

12/3/82 DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'82 DEC -3 P:38

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
GENERAL SERVICE

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

APPLICANTS' NOTIFICATION
CONCERNING PENDING LITIGATION

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

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

D 503

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

2. 40 C.F.R. § 122.66(c)(4)(i) Agreement Case - On August 23, 1982, Intervenor filed suit in the United States District Court for the Northern District of Georgia against DOE, DOE's CRBRP Project Office, and the Environmental Protection Agency ("EPA"), alleging that an Agreement, executed by EPA and the CRBRP Project Office under 40 C.F.R. § 122.66 (c)(4)(i) to allow site preparation activities, violated NEPA and the aforementioned EPA regulation. On September 3, 1982, the District Court issued an injunction restraining DOE from undertaking site preparation until the FES Supplement is completed and the final NPDES permit is issued for CRBRP.

NRC contemplates issuance of the Final FES Supplement on November 1, 1982, and EPA contemplates issuance of the final permit on December 13, 1982. On September 7, 1982, PMC and the Federal defendants filed Notices of Appeal in the District Court and filed Motions for Expedited Appeal in the United States Court of Appeals for the Eleventh Circuit. These Motions requested that briefing be completed by September 15, 1982, oral argument be held on September 17, 1982, and that a decision be rendered on the merits by September 18, 1982. On September 8, 1982, the Eleventh Circuit issued an Order granting PMC's Motion, requiring completion of briefing on September 14, 1982, and scheduling oral argument for September 15, 1982. On September 21, 1982, the Eleventh Circuit issued a decision finding that the Agreement complied with EPA regulation 40 C.F.R. § 122.66(c)(4)(i), reversing the District Court, dissolving the injunction, and taxing costs against NRDC. Thereafter, site preparation activities commenced. On October 8, 1982, NRDC filed a request for rehearing, which was denied by the court on October 29, 1982. On October 21, 1982, the government filed a Motion to Dismiss the case in the U.S. District Court for the Northern District of Georgia. The Motion remains pending at this time.

3. LMFBR Program Statement Case - On September 22, 1982, NRDC filed a complaint, seeking declaratory and injunctive relief against DOE in the United States District Court for the District of Columbia and alleging a failure to

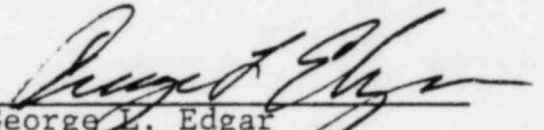
comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., with respect to DOE's LMFBR Program Environmental Statement. NRDC seeks to enjoin all LMFBR Program commercial demonstration activities, including construction of CRBRP, until completion of an adequate LMFBR Program Environmental Statement.

4. Consolidated Permit Regulation Case - On October 1, 1982, NRDC filed with the United States Court of Appeals for the District of Columbia Circuit a Motion to Expedite Consideration of Emergency Motion, an Emergency Motion to Amend the Court's Remand and to Review EPA Regulations, and a Brief on the EPA Construction Prohibition in NRDC v. EPA, No. 80-1607 (and consolidated cases). ^{*/} In this regard NRDC sought: (a) modification of the D.C. Circuit's August 6, 1982 Order which, inter alia, remanded 40 C.F.R. § 122.66(c)(4)(i) back to EPA for implementation of a June 7, 1977 settlement agreement which would eliminate the 40 C.F.R. § 122.66(c)(4)(i) prohibition on construction prior to issuance of an NPDES permit; and (b) expedited review and a decision concerning the validity of

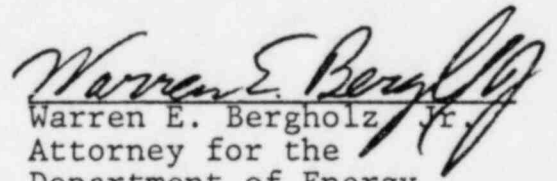
*/ These cases, which have been pending before the D.C. Circuit since the summer of 1980, involve Petitions for Review filed by numerous parties, including NRDC, in connection with EPA's promulgation of the so-called "consolidated NPDES permit regulations." See 45 Fed. Reg. 33290 (May 19, 1980). The consolidated NPDES permit regulations include 40 C.F.R. § 122.66(c)(4)(i).

