UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

PROPOSED CONCLUSIONS OF LAW

1. As the Atomic Safety and Licensing Appeal Board recognized in Project Mgmt. Corp., (Clinch River Breeder Reactor Plant), ALAB-354, NRCI-76/10 383, 391 (Oct. 29, 1976), "the State has a manifestly discernible interest in the well-being of its political subdivisions and in the adequacy of the services which they provide to their residents."

2. As the United States Court of Appeals for the District of Columbia Circuit recognized in Carolina Environmental Study Group v. U.S., 510 F.2d 796, 799 (D.C. Cir. 1975), "Because each statement on the environmental impact of a proposed action involves educated predictions rather than certainties, it is entirely proper, and necessary, to consider the probabilities as well as the consequences of certain occurences in ascertaining their

environmental impact."

3. Although it is true, as the Carolina Environmental Study Group Court recognized, that "[t]here is a point at which the probability of an occurence may be so low as to render it almost totally unworthy of consideration," 501 F.2d at 799, the possibility of premature plant closure is not so speculative that it can be ignored.

4. Indeed, a review of the history of this project clearly shows that such a possibility is very real:

> April - 1977 - President Carter "indefinitely" defers project, citing it as uneconomic and a risk to nuclear proliferation. See Statement of President Jimmy Carter, Nuclear Power Policy, 13 Weekly Comp. of Pres. Doc. 506-507 (April 11, 1977). Licensing Proceedings Suspended. See Order of the Atomic Safety & Licensing Board, April 25, 1977.
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> July, 1981 - Continued funding for project upheld in the House of Representatives by a mere twenty vote margin. See 127 Cong. Rec. H4839-4862 (July 24, 1981).
>
> Nov., 1981 - Continued funding for the project upheld in the Senate by only two votes. See 127 Cong. Rec. S12858 (Nov. 4, 1981).
>
> September, 1982 - Vote to delete funding for the project for fiscal year 1983 fails by only one vote. See 128 Cong. Rec. S12468-9 (September 29, 1982).
>
> December, 1982 - House of Representatives votes, 217 to 196, to provide no funding for the CRBR for Fiscal Year 1983. See 128 Cong. Rec. H9745 (Dec. 14, 1982). Continued funding

> for the project upheld in the Senate by only one vote. See 128 Cong. Rec. S15064 (Dec. 16, 1982). The Conference Committee "strongly urge[s] the cognizant authorizing committees in the House and Senate to consider . . . [further funding] early in the 98th Congress." See 128 Cong. Rec. H10636 (Dec. 20, 1982).

5. In the Supplement to Final Environmental Statement, the NRC Staff has concluded in its "Discussion of Comments Received On The Draft Supplement To The Final Environmental Statement" § 12.4.5 at 12-20:

> The Staff had considered imposing a formal mitigation process on the Applicants as a requirement on the construction permit and license. However, because the Applicants would be the only party to the mitigation process subject to NRC regulations, this approach was rejected.

The Court rejects the Staff's conclusion with the observation that the conclusion is a nonsequitur.

6. The NRC has the authority, indeed, since Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n., 146 U.S. App. D.C. 33, 449 F.2d 1109 (1971), the obligation, to require that the adverse environmental effects (including socio-economic effects) of projects over which it has licensing responsibility are minimized. If the Applicants' license is granted, it should be conditioned to require the Applicants to mitigate adverse socio-economic

impacts by financial assistance which is not limited to the in-lieu-of-tax payments the Applicants are authorized to make pursuant to 42 U.S.C. § 2301 et seq. See, infra.

7. At the outset, it is clear that "socio-economic effects do fall within the environmental effects of proposed action of which NEPA mandates agency evaluation and consideration." McDowell v. Schlesinger, 404 F.Supp. 221, 245 (W.D. Mo. 1975). See also People Against Nuclear Energy v. United States Nuclear Reg. Comm'n., 678 F.2d 222, 230 (D.C. Cir.), cert. granted, ____ (1982); Image of Greater San Antonio, Tex. v. Brown, 570 F.2d 517, 522 (5th Cir. 1978). Thus, such effects fall within the purview of Calvert Cliffs', supra, and require the NRC's attention in the exercise of its licensing responsibility.

8. NEPA carries with it a requirement that the mitigation of adverse environmental impacts be undertaken. Thus, as the CEQ Binding Regulations State, it is the policy of NEPA to ensure that federal agencies:

> [u]se all practicable means . . . to . . . avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 CFR § 1500.2(f) (1981).

9. As stated in Sierra Club v. Froehlke, 359 F.Supp. 1289, 1339 (S.D. Tex. 1973), rev'd. on other grounds, 499

F.2d 982 (5th Cir. 1974), "NEPA states indirectly, but affirmatively, that under some circumstances federal agencies must mitigate some and possibly all of the environmental impacts arising from a proposed project." Accord, Stop H-3 Assoc. v. Brinegar, 389 F.Supp. 1102, 1111 (D. Haw. 1974), rev'd. on other grounds sub nom. Stop H-3 Assoc. v. Coleman, 533 F.2d 434 (9th Cir. 1976).

