UNITED STATES OF A'ERICA

ATOMIC ENERGY COMMISSION

In the matter of	)	
	)	
THE TOLEDO EDISON COMPANY	)	Docket No. 50-346
AND THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY	)	LIFE'S REPLY BRIEF REGARDING
	)	IMPLEMENTATION OF NATIONAL
(Davis-Besse Nuclear Station	)	ENVIRONMENTAL POLICY ACT
		OF 1969

The following brief is LIFE's reply to the briefs filed by the AEC Regulatory Staff and the Applicant regarding implementation of the National Environmental Policy Act of 1969 (NEPA). It should be read together with LIFE's original brief as we have attempted not to repeat the material contained in that brief but only to address ourselves to the matters raised in the briefs of AEC Staff and Applicant. Unless otherwise noted, all forms of emphasis have been added.

The briefs of Applicant and AEC Staff attempt to convey a totally erroneous idea of NEPA's provisions and basic purpose. They have portrayed NEPA as a "disclosure" or "public information" type of statute, designed solely to satisfy public curiousity and to supply facts to the environmental control agencies. They suggest that issuing the so-called Environmental Statement is sufficient compliance with NEPA. Such a limited interpretation of the Act is not warranted by its language, its legislative history, or its interpretations by the Executive or Judiciary branches.

On the contrary, NEPA has given all federal agencies significant substantive and procedural duties. Peterson "An Analysis of Title I

of the National Environmental Policy Act of 1969, 1 ELR 50035 at 50036-7. The substantive duty (ignored in the Davis-Besse proceedings thus far) is to consider environmental factors before making a decision involving major federal action. Sections 101 (b), 102 (1), and 102 (2),

> "Sec. 102. The Congress authorizes and directs that to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall--
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

In explaining this duty, S. Rep. 296, 91st Congress, 1st Sess. 1969 on p. 14 stated:

> "S. 1075 as reported by the committee would provide all agencies and federal officials with a legislative mandate to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as will as the ongoing activities of the regular federal agencies."

Senator Henry Jackson, sponsor of NEPA and chairman of the Senate Committee on Interior and Insular Affairs which held hearings on the bill, stated at the time of Senate passage of the conference report that NEPA:

> "provides a statutory foundation to which administrators may refer to it (sic) for guidance in making decisions which find environmental values in conflict with other values.
>
> * * * *
>
> Taken together, the provisions of section 102 directs any Federal Agency which takes action that it must take into account environmental management and environmental quality considerations."
>
> 115 Congress Rec. 27451 (daily ed. Dec. 20, 1969)

In addition to the substantive duty, NEPA imposes procedural duties in sections 102 (2) (C) and (D) including the preparation of a detailed environmental statement. Performance of these procedures is not a substitute for compliance with the substantive duty.

> "It is important to note that Congress designed the "action-forcing" procedures to force federal officials and agencies to implement the national environmental policy, not to enable them to evade implementation. Thus, the procedures do not limit the substantive duty of federal officials and agencies to implement the policy.
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> * * *
>
> Otherwise an agency could defeat Congressional intent by complying with all the procedures, but ignoring the environmental policy when it made decisions. For example, Congress clearly did not intend that preparation of a detailed statement under Section 102 (2) (C) would exhaust an agency's duty under NEPA. If adverse environmental effects are noted in the statement, the agency must do more before it can take action."
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> Peterson, 1 ELR 50035 at 5540.

Unfortunately, this is exactly what has happened in the present case: the AEC has evaded implementation of the substantive duty (to consider environmental consequences in making a decision on whether to issue the construction permit) by issuing a purported detailed environmental statement--available to the public and to other agencies but not subject to analysis, discussion, or use in the decisionmaking process.

Judicial interpretations of NEPA as well as statutory language and history show that the Act requires use, not mere compilation, of environmental data. To the cases cited

on pp. 6-7 of our earlier brief we could add the recent case of Environmental Defense Fund Inc. v U.S. Army Corps of Engineers. (D.D.C. Jan. 15. 1971) in which the court issued a preliminary injunction to halt construction of the Cross-Florida Barge Canal (a project authorized in 1942 and for which construction began in 1964). All of these cases invalidated agency action for failure to comply with NEPA. They did not happen to involve agency action based on the record of a public hearing, but the cases clearly establish the principle that an agency must include environmental factors in whatever decisionmaking process that agency happens to follow.