EPA regulation 40 C.F.R. § 122.66(c)(4)(i) as interpreted by EPA and the United States Court of Appeals for the Eleventh Circuit. Responses to the Motions were timely filed and the matter remains pending before the court.

Respectfully submitted,



George L. Edgar
Attorney for Project
Management Corporation



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

DATED: December 3, 1982

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1962

September Term, 19⁸²

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

v.

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

Project Management Corporation,
Tennessee Valley Authority,
Intervenors

Before: MacKinnon, Mikva and Edwards, Circuit Judges

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 2 1982

GEORGE A. FISHER
CLERK

O R D E R

It is ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For the Court

George A. Fisher
Clerk

GEORGE A. FISHER
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

December 2, 1982

RE: Appeal No. 82-1962 - NRDC v. NRC & USA

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

Christine M. Smith
Opinions Clerk

Enclosure
DISTRIBUTION:

Eldon V.C. Greenberg, Esquire
Raymond N. Zagone, Esquire
Leon Silverstrom, Esquire
George L. Edgar, Esquire
James E. Fox, Esquire
E. Leo Slaggie, Esquire
Eugene R. Fidell, Esquire
S. Jacob Scherr, Esquire

WILL BE PRINTED AT A LATER DATE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 2 1982

No. 82-1962

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

GEORGE A. FISHER
CLERK

v.

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

Project Management Corporation,
Tennessee Valley Authority, Intervenor

Petition for Review of an Order of the
Nuclear Regulatory Commission

Argued November 24, 1982

Decided December 2, 1982

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

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

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

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

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

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

No. 82-1962

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

v.

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

and

Project Management Corp. and
Tennessee Valley Authority,
Intervenor-Respondents.

Petition for Review of an Order of the Nuclear Regulatory Commission

Before: MacKinnon, Mikva, and Edwards, Circuit Judges.

Opinion for the court per curiam.

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

¹10 C.F.R. §50.12 (1982) provides:

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

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

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

(footnote continued)

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

Petitioners contend that the Commission erred in refusing their request to hold an adjudicatory hearing on the section 50.12 exemption request. They assert that the Commission's consideration of DOE's exemption request was a proceeding within the meaning of section 189(a) of the

(footnote 1 continued)

(2) Whether redress of any adverse environmental impact from conduct of the proposed activities can reasonably be effected should such redress be necessary;

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

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

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

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

Atomic Energy Act, 42 U.S.C. §2239(a) (1976),³ which, inter alia, requires the Commission to hold an adjudicatory hearing in license and construction permit proceedings upon request. We agree.

Prior to the enactment of the National Environmental Policy Act, 42 U.S.C. §4331 et seq. (1976) (NEPA), the Commission consistently asserted that it had no authority under the Atomic Energy Act to consider non-safety related environmental issues associated with the licensing of nuclear power facilities. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 146 U.S. App. D.C. 33, 36, 449 F.2d 1109, 1112 (1971). At that time, for example, Commission authorization to commence site preparation activities was not required. In re Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 N.R.C. 1, 6 (1977). NEPA expanded the Commission's mandate under the Atomic Energy Act to require it to consider the environmental consequences of actions taken pursuant to the Act. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, supra, 146 U.S. App. D.C. at 36-37, 449 F.2d at 1112-13.

Accordingly, the Commission promulgated regulations prohibiting site preparation activities without Commission authorization. 10 C.F.R. §§50.10(c),⁴ 50.10(e) (1982). See In re Kansas Gas & Electric Co., supra,

³42 U.S.C. §2239(a) (1976) (emphasis added) provides:

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. . . .

