

December 30, 1982



SECY-82-503

## ADJUDICATORY ISSUE

(Commission Meeting)

For: The Commissioners

From: Sheldon L. Trubatch  
Acting Assistant General Counsel

Subject: NRDC V. NRC, NO. 82-1902  
(CLINCH RIVER)

Purpose: To provide the Commission with an analysis of the supplemental filings in this proceeding and with a proposed Order

Discussion: On December 10, 1982, in response to the remand by the U.S. Court of Appeals for the D.C. Circuit, the Commission initiated a supplementary proceeding on the Clinch River Breeder Reactor (CRBR) to reconsider whether there are exigent circumstances warranting the grant of an exemption under 10 CFR 50.12 authorizing the initiation of site preparation activities for that facility. Applicants, U.S. Department of Energy (DOE), Project Management Corporation (PMC) and the Tennessee Valley Authority, contend that exigent circumstances are demonstrated by the public interest factors identified in the Commission's Order of August 17, 1982. Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club, contend that the Commission failed to demonstrate exigent circumstances when the exemption was granted and that recent developments only reinforce that lack of exigency. We have briefly summarized and analyzed the parties' positions.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Victor Gilinsky  
John F. Ahearne  
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In the Matter of

UNITED STATES DEPARTMENT OF ENERGY  
PROJECT MANAGEMENT CORPORATION  
TENNESSEE VALLEY AUTHORITY

(Clinch River Breeder Reactor  
Plant)

Docket No. 50-537

MEMORANDUM AND ORDER

CLI-83-\_\_

This decision clarifies the Nuclear Regulatory Commission's previous findings of exigent and other extraordinary circumstances warranting the grant of an exemption pursuant to 10 CFR 50.12 for initiation of site preparation activities for the Clinch River Breeder Reactor ("CRBR"). United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC \_\_ (1982). 1/ The need for this clarification

1/ Commission precedent uses both the terms "exigent" and "extraordinary" to characterize the circumstances under which an exemption may be granted. The term "extraordinary" is used in Louisiana Power and Light Company (Waterford Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 622 n.3 (1973) and Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-9, 7 AEC 197, 198 (1974) ("Shearon Harris I"). The term "exigent" is used only in

[Footnote 1 continues on following page.]

arose in the following way. On July 1, 1982, the Department of Energy, for itself and on behalf of its co-applicant the Tennessee Valley Authority and Project Management Corporation ("Applicants"), applied to the Nuclear Regulatory Commission ("NRC" or "Commission") for an exemption pursuant to 10 CFR 50.12 to begin site preparation activities for the CRBR. In their application, Applicants identified three factors which they believed demonstrated the exigent circumstances sufficient to warrant the grant of an exemption. These were: (1) national policies favoring expeditious completion of CRBR; (2) undue hardship that would result from further delay in the project then at an advanced stage of development; and (3) the project's unique nature. The Natural Resources Defense Council, Inc. and the Sierra Club ("Intervenors") opposed the grant of an exemption. After conducting an informal proceeding, the Commission issued an exemption on August 17, 1982. CLI-82-23, 16 NRC \_\_\_\_ (1982). In its decision, the Commission found that extraordinary circumstances had been demonstrated by most of the factors identified by the Applicants as demonstrating exigent circumstances. Slip op. at 17, 31-32, and additional views of Commissioner

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1/ [Footnote 1 continues from previous page.]

Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 & 5), CLI-77-11, 5 NRC 719, 723 (1977). The Commission has also characterized the requisite circumstances as "compelling," Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 939, 940 (1974), and as "where the facts so warrant," 37 Fed. Reg. 5745 (March 21, 1972). An analysis of these Commission precedents shows that, contrary to the Intervenors' view, the Commission has not limited exemption to cases involving emergencies, although "exigent" circumstances of that nature can provide adequate grounds for an exemption. Exigent circumstances are but one category of extraordinary circumstances. And for the reasons discussed below, the Commission believes that it has identified several "exigent" as well as extraordinary circumstances warranting the grant of this exemption.