> "Total failure to consider an important environmental issue or inadequate consideration of such an issue should be sufficient grounds to find noncompliance with NEPA, because, had the issue been adequately considered, the decision might be different. In legal terminology, if a federal administrator fails to consider adequately the environmental impact of proposed action, the decision to take such action would be arbitrary and capricious, because of the lack of substantial evidence that adverse environmental effects would not occur or could not be prevented." Peterson, 1 ELR 50035 at 50038-9.

Since the Courts will enforce NEPA, the absurd result of the position taken by AEC and Applicant is that new hearings on environmental issues will be ordered by a court. Because the AEC refuses to permit the sufficiency of a detailed environmental statement to be examined at these hearings, its sufficiency will have to be tested in Court, as was done in Wilderness Society v Hickel, 1 Envir. Rptr. 1335 (D.D.C. 1970). The artificiality of excluding non-radiological environmental factors from these hearings is revealed by the fact that the Applicant itself on page 10 of its brief refers to a document

which is part of the detailed statement (a document which this Board cannot consult or consider in its deliberations since it is not on the record!).

In the AEC, a decision on the issuance of a construction permit is made on the basis of a record developed at a public hearing. Since this is the means by which the agency decision is made, environmental facts must be on the record and open to discussion or challenge at the hearing. Otherwise the agency decision makers (like those in the Davis-Besse case) can not take environmental consequences into account; and the permit, if issued, will be invalid.

NEPA requires the detailed statement to accompany proposed action through existing agency review processes. Section 102 (2)(C). NEPA did not specifically name each review process, because every agency has its own version decision making procedures. If a public hearing is part of the review process, however, the detailed statement must be part of that hearing. This was clearly the intent of NEPA as is indicated in a comment by Council on Environmental Quality Chairman, Russell Train in a letter to Congressman Dingell, dated November 19, 1970 (the text of which is published in 1 ELR 10008.) Speaking of the time relationship between public availability and criticism of a detailed environmental statement and the agency's decision and action, Chairman Train said:

> "...(1)it is clear that completion of the final detailed statement must precede the ultimate decision and action and (2) the final detailed statement should 'accompany the proposal through the agency review processes.' It should be borne in mind that the great majority of environmental statements deal with activities, appropriations, or legislation with respect to which full public hearings

> in advance of decision are already required presently by either Congressional, statutory, or administrative procedure."

Applicant notes that "detailed statement" replaced the word "finding" in the final version of Section 102 (2)(C). Obviously it would have been premature to require a "finding" on environmental impact at the stage when "proposals for legislation and other major federal actions" are being made. Congress properly changed the word "finding" because the environmental study was intended to precede discussion of all factors (including environment), findings on all such factors, and decision by the agency. As Senator Muskie stated, the language,

> "provides that environmental impact be discussed as part of ... any decision to commence a major activity."
> 115 Cong. Rec. S. 12111 (daily ed., October 8, 1969)

The same part of NEPA contains other significant words indicating the importance of the detailed statement as evidence to be weighed along with all other evidence before an agency decision is reached.

> "The analytical character of the detailed statement is emphasized by the NEPA requirement that the statement be prepared by a 'responsible official.' Throughout the Act, other responsibilities are delegated to the 'Federal government' or to 'Federal agencies.' The requirement that a 'responsible official' prepare the detailed statement emphasizes the role differentiation between preparation of the statement and making the decision--the former is the responsibility of an identifiable person, while the latter is the responsibility of the agency as a whole."
> Peterson, 1 ELR 50035 at 50043.

On pages 15-16 of its brief Applicant again misinterprets NEPA by saying that the purpose of the detailed statement is "to inform the environmental control agencies and place them in a position to take any action which they may deem necessary." This analysis is obviously incorrect since the statute calls for consultation with and comments from environmental control agencies "prior to making any detailed statement"! Section 102 (2)(C). The comments are then gathered together in the detailed statement which is meant to help the agency make a wise decision from an environmental standpoint.

It is important to remember that NEPA is addressed to environmental-impact agencies, like the AEC. It places specific responsibilities on those agencies. The duty of the environmental control agencies is to supervise the compliance. This does not mean that the environmental impact agencies can ignore the law any more than an individual citizen is justified in stealing property on the theory that it is the duty of the police to catch him! The legislative history emphasizes this distinction.

> "Many existing agencies such as the National Park Service, (others listed) already have important responsibilities in the area of environmental control. The provision of Section 102 (as well as 103) are not designed to result in any change in the manner in which they carry out their environmental protection authority. This provision is, however, clearly designed to assure consideration of environmental matters by all agencies in their planning and decision-making--especially those agencies who now have little or no legislative authority to take environmental considerations into accoutn."
> 115 Cong. Rec. S.17453 (daily ed. Dec. 20, 1969)

A colloquy between Senators Boggs and Muskie, a portion of which Applicant quotes on page 15 of its brief, also emphasizes the distinction between the duty of the environmental impact agency and that of the environmental control agency. It is up to the environmental impact agency--after consultation and full consideration--to make decisions that are compatible with national environmental policy. Of course, the environmental control agencies will be continually checking (what Muskie calls "policing") to ensure that no environmental damage is actually done. 115 Cong. Rec. S. 17460 (daily ed. Dec. 20, 1969).