⁴10 C.F.R. §50.10(c) (1982) provides:

Notwithstanding the provisions of paragraph (b) of this section, and subject to paragraphs (d) and (e) of this section, no person shall effect commencement of construction of a production or utilization

5 N.R.C. at 6. The Commission was aware that the greatest environmental impact of licensing actions often was associated with the site preparation activities which necessarily accompany the construction of a nuclear power facility. Id. at 7 n.3. The Commission also recognized that in order to comply with NEPA's mandate to consider environmental issues it was required to consider site preparation activities in its licensing proceedings.

NEPA did not alter the Commission's authority under the Atomic Energy Act, Gage v. United States Atomic Energy Comm'n, 156 U.S. App D.C. 231, 237 n.19, 479 F.2d 1214, 1220 n.19 (1973); rather, NEPA requires the Commission to consider environmental issues when it exercises that authority. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, supra. NEPA's obligations arise only in the context of, and are an integral part of the Commission's activities pursuant to the Atomic Energy Act. It is clear under the Act and Commission regulations that when the Commission authorizes an applicant to proceed with site preparation activities by either construction permit or limited work authorization pursuant to 10 C.F.R. §50.10(e) (1982), it is conducting a proceeding within the meaning of section 189(a) of the Atomic Energy Act. And we see no difference of substance when the Commission authorizes site preparation activities, which are a necessary part of construction, by granting an exemption under section 50.12. Therefore, section 189(a)

(footnote 4 continued)

facility subject to the provisions of § 51.5(a) of this chapter on a site on which the facility is to be operated until a construction permit has been issued. As used in this paragraph, the term "commencement of construction" means any clearing of land, excavation or other substantial action that would adversely affect the environment of a site

requires that the Commission upon request hold an adjudicatory hearing prior to authorizing site preparation activities.⁵

The Commission failed to hold an adjudicatory hearing on DOE's section 50.12 exemption request for Clinch River. Accordingly, the Commission will be ordered to hold an immediate hearing, strictly limited to issues relevant to the section 50.12 exemption request, and to reconsider its decision authorizing site preparation activities for Clinch River. So as to not further delay the already protracted licensing proceedings, the Commission also will be ordered to file the record of the hearing and its supplemental decision with this Court on or before February 4, 1983.

We recognize, however, that Petitioners' complaint is basically procedural. They have not proffered any substantive fact or argument to support their contention. Therefore, we will order that site preparation activities for Clinch River, as authorized by the Commission's decision of August 17, 1982, may continue subject to the further order of this Court.

ORDER

For the reasons set forth above, it is hereby

ORDERED, that the case is retained by the existing panel and the record is remanded to the Commission to hold a prompt adjudicatory hearing strictly limited to the issues presented by the 10 C.F.R. §50.12 exemption request for the Clinch River Breeder Reactor; it is further

ORDERED, that the Commission reconsider its decision, In re United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23 (Aug. 17, 1982), authorizing site preparation activities for the Clinch River Breeder Reactor, on the basis of the record developed in the above ordered adjudicatory hearing; it is further

ORDERED, that the Commission file the record, as supplemented by the above ordered adjudicatory hearing and its supplemental decision, with this Court on or before February 4, 1983; and it is further

⁵See note 3 supra.

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

Judgment accordingly.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

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

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

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

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

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

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

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

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

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

Oak Ridge Public Library
Civic Center
Oak Ridge, Tennessee 37820

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

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

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

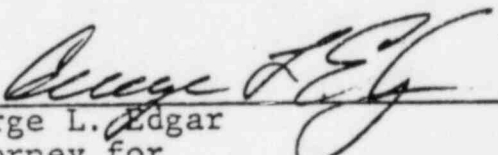
Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

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

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

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

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


George L. Edgar
Attorney for
Project Management Corporation

DATED: December 3, 1982

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