UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
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ARIZONA PUBLIC SERVICE COMPANY, ET AL.	)	Docket Nos. STN 50-529 STN 50-530
	)	
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	

NRC STAFF RESPONSE IN OPPOSITION TO WEST VALLEY AGRICULTURAL PROTECTION COUNCIL, INC.'S MOTION SEEKING DIRECTED CERTIFICATION OF INTERLOCUTORY APPEAL

Lee Scott Dewey
Counsel for NRC Staff

September 15, 1983

DESIGNATED ORIGINAL

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I. INTRODUCTION

On August 27, 1983, West Valley Agricultural Protection Council (West Valley) filed a motion with this Appeal Board seeking directed certification of a Licensing Board's ruling which denied its request for the preparation by Staff of a supplemental FES and a continuance of hearing activities during the interim.[1/] For the reasons set forth below, Staff opposes this motion.

1/ As a premise to its motion for directed certification, Appellant avers that the Licensing Board has found the FES, which is the subject of this proceeding, "inadequate." Motion at 1 & 3. However, as we later detail, the Licensing Board twice stated that, prior to hearings, ". . . there is no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect." (July 11, 1983, Memorandum and Order, at 6-7; August 17, 1983 Order, at 3).

II. BACKGROUND

On October 14, 1982, West Valley petitioned to intervene and reopen the record in the Palo Verde operating license proceeding. It based this petition on alleged newly discovered information that there is potential harm to its members' agricultural crops caused by salt deposition from the Palo Verde nuclear facility. By Memorandum and Order of December 20, 1982, the Licensing Board granted West Valley's petition and reopened the record for Units 2 and 3.[2/]

On February 6, 1983, West Valley requested, inter alia, that the Licensing Board discontinue any discovery or hearings in connection with these salt deposition contentions until the Staff has prepared a supplemental environmental statement (FES) regarding this problem.[3/] On July 11, 1983, the Licensing Board rejected this request on the basis

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2/ Arizona Public Service Co. (Palo Verde Station, Units 2 and 3), 16 NRC 2024 (1982). Subsequently a discovery schedule was set and hearings scheduled to commence on April 2, 1984. (June 14, 1983, Order at 3.)

3/ This motion was opposed by Staff and Joint Applicants by answers of February 14 and 17, 1983, respectively. At a prehearing conference held on February 24, 1983 in Phoenix, Arizona, the question of a supplemental environmental statement was the subject of considerable debate between the parties. See Tr. 2734-2757, 2761-2790, 2793-2798, 2800-2852. West Valley's request for an FES was renewed in a supplemental motion on May 6, 1983. Staff opposed this motion by answer of May 26, 1983, and in a letter dated May 25, 1983, Joint Applicants contended that it was improper under the Commission's Rules of Practice.

that defects in Staff's FES can be cured by the receipt of additional evidence at the hearing rather than by the formal publication of a supplemental FES. (July 11, 1983, Memorandum and Order at 3-5.) The Board also concluded that it did not have the authority to order Staff to prepare a supplemental FES, and that there was no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect. (July 11, 1983, Memorandum and Order at 5-7.)

On July 22, 1983, West Valley filed a letter with the Licensing Board requesting that it authorize an appeal of its decision pursuant to 10 C.F.R. § 2.730(f). On this same date, West Valley also filed a motion with the Appeal Board seeking a stay of ". . . . any hearing in this proceeding pending certification of an appeal from the Licensing Board ruling and the completion by the NRC staff of a supplemental FES." (Motion at 3).

The Appeal Board on August 12, 1983, denied West Valley's request for a stay as premature because the Order appealed from was not appealable except as a matter of discretion. It further stated that the motion for a stay might be renewed if (1) the Licensing Board refers the July 11, 1983 order to the Appeal Board under 10 C.F.R. § 2.730(f), or (2) West Valley petitions for directed certification of the order under 10 C.F.R. § 2.718(i).