10. The CEQ Binding Regulations seek to implement NEPA's mitigation policy by requiring mitigation measures to be included in the agency's discussion of alternatives and environmental consequences. See 40 C.F.R. §§ 1502.14(f) & 1502.16(h). However, the agency's mitigation responsibility does not end with mere discussion in the environmental statement of the need for mitigation. The CEQ Regulations indicate that mitigation is to be an important factor in the agency decision-making process. Thus, the agency's announced decision is required to:

> State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1505.2(c). See also 40 C.F.R. § 1505.3 (implementing the decision).

11. The NRC has the obligation to ensure that the

Applicants will mitigate adverse socio-economic impacts of the CRBRP. As stated in Public Service Co. v. United States Nuclear Reg. Comm'n., 582 F.2d 77, 85 (1st Cir.), cert. denied, 439 U.S. 1046, 99 S.Ct. 721, 58 L.Ed.2d 705 (1978), once "the Commission has jurisdiction over the [project] . . . it [is] clear that, under the dictates of NEPA, it [is] obliged to minimize adverse environmental impact flowing therefrom."

12. More recently, the U.S. Court of Appeals for the D.C. Circuit, in People Against Nuclear Energy v. United States Nuclear Reg. Comm'n., supra, wrestled with the issue of the cognizability under NEPA of impacts on psychological health. In reaching its decision, the Court noted that socio-economic anxieties (as opposed to effects) have consistently been rejected as environmental impacts under NEPA. However the Court stated:

> The agency fulfills its responsibilities under NEPA in this context if it considers and mitigates the underlying causes for alarm, such as the possibility of increased noise, increased crime, and increased congestion.

678 F.2d at 229 (emphasis added).

13. The NRC has previously recognized its duty to "consider and seek to mitigate significant environmental impacts . . .." Kansas Gas & Electric Co. (Wolf Creek, Unit

No. 1) CLI-77-1, 5 NRC 1, 7 (Jan. 12, 1977). As stated by the Appeal Board in Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3) ALAB-247, RAI-74-12 936, 944 (Dec. 20, 1974), the NRC under NEPA "is obliged to minimize to the extent reasonably practicable environmental aftermath of its actions."

14. The requirement to mitigate adverse socio-economic impacts should expressly be made a condition of licensure. The NRC clearly has authority to "issue conditional licenses for regulatory purposes. There can be no objection to its use of the same means to achieve environmental means as well. Detroit Edison Co. v. United States Nuclear Reg. Comm'n., 630 F.2d 450, 454 (6th Cir. 1980) (citation omitted).

15. The Commission itself has stated that there "can be no serious dispute" as to its authority, in considering environmental impacts, to "where necessary impose license conditions to minimize those impacts." Kansas Gas & Electric Co. (Wolf Creek, Unit No. 1), supra, 5 NRC at 8. See also Tennessee Valley Auth. (Phipps Bend, Units 1 & 2) ALAB-506, 8 NRC 533, 550 (Nov. 9, 1978) ("NRC . . . indisputably possesses the right to grant conditional licenses and construction permits . . . to implement the purposes of NEPA.").

16. The Board disagrees with the Applicants' assertion that the Board has "previously considered the question of

whether mitigation can be a mandatory condition of the license" and has ruled that it cannot be made a licensure condition. Applicants' Response To Tennessee Attorney General And City Of Oak Ridge at 6-7. The Applicants' reliance on Project Mgmt. Corp., LBP-76-31, 4 NRC 153, NRC1-76/8 (Aug. 26, 1976) for this proposition is misplaced. That decision did not hold that mitigation, as a general proposition, cannot be made a condition of licensure; rather, that the Board lacked authority to order DOE to make payments in-lieu-of taxes pursuant to the Atomic Energy Community Act. As the Licensing Appeal Board noted in Project Mgmt. Corp., ALAB-354, NRC1-76/10 383, 392 n. 13 (Oct. 29, 1976), "Even if . . . the Board is right in that conclusion [regarding in-lieu-of tax payments], it does not necessarily follow that this Commission is devoid of power to require any form of ameliorative action." In any event, as noted, infra, the Board has reconsidered its August 26, 1976 decision and concludes that the Atomic Energy Act does not limit financial mitigation measures that may be ordered as to DOE.