Asselstine at 3. On December 7, 1982, the United States Court of Appeals for the District of Columbia Circuit ("Court") remanded the record to the Commission to either proceed with its adjudicatory hearing under 10 CFR 50.10 to determine if site preparation activities may continue, or to explain why it was appropriate in this case to invoke 10 CFR 50.12 by identifying exigent circumstances that warranted such relief. NRDC v. NRC, No. 82-1962 (Decided December 7, 1982). The Commission, by Order of December 10, 1982, responded by initiating a proceeding on the issue of exigent circumstances while also explicitly recognizing that an Atomic Safety and Licensing Board was in the final stages of an adjudicatory proceeding on site preparation activities. For the reasons discussed below, the Commission reaffirms its earlier finding of circumstances warranting an exemption pursuant to 10 CFR 50.12.

#### The Legal Standard

Commission precedent on the grant of exemptions under 10 CFR 50.12 is limited and does not exhaust the situations in which the Commission may find "exigent circumstances." <sup>2/</sup> However, Commission precedent does provide some illustrations of exigent circumstances, and establishes that the availability of an exemption is determined by the totality of the particular circumstances in each case. A review of Commission precedent follows to provide the framework for the Commission's decision in this case.

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<sup>2/</sup> Intervenors suggest that the term "exigent circumstances" is limited to the dictionary definition as circumstances "requiring immediate aid or action." While the dictionary definition of a term is helpful to understanding its general use, the dictionary is not to be used as a "fortress" in interpreting the scope of a term in a particular legal context. Farmers Reservoir and Irrigation Company v. McComb,

[Footnote 2 continues on following page.]

Where an exemption is requested for pre-construction site-preparation activities,

the kind of showing which will satisfy the Commission's criteria for an exemption pursuant to 10 CFR 50.12 is illustrated by the Commission's decision in Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-22, 7 AEC 938 (1974). ("Shearon Harris II"). <sup>3/</sup> In that proceeding the applicant requested an exemption to harvest timber on the site, clear and grade the site, excavate for the plant foundation, construct roads, relocate railroad tracks, and construct temporary facilities including a warehouse and concrete plant. Id. at 941. These are just the kinds of activities initiated at the CRBR site. The Commission affirmed the grant of the exemption for Shearon Harris II on the basis of findings of benefits to the public interest that would result from the earlier completion of the

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2/ [Footnote 2 continues from previous page.]

337 U.S. 755, 764 (1948), rehearing denied, 338 U.S. 839 (1948). Rather the use of a term is to be determined by also considering its purpose and history. See, Perrin v. United States, 444 U.S. 37, 42-45 (1979). Intervenors' sole reliance on the dictionary definition of the term "exigent" ignores the purpose and history of that term. In any event, it is sufficient for the grant of this exemption to note that the circumstances here warranted prompt action and satisfied the Commission's high threshold for unusual relief.

3/ Intervenors suggest that Shearon Harris II does not deserve any precedential weight because it was decided prior to the Commission's promulgation of 10 CFR 50.10(e) which established the procedure for a limited work authorization (LWA). But the facts in Shearon Harris show that the availability of an LWA would have been irrelevant. In Shearon Harris, delay was caused by changes in requirements by the Environmental Protection Agency. The availability of an LWA would not have mitigated the delay resulting from complying with those new requirements nor would it have affected the Commission's finding that six months' delay was significant. Therefore, the Commission finds that Shearon Harris II retains its vitality as a precedent for considering whether to grant an exemption pursuant to 10 CFR 50.12.

proposed site preparation activities. Id. at 944. Because earlier completion of site preparation activities would result in earlier completion of the facility, the grant of the exemption reduced by six months the previously unanticipated delay in the provision of needed electric power and resulted in the savings of over \$100 million dollars in costs that would not have been incurred but for the delay caused by changes in requirements. Id. at 941, n. 4. Thus, Shearon Harris II stands for the proposition that the timely satisfaction of public needs by reducing unanticipated delays in the realization of facility benefits and the avoidance of costs induced by such unexpected delays constitute exigent circumstances supporting the grant of an exemption. Such benefits are also presented by the CRBR exemption.