The Licensing Board on August 17, 1983, denied West Valley's request for a stay and for certification of an interlocutory appeal on the ground that there is no irreparable harm in making West Valley take part in a hearing on the adequacy of an EIS, and that there is no basis in the record to determine that the EIS is inadequate or its conclusions are incorrect.

(August 17, 1983 Order at 3). Thereafter, on August 27, 1983, West Valley lodged its instant request for directed certification .

III. DISCUSSION

A. WEST VALLEY'S REQUEST FOR DIRECTED CERTIFICATION

Under the provisions of 10 C.F.R. § 2.718(i) and § 2.785(b), Atomic Safety and Licensing Appeal Boards may direct the certification of legal issues raised in proceedings still pending before licensing boards. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 481 (1975). However, the exercise of this discretionary authority will be granted only sparingly. It is reserved for important licensing rulings that, absent immediate appellate review, would either (1) threaten the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal; or (2) affects the basis structure of the proceeding in a pervasive or unusual manner. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Under this Marble Hill test, it is immaterial whether the Licensing Board ruling in question is in error ". . . unless it can be shown that the error fundamentally alters the very shape of the ongoing adjudication"; otherwise, ". . . appellate review must await the issuance of a 'final' licensing board decision." Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).

In West Valley's Motion Seeking Directed Certification the only reason specifically given for the need for interlocutory review is the statement that: "Failure to grant West Valley's motion would cause West Valley irreparable injury because it will insure that the NRC staff does not perform an impartial full analysis of potential harm caused by the PVNGS." Motion, at 3. This is incorrect. The entire purpose of reopening the record and scheduling hearings is to test whether adequate analyses were performed for the FES, and to correct any inadequacy in the FES if such inadequacy exists. As the Licensing Board has reiterated, "After a hearing the Board might deny a license or require further development of a record to support an application." July 11, 1983, Memorandum and Order, at 6; see also e.g. August 17, 1983, Order, at 3-4. On no basis can it be determined that the hearing testing the adequacy of the FES and to correct it if inadequate, will cause a failure to "perform an impartial full analysis of potential harm caused by PVNGS."

Thus neither of the Marble Hill tests are met. As the Licensing Board recognized in denying West Valley's request for referral, having to participate in an early hearing (the only discernable injury to West Valley in the instant matter) does not constitute "irreparable injury." August 17, 1983 Order at 3. See Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 552 (1975); see also Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 628 (1977). Nor can it be found that there is a "pervasive effect on the basic structure of the proceeding." If at the hearing some inadequacy is found in the FES, it can then be corrected.

See 10 C.F.R. § 51.52(b)(3).[4/] If the Licensing Board is not satisfied that all facets of the issue have been adequately covered during the hearing, further development of the record can be required. See August 17, 1983 Order at 3-4; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526 (1977), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 321, 324 (1973).

In the Memorandum in support of its motion for directed certification, West Valley also claims that allowing the hearing to proceed before Staff has prepared a supplemental environmental statement would constitute a ". . . fundamental perversion of the EIS process" and ". . . violates the procedures mandated by the National Environmental Protections Acts, 42 U.S.C. § 4321 et seq." Memorandum at 3. It bases its perception of such a "pervision of the NEPA process" upon its incorrect belief that the Licensing Board in its initial decision had found the environmental statements for Palo Verde to be inadequate. Motion at 3. Contrary to

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4/ Two Courts of Appeal have ruled that this regulation does not violate NEPA. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975) and Ecology Action v. AEC, 492 F.2d 998, 1001-02 (2d Cir. 1974)), and NRC tribunals have traditionally allowed this procedure to be utilized rather than having the Staff issue a new environmental statement. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 29 fn.43 (1978); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 785-87 (1979); Allied-General Nuclear Service (Barnwell Nuclear Separation Facility), ALAB-296, 2 NRC 671, 680 (1975); Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), ALAB-660, 14 NRC 987, 1014 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 196-197 (1975).

this assertion, the Licensing Board never stated that Staff's environmental statements were inadequate. Although it may have used the word "sparse" in its initial decision in referring to portions of the environmental statement (Arizona Public Service Co., supra, 16 NRC at 2032), it also there stated that it rejected West Valley's assertions ". . . that the Staff furnished misleading information or clearly erroneous information or that they could not have previously known that salt deposition might have an effect on local agriculture." Id. at 2028. Any misconceptions that West Valley may have had concerning the Licensing Board's intent regarding the adequacy of Staff's environmental statements should have thereafter been conclusively dispelled by the Licensing Board's July 11, 1983 Memorandum and Order where it stated that:

> ". . . at this time there is no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect. (At 6.)

