997

LBP-85-7

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Ivan W. Smith, Chairman
Dr. Cadet H. Hand, Jr.
Gustave A. Linenberger, Jr.

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

March 11, 1985

MEMORANDUM AND ORDER GRANTING APPLICANTS' MOTION TO DISMISS PROCEEDING

In November 1983, in the face of action the month before by Congress which made it appear very likely that the funds necessary to complete the construction of the Clinch River Breeder Reactor Plant would not be appropriated, the Applicants--the United States Department of Energy (DOE), the Project Management Corporation (PMC) and the Tennessee Valley Authority (TVA)--agreed to terminate the project. The Applicants now move the Board to authorize revocation of the Applicants' Limited Work Authorization (LWA), and to dismiss the proceeding without prejudice. Since termination of the project, there has been a search

DS03

for an alternate industrial use for the project site, but no such use has been found. The Applicants therefore propose to redress the site in accord with commitments they made before they began to prepare the site for construction of the plant. Applicants' Motion dated October 19, 1984. The NRC Staff, having obtained the agreement of the Applicants to honor certain conditions regarding redress, supports the Motion by a filing dated November 8, 1984. In their Response, dated October 30, 1984, the Natural Resources Defense Council (NRDC) and the Sierra Club, joint intervenors in this proceeding, do not oppose the Motion. Exercising our responsibility under 10 C.F.R. § 2.107(a) to consider whether we should prescribe terms for the withdrawal of an application, we grant the Applicants' Motion, after clarifying what the responsibilities of the Applicants and the Staff are in the event an alternate industrial use is found for the site before redress is complete.

The Applicants' Commitments and Our Jurisdiction

Nearly 15 years have passed since Congress first authorized the Clinch River Breeder Reactor Plant as a cooperative project between industry and government for the design, construction, and operation of the Nation's first demonstration scale fast breeder reactor. A construction permit was applied for in 1974, and the next year NRDC and the Sierra Club petitioned to intervene in the mandatory hearings. In 1977 the Carter administration decided to cancel the project, and this proceeding and the Staff's review of the application were suspended.

Four years later, the Reagan administration directed that the project be completed, and the next year, on motion from the Applicants, we lifted the suspension of this proceeding. The parties and the Board then undertook preparations for evidentiary hearings on issues which had to be decided before we could authorize the issuance of an LWA, and ultimately, a construction permit.

10 C.F.R. § 50.10(c) prohibits the commencement of certain site or construction work before an applicant obtains a construction permit or an LWA, but 10 C.F.R. § 50.12 provides for exemptions from § 50.10(c), upon a consideration and balancing of several factors, including "whether redress of any adverse environment impact from conduct of the proposed activities can reasonably be effected should such redress be necessary." On motion from the Applicants, the Commission granted the Applicants an exemption from § 50.10 permitting the conduct of non-safety related site preparation activities. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-3, 16 N.R.C. 412 (1982). The Commission's decision rested in part on record evidence that, although "perfect restoration of the topography could not be achieved", "substantial redress" could be, and that the Applicants had committed to whatever redress was both achievable and necessary. Id. at 427-28.

In 1983 this Board, after evidentiary hearings, authorized the issuance of an LWA. LBP-83-8, 17 N.R.C. 158 (1983). Then, after the

completion of hearings on construction permit issues, while we were writing the initial decision on those issues, the Senate voted to table its Appropriations Committee amendment containing a multi-year appropriation for the project.[1] On motion from the Intervenors, the Appeal Board terminated its own proceedings on LWA issues, and vacated our authorization of the issuance of the LWA. ALAB-755, 18 N.R.C. 1337 (1983). However, the Appeal Board denied the Intervenors' motion to authorize the Director of Nuclear Reactor Regulation to revoke the LWA. The Appeal Board argued that the issue of revocation was better left to this Board, which still retained jurisdiction over the application for a construction permit, to determine whether conditions should be imposed to ameliorate the environmental impacts of site preparation. Id. at 1339.

The Redress Plan

The Applicants have agreed to redress the site in accord with a plan identified in the Final Site Redress Plan (Applicants' Motion, Attachment 1) as Alternative 2. The objective of that Alternative is a self-maintaining, environmentally stable, and aesthetically acceptable

---

1 We nonetheless issued a Memorandum of Findings to memorialize our assessment of the issues as reflected in the extensive record before us, to which impressive amounts of resources had been devoted by all parties over some eight years. The history of the project is more fully recounted and documented in that Memorandum. See LBP-84-4, 19 N.R.C. 288 (1984), 291-98.

site suitable for industrial use, for which the site has long been zoned. Applicants' Motion at 12. To achieve that objective, Alternative 2 requires, among other things, that excavations be filled in at least to elevations high enough to allow the site to gravity-drain to the Clinch River, that areas outside the presently cleared area be left undisturbed, that the surface be stabilized to prevent erosion, and that certain buildings be removed from the site. Id. at 12-13. Environmental control of the site since termination of the project has been carried out in accordance with a complex regulatory scheme involving the Applicants and several other state and federal agencies. Id., §§ 3.2-3 and Appendix B. The same scheme will be adhered to while the site is being redressed. Id.