Shearon Harris II also illustrates that the Commission considers the peculiar circumstances leading to the situation requiring relief. Such considerations are intrinsic to the nature of an exemption, i.e. the need for unusual relief from a rule due to a situation not contemplated when that rule was promulgated. In Shearon Harris II, the peculiar circumstances creating the need for relief were externally induced delays in construction due to changes in government policy. Here, as there, further delay could result in the loss of significant benefits to the public, as described in detail below. And here, as there delay was caused by changes in government policy. Thus, the circumstances leading up to the Applicants' request for an exemption for CRBR are consistent with Commission practice as established in Shearon Harris II.

The Commission also granted an exemption in Gulf States Utilities Company (River Bend Station, Units 1 and 2), CLI-76-16, 4 NRC 449 (1976) ("River Bend"). This decision illustrates that the showing of exigency

supporting an exemption varies directly with the environmental impacts of the proposed activities. This principle is reasonable in light of the nature of the exemption: the conduct of site preparation activities prior to an adjudicatory hearing on those activities. Where the staff's detailed evaluation of the proposed activities have shown them to have insignificant environmental impacts, the conduct of those activities prior to a hearing does not significantly increase the risk to the environment from an error in estimating those impacts. Thus, where site preparation activities have insignificant impacts, it is reasonable to permit those activities to proceed even when the exigencies of the particular situation are somewhat uncertain, i.e. the agency can act more readily to mitigate the costs of unanticipated delay when the environmental risk of prompt action is small.

In River Bend, the Commission did not specify the exigent circumstances. It only noted that the proposed activities would not present adverse environmental impacts, might serve to protect the site environment and would be consistent with any possible outcome of the proceedings below. These factors, in addition to the temporary unavailability of a limited work authorization (LWA) under 10 CFR 50.10(e)(1), were found to constitute a sufficient basis for issuing the exemption. In CRBR, the Commission also found that site preparation would not cause significant environmental impacts and that site improvements would be consistent with any future use of the site because it was zoned for industrial development. Maryland-National Capital Park and Planning Commission v. Postal Service, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973). As in River Bend, these findings weigh against any uncertainties in the exigency of the circumstances.

In Kansas Gas and Electric Company, et al. (Wolf Creek Generating Station, Unit 1), CLI-76-20, 4 NRC 476 (1976) ("Wolf Creek") and in Washington Public Power Supply System (WPPSS Nuclear Project, Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977) ("WPPSS"), the Commission rejected requests for exemptions because changed circumstances vitiated each licensee's claim of exigent circumstances. In Wolf Creek, the applicant appears to have relied solely on the temporary unavailability of an LWA as its basis for a showing of exigent circumstances. Since the Commission had already reinstated the availability of the LWA procedure, its previous unavailability no longer provided a basis for claiming exigent circumstances. Thus, Wolf Creek appears to stand for the proposition that an exemption will not be granted where changed circumstances have vitiated a licensee's claim of exigent circumstances.

In WPPSS, the applicant wanted to commence site preparation during the advantageous dry season and to avoid additional costs for storing equipment that had been ordered. The applicant was also concerned that it could not foresee when an Atomic Safety and Licensing Board ("Licensing Board") would act on a pending request for a Limited Work Authorization (LWA). Simultaneous with its request for an exemption from the Commission, the applicant requested the Licensing Board for permission to undertake some of the same proposed activities on the basis that they were not precluded by 10 CFR 50.10(c) because those activities would not significantly affect the environment. The Licensing Board granted that request in part, thus allowing site preparation to begin. This development, plus the apparent imminence of a decision on the pending LWA request, led the Commission to reject the exemption request because time was no longer of the essence and relief from the Licensing Board was neither impossible nor highly unlikely.

Id. at 723. Thus, WPPSS, likely Wolf Creek, stands for the proposition that the Commission will not grant an exemption when changed circumstances vitiate the base for requesting that exemption. In CRBR, by comparison, relief from the Licensing Board was not imminent, and time was of the essence for the reasons discussed below.