The Licensing Board reiterated this same conclusion regarding the adequacy of the EIS in its August 17, 1983 Order. (At 3). Under these circumstances, there is no basis for West Valley's assertion that the Board found the environmental statements to be inadequate.

Moreover, the only time that it has been suggested that an NRC environmental statement may not be able to be satisfactorily supplemented at a hearing is when additional information has been discovered which (1) concerns a subject mater omitted in the FES or (2) departs markedly from the information reflected in the FES. Florida Power & Light Company, supra., 14 NRC at 1014; Allied-General Nuclear Fuel Services, supra.,

2 NRC at 680; Public Service Co. of Oklahoma, supra., 10 NRC at 786. Neither situation is present here. First, information was not omitted since the Palo Verde environmental reports substantially dealt with the subject of salt deposition on vegetation from drift caused by the Palo Verde nuclear facility.[5/] Second, the information supplied by West Valley does not invalidate Staff's FES. As noted, the Licensing Board has concluded that there is no present basis in the record for determining that the environmental reports prepared by Staff are inadequate or that their conclusions are incorrect. July 11, 1983 Order at 6-7; August 17, 1983 Order at 3.

For these reasons, West Valley's NEPA arguments are misplaced and there is no basis for its assertion of "irreparable harm" or that the basic structure of the proceeding will be perverted.

B. WEST VALLEY'S REQUEST THAT HEARINGS BE STAYED

In its July 22, 1983 motion to the Appeal Board, West Valley requested that the Appeal Board ". . . stay any hearings in this proceeding pending certification of an appeal from the Licensing Board ruling and the completion by the NRC staff of a supplemental FES." Motion at 3. On August 12, 1983, the Appeal Board denied West Valley's motion as premature absent a

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5/ For example, the FES-CP included this subject matter in the following sections of that report: §§ 3.6.1, 3.6.2, 3.6.3, 3.6.4, 3.6.5, 5.5, 5.5.2, 9.2, 10.1. The DES-OL included this same subject matter and also contained as an attachment the FES-CP. (See DES-OL at §§ 4.2.4, 4.2.6, 5.3.6, 5.3.2, 5.4.5.5; Appendix A.) The FES-OL also contained information concerning this subject matter and it further referenced the FES-CP at §§ 5.4, 5.5.1.1, Appendix A.

referral of its appeal by the Licensing Board or a petition by West Valley for directed certification.

In support of its instant motion to the Appeal Board for directed certification, West Valley has attached this July 22, 1983 motion requesting a stay. As the Staff previously indicated in our response to this motion[6/] one seeking a stay must address:

> (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.

10 C.F.R. § 2.788(e)(1-4); see also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-2, 14 NRC 795 (1981); South Carolina Electric and Gas Co. (Virgil C. Summer, Unit 1, ALAB-643, 13 NRC 898 (1981). The party seeking the stay (West Valley) bears the burden of marshaling the evidence and demonstrating that it is entitled to such relief. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977).

In Staff's Answer to West Valley's Motion we have shown that there is no likelihood of success on the merits. The Licensing Board's orders have only provided for a hearing to determine the adequacy of the FES, and for

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6/ Staff's Answer to West Valley's Agricultural Protection Council, Inc.'s Motion Seeking Stay of Licensing Board's Decision to Permit Hearing to Proceed Without a New EIS, August 8, 1983, at 2-3.

its supplementation if necessary. In so doing, the Licensing Board followed procedures approved in both Commission and Court precedent. See pp. 7-8, supra; Staff's Answer to West Valley's Motion Seeking Stay, at 3-6.