By letter dated June 6, 1984, the Staff conditioned its acceptance of Alternative 2 on the Applicants' agreeing to certain requirements concerning, principally, reports to the Staff and facilitation of the regrowth of vegetation. Applicants' Motion, Attachment E. The Applicants have agreed to conform to these requirements. Applicants' Motion at 3.

In August 1984, DOE and TVA entered into a Supplemental Agreement in which DOE agrees to redress the site in accordance with Alternative 2 as described in the Site Redress Planning Task Force Report (Task Force Report), on which the Final Site Redress Plan is based. Applicants' Motion, Attachment F at 2. The Staff's support of the Applicants'

Motion to dismiss the proceeding is conditioned on the Applicants' agreement to abide by the Final Site Redress Plan wherever it differs from the Task Force Report. Staff Response at 2-3, and Attachments 2 and 3 thereto. The Supplemental Agreement also obligates $5,000,000 for the redress and sets November 30, 1985 as the date for the completion of the work. Applicants' Motion, Attachment F at 3.

The Intervenors would have preferred that the Applicants restore the site "to as nearly approaching its original condition as possible." Intervenors' Response at 2-3. Barring this virtually complete restoration, the Intervenors would prefer an option identified in the Final Site Redress Plan as Alternative 1. Under Alternative 2, the agreed-upon option, redress will leave some 54 acres parceled out into three distinct but connected areas at elevation 810. Applicants' Motion, Attachment A, Sketch 3. Redress under Alternative 1, however, would leave a roughly rectangular area at the same elevation, an area which, though it is a few acres smaller than the three areas under Alternative 2, would permit greater flexibility in land use by any future industrial user than would the three areas. Id., Sketch 2. The Intervenors also assert that Alternative 1 is environmentally superior to Alternative 2, though they put forward no basis for their claim and we cannot identify any such basis. Tr. 8912.

However, rather than risk further delay in redressing the site, the Intervenors have chosen not to oppose the terms the Applicants and the Staff propose for dismissal of the proceedings and revocation of the

LWA. Intervenors' Response at 1; Tr. 8917-18. Instead, the Intervenors invite us to exercise our power under § 2.107(a) to prescribe terms for the withdrawal of the application in the direction of Intervenors' preference. Intervenors' Response.

We decline to require either that redress be carried out according to the terms of Alternative 1, or that the site be restored as nearly as possible to its original condition. We find no deficiency in Alternative 2's treatment of the environment. Moreover, there has been no showing that Alternative 1 is either environmentally superior to Alternative 2, or more geared to industrial development. But, in any event, Alternative 2 will leave the site more suited to industrial development than it was in its original condition. Tr. 8910-11. We have no jurisdiction to ask for a site condition even more suited to such development.

The Responsibilities of the Applicants and the Staff If an Alternate Use is Found Before Redress is Complete

By the time the Applicants filed the Motion before us, they and the Staff apparently had come to an agreement about whether, and how, redress would be modified if an alternate use were found before redress had been completed. However, the terms of that agreement were not clear to us. The language of the Final Site Redress Plan was definite: The redress plan would be modified only if a "committed" alternate use were found prior to the commencement of redress; and in such a case, modification took a definite form: "redress would be implemented by the

Project in accordance with this plan on those areas of the site not committed to industrial use." Applicants' Motion, Attachment A at 16-17. The language of later documents, however, was more general and loose: The plan would be modified "as appropriate" if there were an "expression" of "interest" from a "serious prospect" before the completion of redress. Id., Attachment E (Staff's June 6, 1984 letter) at 1; Id., Attachment F (Supplemental Agreement) at 3.

More important, it was not clear to us what jurisdiction the parties thought the NRC, and most crucially, this Board, had over any negative environmental effects arising from modification of the redress plan to make the site more attractive to a "serious prospect". On the one hand, under § 2.107 and the Appeal Board's Order dismissing its proceeding and vacating our authorization of the LWA, we had the power to prescribe terms for withdrawal of the application in order to ameliorate any environmental effects of site preparation. On the other hand, it was clear that neither the Staff nor the Board had any jurisdiction over any negative environmental effects caused by an alternate use secured after redress was complete. What jurisdiction, then, did either the Staff or the Board have over such negative effects in the case where an alternate use was found before redress was complete? And could we delegate any jurisdiction we had in the latter case to the Staff?