In summary then, under Commission case law the Commission considers the totality of the circumstances in determining whether to grant an exemption, and evaluates the exigency of the circumstances in that overall determination. Exigent circumstances have been found where: (1) further delay would deny the public of currently needed benefits that would have been provided by timely completion of the facility but were delayed due to external factors, and would also result in additional otherwise avoidable costs; and (2) no alternative relief has been granted (in part) or is imminent. Moreover, the Commission will weigh the exigent circumstances offered to justify an exemption against the adverse environmental impacts associated with the proposed activities. Where the environmental impacts of the proposed activities are insignificant, but the potential adverse consequences of delay may be severe and an exemption will mitigate the effects of that delay, the case is strong for granting an exemption that will preserve the option of realizing those benefits in spite of uncertainties in the need for prompt action. For the reasons discussed below, the Commission believes that the applicant's exemption request for Clinch River satisfied the Commission's criteria for an exemption under 10 CFR 50.12.

## II. The Exigent Circumstances Warranting An Exemption For The Clinch River Breeder Reactor

The Commission's decision of August 17, 1982 described and discussed several circumstances which the Commission found persuasive as justification for request for an exemption to initiate site preparation activities for CRBR. CLI-82-\_\_\_, 16 NRC \_\_\_, Slip op. 23-30. These circumstances are (1) the potential loss of a significant part of the public's investment in CRBR; (2) the possibility of an irreversible foreclosure of the opportunity to transfer information from CRBR to the follow-on projects in the overall program for developing the liquid metal fast breeder reactor (LMFBR); and (3) the probability of jeopardizing the establishment of cooperative agreements with the nuclear industry and other countries for development of the LMFBR. The Commission also found that the national policy favoring expeditious completion of CRBR created a need for prompt relief. On reconsideration, the Commission continues to find that these circumstances, in conjunction with the Commission's finding that the environmental impacts of site preparation will be insignificant, constitute, in the totality of the circumstances, a showing of exigence sufficient for granting an exemption pursuant to 10 CFR 50.12. Moreover, recent developments reinforce the correctness of the Commission's decision. A recapitulation of the circumstances previously identified by the Commission and the effects of recent developments follows.

### A. Further Delay Would Deny The Public Of Benefits To Be Realized By Prompt Completion Of The Facility

Delay in CRBR was caused by the previous Administration's successful suspension of the licensing proceeding. The magnitude of that delay was significant because it partially desynchronized CRBR from the rest of the

LMFBR program. The Commission found that CRBR had reached such an advanced state of development that important anticipated benefits could now be realized only by prompt initiation of site preparation activities. CLI-82-23, 16 NRC \_\_\_\_, Slip op. 26-30. At the time of the Commission's decision, more than \$600 million of parts and hardware were either delivered or on order and the project design was 90% completed; further progress on the project required the initiation of site preparation activities. Under these circumstances, the Commission found that the grant of an exemption would further the public interest. Any further delay in site preparation activities would result in further delay of the safety-related construction information which could be more useful to the follow-on projects in the LMFBR program if obtained early enough to allow changes to be made in that program. Thus, further delay could irretrievably foreclose the opportunity to obtain information from CRBR early enough to be useful to the rest of the LMFBR program. Under these circumstances, time was of the essence in order to preserve the option of effective transferability of information.

The Commission also determined that the public could lose its investment in the cadre of technically trained personnel who might otherwise drift away to other more active engineering projects. Such a diffusion of talent would further delay CRBR and also delay the remainder of the LMFBR program by depriving it of the experience developed by that cadre. Here, again, prompt Commission action was necessary to avoid the adverse impacts on the public interest that could result from such potential losses.

Finally, the Commission also found that delays in CRBR could jeopardize the establishment of cooperative agreements for developing

LMFBRs in conjunction with the nuclear industry and potential foreign competitors. <sup>4/</sup> The potential for irretrievably losing such opportunities for cooperation also required prompt Commission action.

All these factors show that time was of the essence in granting an exemption, and nothing has occurred since then to significantly change that determination.

B. National Policy Favors Expeditious Completion of CRBR

The Commission found that the Congress, the President and the Department of Energy had all determined that CRBR should be completed as expeditiously as possible. These findings were based on the legislative history of the Omnibus Budget Reconciliation Act of 1981, the President's October 8, 1981 policy statement directing government agencies to proceed with breeder reactor technology, and the Department of Energy's Record of Decision for the LMFBR Program. CLI-82-23, 16 NRC \_\_\_\_, Slip op. 23-26. In particular, the Commission stated:

While this Congressional intent may not rise to the level of a mandate that compels the grant of the exemption, it is one important factor to consider that argues strongly in favor of the exemption.