Nor is any irreparable injury shown. As detailed above at p. 5, the only possible harm is causing West Valley to participate in a hearing that it feels is unnecessary. As a matter of law, such participation is not irreparable harm. Potomac Electric Power Co. supra, 1 NRC at 552; Toledo Edison Co., supra, 5 NRC at 628. See also Staff's Answer to West Valley's Motion Seeking Stay, at 7-8.

The last two factors in determining whether to grant a stay similarly weigh against West Valley. To delay the proceeding, as West Valley seeks, would harm the Applicant in not allowing it to receive a timely decision on the Palo Verde units, and harm the public in not allowing it an early decision. The interests of the Applicant and the public are that a hearing go forward to determine if the FES is adequate, and to correct any faults therein. No purpose is served by staying the proceeding. Allied Nuclear Fuel Services, supra, 2 NRC at 684. See also Staff's Answer to West Valley's Motion Seeking Stay at pp. 8-9.

IV. CONCLUSION

For the aforesaid reasons, West Valley's motion for directed certification and a stay should be denied.

Respectfully submitted,

Lee Scott Dewey

Lee Scott Dewey
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of September, 1983

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STAFF'S ANSWER TO WEST VALLEY AGRICULTURAL PROTECTION COUNCIL, INC.'S MOTION SEEKING STAY OF LICENSING BOARD'S DECISION TO PERMIT HEARING TO PROCEED WITHOUT A NEW FES

Lee Scott Dewey
Counsel for NRC Staff

August 8, 1983

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STAFF'S ANSWER TO WEST VALLEY AGRICULTURAL PROTECTION COUNCIL, INC.'S MOTION SEEKING STAY OF LICENSING BOARD'S DECISION TO PERMIT HEARING TO PROCEED WITHOUT A NEW FES

I. INTRODUCTION

On July 22, 1983 West Valley Agricultural Protection Council (West Valley) filed a motion with the Appeal Board seeking a stay of the Licensing Board's July 11, 1983 Memorandum and Order denying West Valley's request that the Palo Verde OL hearings be stayed pending certification of a Licensing Board ruling regarding the need for a supplemental FES. For the reasons set forth below, the request for a stay should be denied.

II. DISCUSSION

The background of this matter is set out in the Licensing Board's opinion ruling on West Valley's request that the Licensing Board discontinue any discovery or hearings in connection with the salt deposition contentions in this proceeding until the Staff has prepared a supplemental environmental statement (FES) regarding this problem.[1/] In that Opinion the Licensing Board rejected this request on the basis that defects, in

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1/ Arizona Public Service Co. (Palo Verde Station, Units 2 & 3), ASLBP 80-44201 OL, Slip Opinion at 1-3 (July 11, 1983) (hereafter "Order").

the Staff's FES, if any are found to exist, can be cured by the receipt of additional evidence at the hearing rather than by supplementation and recirculation of the FES. (Opinion at 3-5.) The Board also concluded that, for the reasons described below, it does not have the authority to order Staff to prepare a Supplemental FES and furthermore that there is no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect (Opinion at 5-7).

As a result of this ruling, on July 22, 1983 West Valley filed a letter with the Licensing Board requesting that the Licensing Board authorize an appeal of its decision pursuant to 10 C.F.R. § 2.730(f) and certify this appeal to the Appeal Board. On this same date, West Valley filed the instant motion for a stay with this Appeal Board requesting that the Appeal Board . . . "stay any hearing in this proceeding pending certification of an appeal from the Licensing Board ruling and the completion by the NRC staff of a supplemental FES." Motion at 3.

A. The Requirements For a Stay

In determining whether to grant or deny West Valley's motion for a stay pursuant to 10 C.F.R. § 2.788(e), the following factors should be considered:

> (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.

