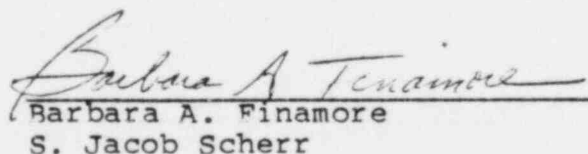
Even if delay costs or programmatic losses were associated with starting site preparation activities at a later date, the public interest under NEPA militates strongly in favor of granting the stay.

The need for a careful, considered and complete environmental review under NEPA before authorizing work on a project of this magnitude often has been held by other courts to outweight cost or programmatic considerations. See, e.g., Steubing v. Brinegar, 511 F.2d 489, 497 (2d Cir. 1975); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). See also, Calvert Cliffs', supra, 449 F.2d at 1115. As court after court has noted, in the words of the Second Circuit, "[C]ompliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted." Steubing v. Brinegar, supra, 511 F.2d at 497. See also Scherr v. Volpe, 336 F. Supp. at 889-890.

Conclusion

For all the reasons set forth above, Intervenors respectfully request that the effectiveness of the ASLB Partial Initial Decision (Limited Work Authorization) be stayed pending full Commission review on the merits.

Respectfully submitted,



Barbara A. Finamore
S. Jacob Scherr

Attorneys for Intervenors

March 18, 1983