Since NEPA mandates consideration of environmental factors in the decisionmaking process and since nuclear facility construction permits are granted on the basis of the record of a public hearing--the AEC is violating NEPA until it permits consideration of environmental factors at such a hearing. Postponement of compliance was not authorized by the language of the Act, or envisioned in the legislative history. It directly contradicts the May 12, 1970 Council on Environmental Quality Interim Guidelines and the March 5, 1970 Executive Order 11514 (which had "specific foundation in Congressional action", unlike the Executive Order in the Manhattan-Bronx Postal Union case cited by the Applicant on p. 8 of their brief.) Administrative convenience certainly cannot justify the delay when such expensive and irrevocable long-term commitments as nuclear power plants are involved.

The postponement of full compliance and the interim

operation under proposed Appendix D clearly violated NEPA. NEPA is "discretionary" only in the sense that it does not require implementation if(and only to the extent that) an agency is precluded from doing so by another statute. The question of discretion was specifically answered in the final report on the legislation at the time of Senate passage of the Conference Report:

> "(E)ach agency...shall comply... unless the existing law applicable to such agency's operations does not make compliance possible." 115 Cong. Rec. S. 17453 (daily Ed. Dec. 20, 1969)

See also, 115 Cong. Rec. 57815 (daily ed. July 1o, 1969); 115 Cong. Rec. S. 12142-43 (daily ed. Oct. 8, 1969); 115 Cong. Rec. H 12634-35 (daily ed. Dec. 17, 1969). Ely v Velde, cited on page 10 of Applicant's brief, concerned the Safe Streets Act which absolutely requires the Law Enforcement Administration Agency to make grants to states that meet very specific requirements. The L.E.A.A. has no discretion to deny a grant if the requirements are performed. The Court resolved a conflict between that Act and NEPA by holding that Safe Streets Act prevailed because it (the "existing law applicable to (L.E.A.A.) operations") did not make compliance with NEPA possible. In the present case however, the AEC is not compelled by any statute to grant a construction permit. The Atomic Energy Act gives it discretion to grant one if full review reveals that the proposed plant will be beneficial and not inimical to public health and safety. There is no conflict between this discretionary authority and the NEPA duty to consider environmental consequences before making an decision.

The foregoing discussion demonstrates the inadequacy of attempts by AEC staff and by Applicant to justify the refusal to consider environmental consequences in the Davis-Besse construction permit hearings. Statutory language, legislative history, judicial and executive interpretations of NEPA all show that reference to the environment has been illegally prohibited. There is no excuse for it in this case where hearings began almost a full year after NEPA went into effect. For the reasons stated in both of our briefs, therefore, we urge this Board to conclude that postponement of full implementation of NEPA under Appendix D violated the Statute; that the interim procedures of proposed Appendix D were an unreasonable exercise of discretion and that there is no proof that the interim procedures were actually complied with in the present case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of February, 1971, forwarded copies of the foregoing to Gerald Charnoff, Esq., Attorney for Applicant, at Shaw, Pitman, Potts, Trowbridge, Madden, 910 17th Street, N. W., Washington, D. C., 20006, to Thomas S. Englehardt of the AEC Regulatory Staff, Washington D. C., 20545, to Walter T. Skallerup, Jr., Chairman, Atomic Safety and Licensing Board, Washington D. C., to Dr. Charles Winters, Atomic Safety and Licensing Board, Washington, D. C., and to Mr. Stanley Robinson, Jr., Chief Public Proceeding Branch, Atomic Energy Commission, Washington, D. C., by hand delivery to Wilson Snyder, Esq., Attorney for Toledo Edison Company, Fuller, Seney, Henry & Hodge, 800 Owens-Illinois Building, Toledo, Ohio; and mailed copies to Russell Baron, Esq., Attorney for the Coalition for Safe Nuclear Power at Brannon, Ticktin, Baron, and Manzini, Cleveland, Ohio; to Glenn Lau, RR. 1, Box 186, Oak Harbor, Ohio, and to Dr. Walter Jordon, Oak Ridge National Laboratory, P. O. Box X, Oak Ridge, Tennessee, 37830.