10 C.F.R. § 2.788(e)(1-4); see also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-2, 14 NRC 795 (1981); South Carolina

Electric and Gas Co. (Virgil C. Summer, Unit 1, ALAB-643, 13 NRC 898 (1981). The party seeking the stay (West Valley) bears the burden of marshaling the evidence and demonstrating that it is entitled to such relief. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 785 (1977). For the reasons discussed below, West Valley has failed to meet this burden.

1. Likelihood of Success on the Merits

West Valley has failed to demonstrate that its allegation that the Board erred in not requiring Staff to prepare a supplemental FES prior to holding hearings on the salt deposition issue has any likelihood of success on the merits. The Licensing Board's ruling was based on its conclusion that: (1) an FES is usually not required to be reissued since any deficiencies in that document can be remedied at the hearing pursuant to 10 C.F.R. § 51.52(b)(3),[2/] (2) at this time, there is insufficient basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect,[3/] and (3) at this early stage of the proceeding the Board does not have

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2/ Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 785-87 (1979), Allied General Nuclear Service (Barnwell Nuclear Separation Facility), ALAB-2967, 2 NRC 671, 680 (1975); Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 & 4), ALAB-660, 14 NRC 987, 1014 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 196-197 (1975); Niagara Mohawk Power Corp. (Nine Mile Point Unit 2), ALAB-264, 1 NRC 347, 371-372 (1975). Reissuance of an FES will only be necessary when there are acknowledged to be very substantial errors in that document. Allied-General Nuclear Services, supra, 2 NRC at 680. See also Staff's May 26, 1983 Answer at 7 and Staff's February 17, 1983 Answer at 3-4.

3/ See Staff's May 26, 1983 Answer at 5-9; Staff's February 17, 1983 Answer at 4-5.

the authority to order Staff to prepare new or supplemental environmental statements.[4/] Opinion at 5-7.

In challenging to attack these three Board findings before the Appeal Board, West Valley makes the following arguments, none of which have merit. First, it relies upon the following quote from Consumers Power Company, supra, 6 AEC at 334 cited in Public Service Co. of New Hampshire, supra, 5 NRC at 526 for the proposition that the Palo Verde Licensing Board has the authority at the present time to order a new FES. West Valley July 21, 1983 Memoranda (hereinafter "Memorandum") at 8. In that case the Appeal Board stated that:

> A licensing board . . . is expected to evaluate independently and resolve the appropriate contentions of the various parties, to assure itself that the regulatory staff's review has been adequate, and to inquire further into areas where it may perceive problems or find a need for elaboration. If it finds itself not satisfied with the adequacy or completeness of the staff review, or of the evidence presented in support of the license application, it may, for example, reject the application, or may require further development of the record to support such application. (emphasis added)

West Valley's reliance on this language is misplaced since the Appeal Board in Consumers merely held that Licensing Boards may review the adequacy of Staff review and if not satisfied "may require further development of the record" at the hearing. Id at 526. Nowhere in this quote is it stated, or can it logically be inferred, that the Licensing Board can require the publication of a new FES or that a FES can be required prior to the hearing. In fact, existing precedent is to the contrary. New England Power Co., supra, 7 NRC at 279-80; Consumers Power Co., 13 NRC at 330-331.

4/ See Staff's February 17, 1983 Answer at 2; New England Power Co. (NEP, Units 1 & 2), LBP-289, 7 NRC 271, 279-80 (1978), Offshore Power Systems (Floating Nuclear Plants), ALAB-498, 8 NRC 194, 206-207 (1978).

West Valley next argues that the Board has erred in concluding that there is currently insufficient basis for determining that Staff's environmental statements are adequate. Memorandum at 8-9. In support thereof it relies upon a prior statement that the Licensing Board had made when it ruled upon West Valley's petition to intervene. There the Licensing Board had used the word "sparse" in referring to certain portions of Staff's environmental statements regarding the salt deposition contention. Order at 9. Contrary to West Valley's claim, the Licensing Board's incidental use of this word in referring to certain portions of the FES in no way contradicts its assessment, based upon the considerable evidence of record, that the salt deposition issue does not involve significant new information and that there is no present basis for concluding that new information is available which would significantly alter the earlier conclusions in Staff's FES.[5/]

West Valley's final argument is that the Board has erred in stating that defects in the EIS can be curred by the receipt of additional testimony at the hearing. (Memorandum at 9). While West Valley concedes than an "adequate" FES can be cured in the manner stated by the Board, it claims that an "inadequate" FES cannot. Id. The Commission's regulations explicitly provide that a Licensing Board decision based on the evidentiary record before it shall be deemed to modify the Staff prepared FES, 10 C.F.R.

