

12/8/82

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'82 DEC -8 12:53

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
OPERATING & SERVICE
BRANCH

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


APPLICANTS' NOTIFICATION
CONCERNING PENDING LITIGATION

The United States Department of Energy ("DOE") and Project Management Corporation ("PMC"), for themselves and on behalf of the Tennessee Valley Authority (the Applicants), hereby file this Notification Concerning Pending Litigation. The Applicants are providing this Notification for the purpose of keeping the Board currently informed as to matters potentially affecting the above-captioned proceeding, as follows:


Section 50.12 Case - On August 19, 1982, NRDC and the Sierra Club ("Intervenors") filed, in the United States Court of Appeals for the District of Columbia Circuit, a Petition for Review and an Application for Stay of the Commission's August 17, 1982 Order granting Applicants' July 1, 1982 request to conduct site preparation activities pursuant to 10 C.F.R. § 50.12. As of August 30, 1982, all

responsive pleadings concerning the Application for Stay had been filed with the court. On October 4, 1982, the court issued a temporary stay of the Commission order under review in order to afford the court an opportunity to more fully consider the pending Application for Stay and responses thereto. Site preparation activities were halted as a result of the temporary stay. On October 6, 1982, the court issued an order denying the Application for Stay, and establishing an expedited schedule for review on the merits. On December 2, 1982, the court issued its opinion remanding the cause to the Commission for the conduct of an adjudicatory hearing and reconsideration of its August 17, 1982 decision before February 4, 1983. The court further ordered that site preparation activities could continue under the Commission's August 17, 1982 Order. On December 7, 1982 the court, sua sponte, withdrew its December 2 opinion, and remanded the case to the Commission, (1) to reconsider the availability of Section 50.12 under the Commission's own interpretation of that provision, or (2) to proceed with the LWA hearings (copy attached).

Respectfully submitted,


George L. Edgar
Attorney for Project
Management Corporation

DATED: December 8, 1982


Warren E. Bergholz, Jr.
Attorney for
Department of Energy

WILL BE PRINTED AT A LATER DATE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 7 1982

No. 82-1962

Natural Resources Defense Council, Inc.,
and The Sierra Club, Petitioners

GEORGE A. FISHER
CLERK

v.

United States Nuclear Regulatory Commission
and the United States of America, Respondents

Project Management Corporation,
Tennessee Valley Authority, Intervenors

Petition for Review of an Order of the
Nuclear Regulatory Commission

Argued November 24, 1982

Decided December 7, 1982

Eldon V.C. Greenberg, with whom S. Jacob Scherr and Barbara A. Finamore,
were on the brief, for petitioners.

Sheldon L. Trubatch, Acting Assistant General Counsel, United States
Nuclear Regulatory Commission, with whom E. Leo Slaggie, Acting Solicitor,
United States Nuclear Regulatory Commission, were on the brief, for respondent,
United States Nuclear Regulatory Commission.

R. Tenney Johnson, General Counsel, Joseph DiStefano, Assistant General
Counsel, Department of Energy, Raymond N. Zagone and Jacques B. Gelin, Attorneys,
Department of Justice, Leon Silverstrom, Assistant General Counsel, International
Development and Defense Programs, were on the brief, for respondent, United
States of America. Edward J. Shawaker, Attorney, Department of Justice, also
entered an appearance, for respondent, United States of America.

George L. Edgar, with whom Thomas A. Schmutz, Frank K. Peterson and Gregg A.
Day, were on the brief, for intervenor, Project Management Corporation.

James E. Fox, was on the brief for intervenor, Tennessee Valley Authority.

Robert L. Baum, Eugene R. Fidell and Marilyn J. Shaw, were on the brief,
for amicus curiae, urging affirmance.

Natural Resources Defense Council, Inc. and Sierra Club v. United States Nuclear Regulatory Commission and United States of America, No. 82-1962

Before: MACKINNON, MIKVA, and EDWARDS, Circuit Judges.

Opinion for the court per curiam.

PER CURIAM: On December 2, 1982, a per curiam opinion was filed in the instant case, reversing and remanding the record to the Nuclear Regulatory Commission ("NRC" or "Commission") "to hold a prompt adjudicatory hearing strictly limited to the issues presented by the 10 C.F.R. § 50.12 exemption request for the Clinch River Breeder Reactor Plant." Following the issuance of that opinion the panel has, sua sponte, reconsidered the matter and decided to withdraw the Opinion and Order of December 2, 1982, and to issue this modified opinion.