17. To the extent, if at all, that TVA and/or PMC are not considered by the Applicants as sources for financial assistance for mitigation because of contractual arrangements between them which delineates responsibilities (financial and otherwise) between DOE, TVA, and PMC, the Board holds, first, that the Applicants cannot rely on

contractual arrangements among themselves to defeat the purposes and mandates of NEPA. All three of these entities are Applicants and all must meet licensing conditions, including the requirements of NEPA. Any attempt to insulate NEPA obligations under a facade of a contractual inability to perform is a shocking violation of public policy and the Board has the authority to order mitigation to be provided by all of the Applicants.

18. Secondly, even assuming for the sake of argument that mitigation measures are limited to being provided by DOE, the Board has reconsidered its decision in Project Mgmt. Corp. (Clinch River Breeder Reactor Plant), LBP-76-31, NRC1-76/8 153 (Aug. 26, 1976) and rejects the argument that DOE's ability (and consequently, its liability) to provide financial mitigation is limited to the Atomic Energy Community Act for the reasons discussed, infra.

19. NEPA provides, in pertinent part:

> The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a)(emphasis added). Further, Congress has declared:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources . . ..

42 U.S.C. § 4331(b).

20. The above-quoted policy statement of NEPA clearly illustrates the congressional intent for the Federal Government to mitigate the adverse social and economic impacts of federal projects. Congress specifically directed that financial and technical assistance should be provided towards this end. As the Court in Detroit Edison Co., supra, 630 F.2d at 452 observed, "A congressional directive to 'consider' environmental factors is meaningless unless agencies can also act to minimize the environmental damage attributable to their licensees."

21. All federal agencies are to comply with the requirements of Section 102 of NEPA (42 U.S.C. § 4332) "to the fullest extent possible . . .." As stated in Flint Ridge Dev. Co. v. Scenic Rivers Assoc. of Oklahoma, 426 U.S. 776, 787-8, 96 S.Ct. 2430, 2438, 49 L.Ed.2d 305 (1976):

> The purpose of the new language is to make clear that each agency of the Federal Government shall comply with the directives set out in [§ 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . .. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102.

Accord 40 C.F.R. § 1500.6. As stated in Calvert Cliffs' Coordinating Comm., supra, 449 F.2d at 1115, n.12 "only when such specific obligations conflict with NEPA, do agencies have a right under § 104 and the 'fullest extent possible' language to dilute their compliance with the full letter and spirit of the Act."

22. It is true that "NEPA was not intended to repeal by implication any other statute," United States v. SCRAP, 412 U.S. 669, 694, 93 S.Ct. 2405, 2419, 37 L.Ed.2d 254 (1973), and that "Section 102 recognizes . . . that where a clear and unavoidable conflict in the statutory authority exists, NEPA must give way," Flint Ridge Dev. Co. v. Scenic Rivers Assoc. of Oklahoma, 426 U.S. 776, 788, 96 S.Ct. 2430, 2438, 49 L.Ed.2d 305 (1976).

23. However, "Section 102 exempts agencies from compliance only when other statutory authority under which the agencies are proceeding expressly precludes compliance." Environmental Defense Fund v. Tennessee Valley Auth., 468

F.2d 1164, 1176 (6th Cir. 1972) (emphasis added). Accord, Tennessee Valley Auth. (Phipps Bend, Units 1 & 2), supra, 8 NRC at 545. The Board sees no conflict between DOE's authority to make in-lieu-of-tax payments pursuant to the Atomic Energy Community Act and a requirement that DOE provide financial mitigation measures in addition to such in-lieu-of-tax payments. Nothing in the Act indicates that the statute "expressly precludes compliance" with NEPA.

24. Section 105 of NEPA (42 U.S.C. § 4335) provides:

> The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Thus, as stated in Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3), ALAB-247, RAI-74-12 936, 938 (Dec. 20, 1974), "NEPA's enactment substantially broadened the environmental responsibilities of the Federal Government by making the policies of that Act 'supplementary to those set forth in existing authorizations of Federal agencies.'" Accord Kansas Gas & Electric Co. (Wolf Creek Station, Unit No. 1), ALAB-321, NRCI-76/4 293, 305 & 306 (Apr. 7, 1976), aff'd., CLI-77-1, 5 NRC 1 (Jan. 12, 1977).

25. In sum, NEPA does not prevent NRC from conditioning a project by requiring DOE to provide financial assistance to mitigate adverse impacts, above and beyond in-lieu-of-tax

payments, although such financial assistance is not expressly authorized by the Atomic Energy Act. As the Appeal Board made clear in Tennessee Valley Auth. (Phipps Bend, Units 1 & 2), supra, 8 NRC at 544:

> NEPA added to the Commission's original responsibilities in the sense that it must now consider and act to prevent or minimize the adverse environmental . . . consequences of the facilities it licenses. And . . . the Atomic Energy Act in general . . . [does not bar] the inclusion in licenses for government-owned plants of conditions designed to achieve such results.

(emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed to the following via expedited mail where indicated by an asterisk and otherwise via first-class U.S. mail, postage prepaid on this the 21st day of January, 1983:

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