5/ See Staff's May 26, 1983 Answer at 5-9; Staff's February 17, 1983 Answer at 4-5. Furthermore, as part of this argument West Valley additionally contends that Staff's environmental statements are also shown to be defective by certain affidavits of West Valley's consultants which it has attached to its motion. This argument must also fail. Although these consultants have made various claims regarding the adequacy of Staff's environmental statements, these are only allegations whose validity has not been substantiated and there is no reason why they cannot be resolved at the hearing pursuant to 10 C.F.R. § 51.52(b)(3).

§ 51.52(b)(3) and, as noted by the Board, three courts of appeal have approved of this rule. (Opinion at 4). If the distinction West Valley advocates relates to the case where the additional evidence supplements or amplifies the discussion in a FES versus the case where the additional evidence (1) concerns a subject omitted in the FES or (2) departs markedly from the position espoused or the information reflected in the FES, the Staff agrees that the Appeal Board has cautioned that the facts of the latter case need to be examined to determine if recirculation may be required. Florida Power & Light Company (Turkey Point Nuclear Generating Units Nos. 3 and 4(, ALAB-660, 14 NRC 987, 1014 (1981), Allied-General Nuclear Services, supra, 2 NRC at 680. However, such omissions or inconsistencies have not been established with respect to the Palo Verde environmental statements nor is there any basis for concluding that, if defects exist, they cannot be cured at the hearing.[6/]

For these reasons West Valley has failed to establish that its petition for a stay is likely to succeed on the merits.[7/]

6/ See Staff's May 26, 1983 Answer at 5-9.

7/ The situation here closely resembles that in Allied-General Nuclear Services, supra, 2 NRC at 677-678, where there was also a question of whether hearings should be stayed because an FES was allegedly deficient. In determining that it was appropriate for the hearing to take place rather than be stayed, the Appeal Board acknowledged that ". . . the intervenors may well be able to establish at the hearing that those deficiencies [in the FES] do exist . . .", but concluded that the hearings could nevertheless take place as scheduled if the Licensing Board deemed it appropriate. Id. at 679-680. This same principle should also apply in this case since there appear to be more reasons for granting a stay in Allied General Nuclear Services than here. In that case one of the asserted deficiencies in that FES was a failure to include the results of the Commission's study of plutonium recylcing (GESMO) which was ongoing at the time. Id. at 681-683. The situation in Palo Verde is much less tenuous since when this hearing is held all studies will be completed and all relevant information will be before the Licensing Board.

2. Irreparable Injury

Although the granting of a stay request turns on the balancing of all four factors of 10 C.F.R. § 2.788(e) (Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10, 14 (1976)), the Commission has concluded that the most important factor is whether the party requesting the stay has shown that it will be irreparably injured unless a stay is granted. Westinghouse Electric Corporation (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980); Public Service of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-508, 8 NRC 559, 560-561 (1978). Failure to satisfy this factor requires "overwhelming" showing on the other factors. Id at 560-561.

West Valley will not suffer any damage if its requested stay is not granted. As a party to this proceeding, West Valley may engage in all prehearing activities including discovery on any additional information the other parties intend to offer at the hearing and to cross-examine any witness proffered at the hearing. After the record is developed on this matter, West Valley can file any appropriate motions.

West Valley's arguments in regard to this factor are basically that if this case goes to hearing without a supplemental environmental impact statement first being prepared, the requirements of NEPA will be subverted because: (1) environmental impact statements should be supplemented independently by the Staff rather than by a Licensing Board; (2) there will not be "public input," and (3) the issues will not be fully developed. (Memorandum at 8-9).