Petitioners seek review of an order of the United States Nuclear Regulatory Commission which permitted the United States Department of Energy ("DOE") and Intervenor to commence site preparation activities for the Clinch River Breeder Reactor ("Clinch River") prior to the issuance of a construction permit. The order was issued pursuant to 10 C.F.R. § 50.12 (1982), ^{1/} which provides that the Commission may,

^{1/} 10 C.F.R. § 50.12 (1982) provides:

(a) The Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

(b) Any person may request an exemption permitting the conduct of activities prior to the issuance of a construction permit prohibited by § 50.10. The Commission may grant such an exemption upon considering and balancing the following factors:

(1) Whether conduct of the proposed activities will give rise to a significant adverse impact on the environment and the nature and extent of such impact, if any;

(2) Whether redress of any adverse environment [sic] impact from conduct of the proposed activities can reasonably be effected

[Continued]

upon consideration of certain factors, grant exemptions from its regulations. Following an informal proceeding at which it received written and oral submissions from interested parties concerning a section 50.12 exemption request for Clinch River submitted by DOE, ^{2/} the Commission authorized site preparation activities for Clinch River, concluding that each of the factors enumerated in section 50.12 favored permitting those activities prior to the issuance of a construction permit. In re United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, slip op. at 31-32 (Aug. 17, 1982).

Petitioners contend that, in order to authorize the commencement of site preparation activities, the Commission was required either (i) to adhere to the procedures incorporated in section 50.10, the regulation ordinarily invoked in these circumstances or (ii) to abide by its own prior interpretation of the limited circumstances under which section 50.12 is available. We agree.

Prior to the enactment of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq. (1976 & Supp. IV 1980) (NEPA), the Commission consistently asserted that it had no authority under the Atomic Energy Act to consider non-safety related environ-

should such redress be necessary;

(3) Whether conduct of the proposed activities would foreclose subsequent adoption of alternatives; and

(4) The effect of delay in conducting such activities on the public interest, including the power needs to be used by the proposed facility, the availability of alternative sources, if any, to meet those needs on a timely basis and delay costs to the applicant and to consumers.

Issuance of such exemption shall not be deemed to constitute a commitment to issue a construction permit. During the period of any exemption granted pursuant to this paragraph (b), any activities conducted shall be carried out in such a manner as will minimize or reduce their environmental impact.

^{2/} Letter from W. Kenneth Davis, Acting Secretary of Energy to the Nuclear Regulatory Commission (July 1, 1982). DOE submitted the section 50.12 exemption request for Clinch River "for itself and on behalf of Project Management Corporation and the Tennessee Valley Authority." Id.

mental issues associated with the licensing of nuclear power facilities. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 146 U.S. App. D.C. 33, 36, 449 F.2d 1109, 1112 (1971). At that time, for example, Commission authorization to commence site preparation activities was not required. In re Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 N.R.C. 1, 6 (1977). NEPA expanded the Commission's mandate under the Atomic Energy Act to require it to consider the environmental consequences of actions taken pursuant to the Act. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, *supra*, 146 U.S. App. D.C. at 36-37, 449 F.2d at 1112-13.

Accordingly, the Commission promulgated regulations prohibiting site preparation activities without Commission authorization. 10 C.F.R. §§ 50.10(c), ^{3/} 50.10(e) (1982). See In re Kansas Gas & Electric Co., *supra*, 5 N.R.C. at 6. The Commission was aware that the greatest environmental impact of licensing actions often was associated with the site preparation activities which necessarily accompany the construction of a nuclear power facility. *Id.* at 7 n.3. The Commission recognized that in order to comply with NEPA's mandate to consider environmental issues, it was required to consider site preparation activities in its licensing proceedings and to do so in the context of adjudicatory hearings.

Section 50.12 provides a mechanism for obtaining an exemption from the procedures incorporated in section 50.10, but one that may be invoked only in

^{3/} 10 C.F.R. § 50.10(c) (1982) provides:

Notwithstanding the provisions of paragraph (b) of this section, and subject to paragraphs (d) and (e) of this section, no person shall effect commencement of construction of a production or utilization facility subject to the provisions of § 51.5(a) of this chapter on a site on which the facility is to be operated until a construction permit has been issued. As used in this paragraph, the term "commencement of construction" means any clearing of land, excavation or other substantial action that would adversely affect the environment of a site

extraordinary circumstances. ^{4/} The Commission has made clear that section 50.12 is available "only in the presence of exigent circumstances, such as emergency situations in which time is of the essence and relief from the Licensing Board is impossible or highly unlikely." Washington Public Power Supply System, 5 N.R.C. 719, 723 (1977). ^{5/} In this case, despite the fact that section 50.10(e) may have been appropriate and available, the Commission proceeded under section 50.12 without identifying the "exigent circumstances" that warranted such extraordinary relief. Fair notice to affected parties requires that the Commission not alter suddenly and sub silentio settled interpretations of its own regulations. See Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1970). Accordingly, the record is remanded to the Commission so that it may either proceed under section 50.10 or explain why it is appropriate in this case to invoke section 50.12.