To help us clarify what the Applicants', the Staff's, and our responsibilities would be in the event an alternate use were found

before completion of redress, we held a conference of the parties on February 28, 1985. Tr. 8885-8924. At the conference, the Intervenors argued that the looser language in which the Staff's June 6, 1984 acceptance letter and the Supplemental Agreement between DOE and TVA described possible modifications to the redress plan left room for the Applicants to treat expressions of slight interest in industrial use of the site as excuses to postpone redress, or its completion, indefinitely. Tr. 8890-91. The Intervenors therefore urged that the redress plan be modified only upon the securing of a firm commitment to an alternate use, a commitment as expressed in a letter of intent or some similar document, and that even in the event of such a commitment, redress be continued to the greatest extent possible. Tr. 8915-16.

In reply, the Applicants claimed that, given the lack of success of the extensive efforts to find an alternate use for the site, it was not likely that one would be found before redress was complete, and that therefore, it was not likely that the Applicants would have the opportunity, let alone the inclination, to delay redress. Tr. 8892. They said, though, that given such an opportunity they would adhere to the more definite language of the Final Site Redress Plan, which explicitly calls for redress according to Alternative 2 of all areas not slated for alternate use. Tr. 8892, 8905. The Applicants also made clear that even in those areas which were slated for alternate use, redress would continue to the greatest extent possible. Tr. 8905, 8922. However, they argued that binding them to require a serious prospective

user to execute a letter of intent or similar document before redress would be modified might lead to a situation in which certain valuable uses of the site would be foreclosed. Tr. 8891-92. The Applicants also disavowed any inclination to use expressions of slight interest as an excuse for delay. Tr. 8898.

Thus the problem presented the Board in the conference of the parties was to find that action by the Board which would help assure both that completion of redress would not be delayed but also that resources would not be wasted by letter-perfect adherence to Alternative 2 in the face of an expression of genuine interest in an alternate use of the site. The Intervenors proposed that we keep jurisdiction over redress until its completion. Tr. 8900, 8914, 8918. They also asked that they be fully informed by the Applicants of the existence of an alternate use and of any modifications to Alternative 2. Intervenors' Response at 3. The Applicants on the other hand, argued that the Staff was quite able to oversee redress and any modifications to the plan, and to distinguish sham expressions of interest from genuine ones, and that, in any event, a complex regulatory scheme was in place to protect environmental values both now and during redress. Tr. 8897-98, 8920, 8893f. The Applicants nonetheless expressed their willingness to inform the Intervenors fully of the existence of an alternate use and of any modifications to redress. The Staff for its part expressed its commitment not to permit unjustified delay in the completion of redress. Tr. 8918.

In our view, the best course is to entrust to the Staff the oversight of redress and any modification of Alternative 2. The most important bases for our decision are the Applicants' explicit commitments and acknowledgement of the Staff's jurisdiction over not only the implementation of the redress plan but also the justification for modifications to that plan. The already unlikely prospect of delay in the completion of redress is made more unlikely by the Applicants' commitment to carry redress to completion in all areas of the site which, before the end of redress, do not become slated for alternate use, and in those latter areas to continue redress to the greatest extent possible. This commitment conforms to at least part of what the Intervenors seek here. But they also want us to oversee the carrying out of that commitment. However, the redress plan has been subject to litigation in this proceeding and has gained the approval of all the parties and of the Board. What remains for this agency to do is to see that the terms of the plan are carried out, and such oversight is classically a function of the Staff. Even if, despite the Applicants' commitment to continue redress to the greatest extent possible, there remains some possibility that redress might be delayed on grounds of a less-than-genuine expression of interest in the site, the Staff may be depended upon to discern whether delay would be justified. The exercise of such routine business judgment is not ordinarily a fit object of litigation. Since the NRC's remaining responsibilities for the site are most properly the Staff's, the Intervenors' remedy, should they conclude

that the Staff is not bearing its responsibilities, is a petition under 10 C.F.R. § 2.206. See also Tr. 8920-21 (Edgar).

ORDER

The Applicants' October 19, 1985 Motion that the Board authorize revocation of the LWA and dismiss the proceedings without prejudice is hereby granted on the following conditions, agreed to by the NRC Staff and Applicants:

1) The Applicants will redress the site in accord with Alternative 2 as described in the Final Site Redress Plan, and under the conditions set out in the Staff's June 6, 1984 letter of acceptance of the Final Site Redress Plan.

2) The Applicants will modify the redress plan only in the event of a genuine expression of interest in an alternate use of the site from a serious prospect. In the event of such a prospect, the Applicants will carry out the redress plan to the greatest extent possible consistent with the alternate use. The Staff will review such prospects and any modifications.

3) The Applicants will inform the Intervenors fully and immediately of the existence of an alternate use of the site, and of any modifications to redress.

The Director of Nuclear Reactor Regulation is hereby authorized to revoke the Limited Work Authorization issued under LBP-83-8, 17 N.R.C. 158 (1983). In accord with 10 C.F.R. § 2.107(c), the Director will

cause to be published in the Federal Register a notice of withdrawal of the application for a construction permit.

This proceeding is dismissed without prejudice.

ATOMIC SAFETY AND LICENSING BOARD

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

March 11, 1985

Judge Hand agrees with this action but was unavailable to join in the Memorandum and Order.