None of these arguments are well founded. Argument (1), concerning the need for an independent Staff preparation of a supplement rather than supplementation of an FES at a hearing, is in direct conflict with § 51.52(b)(3) of the Commission's Rules of Practice which allows an FES

to be modified at a hearing. Such challenges to Commission regulations are not permitted under 10 C.F.R. § 2.758(a).

Argument (2) regarding the need for "public input" fails to recognize that the "public input" required by the NEPA process has already been provided. The Palo Verde draft environmental statements, which had earlier been circulated by Staff for comment, included the salt deposition subject matter. When a draft environmental statement contains sufficient discussion of the general subject matter, a new DES will not be required to be circulated.[8/]

West Valley's argument (3) is also in error. There is no basis in fact for its claim that there will be a less thorough review of the salt deposition issue if a supplemental FES is not prepared. Staff intends to perform just as careful an analysis for the hearing on the salt deposition issue as it would have if it had prepared a supplemental FES.[9/]

3. Harm To Other Parties

This factor weighs in favor of denying the stay. There is potential economic harm to the Applicant which could be caused by delay in the fuel load date of Unit 2. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188 (1977); Public Service

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8/ Niagara Mohawk Power Corp. (Nine Mile Point, Units 2), ALAB-264, 1 NRC 347, 371-372. Moreover, there may be instances when even a lack of such prior notice may not be fatal since, as the Ninth Circuit has stated, ". . . The public comment process . . . is not essential every time new information comes to light after an EIS is prepared "since to do so" . . . could prolong NEPA review beyond reasonable limit. State of California v. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982). See also Staff's May 26, 1983 Answer at 9-11.

9/ There is assurance that this analysis will be complete since if at the hearing the Licensing Board is not satisfied, it can require further development of the record to support the license application. See Public Service Co. of New Hampshire (Seabrook Station Units 1 & 2), CLI-77-8, 5 NRC 503, 526 (1977), quoting Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 321, 334 (1973).

Company of Indiana (Marble Hill, Units 1 & 2), ALAB-437, 6 NRC 630, 634 (1977).

4. Public Interest

This factor also weighs in favor of denying the stay. The public interest is in favor of this denial since there is a strong public interest in having an early decision on a nuclear facility, whether that decision is positive or negative. Allied Nuclear Services, supra, 2 NRC at 684.

West Valley argues regarding this factor that the public interest requires the preparation of an adequate EIS before an agency can proceed with a project that has a significant effect on the human environment. (Memorandum at 11). Although under certain circumstances not here present this assessment may be correct, it is not now applicable since the Licensing Board has correctly found that ". . . at this time, there is no basis in the record for determining that the environmental reports prepared by the Staff are inadequate or that the conclusions therein are incorrect." Opinion at 6.

III. CONCLUSION

For the aforesaid reasons, West Valley's motion to stay the Licensing Board's decision to permit hearings to proceed without a supplemental FES should be denied.

Respectfully submitted,

Lee Scott Dewey

Lee Scott Dewey
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 8th day of August, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
ARIZONA PUBLIC SERVICE COMPANY, ET AL.	)	Docket Nos. STN 50-529 STN 50-530
	)	
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF'S ANSWER TO WEST VALLEY AGRICULTURAL PROTECTION COUNCIL, INC.'S MOTION SEEKING STAY OF LICENSING BOARD'S DECISION TO PERMIT HEARING TO PROCEED WITHOUT A NEW FES" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 8th day of August, 1983:

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Washington, D.C. 20555

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
ARIZONA PUBLIC SERVICE COMPANY, ET AL.	)	Docket Nos. STN 50-529 STN 50-530
	)	
(Palo Verde Nuclear Generating Station, Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO WEST VALLEY AGRICULTURAL PROTECTION COUNCIL, INC.'S MOTION SEEKING DIRECTED CERTIFICATION OF INTERLOCUTORY APPEAL" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of September, 1983:

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