ORDER

For the reasons set forth above, it is hereby

ORDERED, that the Opinion and Order entered on December 2, 1982, are hereby withdrawn; and it is further

ORDERED, that the case is retained by the existing panel and the record is remanded to the Commission either (1) to reconsider the availability of section 50.12 under the Commission's own interpretation of that provision or (2) to proceed with its adjudicatory hearing pursuant to section 50.10 to determine if site preparation activities.

^{4/} The Commission does not contend, and we do not here mean to suggest, that the regulation embodied in section 50.12 may be invoked to avoid the statutory hearing requirements explicitly set forth in section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1976).

^{5/} Cf. 39 Fed. Reg. 14506, 14507 (1974) (describing the Commission's "policy regarding granting of exemptions from § 50.10(c) pursuant to 50.12(a)" as one of "granting such exemptions sparingly and only in cases of undue hardship" and asserting that the Commission "will continue [that] policy").

may continue; and it is further

ORDERED, that the Commission file the record, as supplemented by the Commission's response to the foregoing instructions, on or before January 7, 1983; and it is further

ORDERED, that site preparation activities for the Clinch River Breeder Reactor may continue as authorized by the above referenced decision of the Commission subject to the further order of this Court or of the Commission.

Judgement accordingly.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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

'82 DEC -8 P12:53

OFFICE OF SECRETARY
DOCKETING & SERVICE
Docket No. 50-537

CERTIFICATE OF SERVICE

Service has been effected on this date by personal
delivery or first class mail to the following:

***Marshall E. Miller, Esquire
Chairman
Atomic Safety & Licensing Board
Nuclear Regulatory Commission
Washington, D.C. 20545 (2 copies)

****Dr. Cadet H. Hand, Jr.
Director
Bodega Marine Laboratory
University of California
P.O. Box 247
Bodega Bay, California 94923

***Custave A. Linenberger
Atomic Safety & Licensing Board
Nuclear Regulatory Commission
Washington, D.C. 20545

****Daniel Swanson, Esquire
Stuart Treby, Esquire
Office of Executive Legal Director
Nuclear Regulatory Commission
Washington, D.C. 20545 (2 copies)

*Atomic Safety & Licensing Appeal Board
Nuclear Regulatory Commission
Washington, D.C. 20545

*Atomic Safety & Licensing Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20545

*Docketing & Service Section
Office of the Secretary
Nuclear Regulatory Commission
Washington, D.C. 20545 (3 copies)

William M. Leech, Jr., Attorney General
William B. Hubbard, Esquire
Michael D. Pearigen, Esquire
State of Tennessee
Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Oak Ridge Public Library
Civic Center
Oak Ridge, Tennessee 37820

Herbert S. Sanger, Jr., Esquire
Lewis E. Wallace, Esquire
W. Walter LaRoche, Esquire
James F. Burger, Esquire
Edward J. Vigluicci, Esquire
Tennessee Valley Authority
Office of the General Counsel
400 Commerce Avenue
Knoxville, Tennessee 37902 (2 copies)

**Dr. Thomas Cochran
Barbara A. Finamore, Esquire
Natural Resources Defense Council, Inc.
1725 Eye Street, N.W.
Suite 600
Washington, D.C. 20006 (2 copies)

Ellyn R. Weiss, Esquire
Harmon & Weiss
1725 Eye Street, N.W.
Suite 506
Washington, D.C. 20006

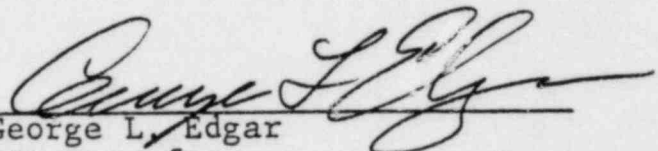
Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

William E. Lantrip, Esquire
Attorney for the City of Oak Ridge
P.O. Box 1
Oak Ridge, Tennessee 37830

**Leon Silverstrom, Esquire
Warren E. Bergholz, Jr., Esquire
Department of Energy
1000 Independence Avenue, S.W.
Room 6B-256
Washington, D.C. 20585 (4 copies)

**Eldon V. C. Greenberg
Galloway & Greenberg
1725 Eye Street, N.W.
Suite 601
Washington, D.C. 20006

Commissioner James Cotham
Tennessee Department of Economic
and Community Development
Andrew Jackson Building
Suite 1007
Nashville, Tennessee 37219


George L. Edgar
Attorney for
Project Management Corporation

DATED: December 8, 1982

-
- */ Denotes hand delivery to 1717 H Street, N.W.,
Washington, D.C.
 - **/ Denotes hand delivery to indicated address.
 - ***/ Denotes hand delivery to 4350 East-West Highway,
Bethesda, Maryland.
 - ****/ Denotes hand delivery to 7735 Old Georgetown Road,
Maryland National Bank Building, Bethesda, Maryland.
 - *****/ Denotes delivery by Air Express.