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<sup>4/</sup> Recent developments lend support to the Commission's belief that international cooperation is an important element of any public interest determination. A nuclear trade publication recently reported that the Office of Management and Budget had approved the Department of Energy's budget request for \$15 million for an international cooperative design effort for a commercial-sized LMFBR, the next step in the LMFBR program. Moreover, foreign support for such cooperation was provided by two recent actions: (1) the Secretary of Energy for the United Kingdom in a policy statement to the House of Commons urged international cooperation in LMFBR development; and (2) representatives of the Versailles Summit countries at a Washington meeting at the Office of Science and Technology Policy strongly supported international cooperation in Breeder development. Inside Energy/With Federal Lands, 7 (December 6, 1982). The French and Germans have also proposed international cooperation based in part on American pursuit of CRBR. 127 Cong. Rec. H. 9736, c. 1 (Daily Edition, December 14, 1982).

CLI-82-23 at 26, Slip op. at 26.

Recent developments have reaffirmed this factor. On two recent occasions Congress has continued funding for CRBR after explicitly considering the Commission's grant of the exemption authorizing the initiation of site preparation activities. H.J. Res. 599 (October, 1982) (first continuing resolution) and H.J. Res. 630 (December, 1982) (second continuing resolution). And the Conference Report for the second continuing resolution provided that "Ongoing activities related to the NRC licensing process should be continued." 128 Cong. Rec. H. 10636, c. 3 (Daily Edition, December 20, 1982). Other provisions in the Conference Report regarding private industry's share of the costs do not affect timing of the project and neither does the limit on the construction of permanent facilities which was not due to begin before the period of the continuing resolution expires. <sup>5/</sup>

The Commission agrees with the Intervenor's position that reconsideration of the exemption should recognize the factual situation as it now exists. Post-exemption Congressional actions cannot retroactively modify the Commission's finding of exigent circumstances at the time an exemption was granted. Thus, recent Congressional actions are not relevant to whether an exemption should have been granted in August, 1982, but rather, only to whether the exemption should now be revoked. There is nothing in Congress' continuation of funding for CRBR, or in the Conference Report for the second continuing resolution, which suggests that Congress

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<sup>5/</sup> As for the erosion of Congressional support for CRBR, Intervenor presented the same argument to the Commission before it granted the exemption. The fact remains that this Congress has continued funding for CRBR and that the next Congress has not had an opportunity to express its position on this issue.

intended a revocation of the exemption or a halt to ongoing site preparation activities. Contrary to Intervenor's suggestion that Congress was reacting against accelerating CRBR, the Commission believes that Congress indicated clearly that there should be no deceleration of CRBR by revoking the exemption.

C. Alternative Relief Had Neither Been Granted Nor Was Imminent

Applicants requested an exemption because no other avenue of relief was available to permit prompt initiation of site preparation activities. Even Intervenor's acknowledged that the re-started LWA proceeding would not be concluded for several months.<sup>6/</sup> Where alternative relief is unavailable, a condition for an exemption has been met. Shearon Harris II, supra; River Bend, supra. Compare, Wolf Creek, supra, and WPPSS, supra. And the delay that would have been occasioned by waiting for a decision on an LWA was of at least the same magnitude as found to be significant in Shearon Harris II. Accordingly, the Commission found that exigent circumstances were presented by the unavailability of alternative prompt relief.

Intervenor's appear to suggest that an exemption is no longer warranted because the Licensing Board for the CRBR adjudicatory proceeding is scheduled to issue an LWA-1 decision by mid-February and, assuming that the decision is favorable, the Commission could shorten its almost three-month period for reviewing that decision before making it effective. Thus, Intervenor's believe that only a few months' delay would result from revoking the exemption. However, there has been no showing that the

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6/ Experience has borne out this prediction. The Licensing Board conducting the LWA proceeding is not expected to issue its initial decision before mid-February 1983 at the earliest, about 6 months after the Commission authorized the exemption.

