

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Thomas S. Moore, Chairman
Dr. W. Reed Johnson
Gary J. Edles

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OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the Matter of)
)
NUCLEAR FUEL SERVICES, INC.)
)
and)
)
NEW YORK STATE ENERGY RESEARCH)
AND DEVELOPMENT AUTHORITY)
(Western New York Nuclear Service)
Center))
)
)

Docket No. 50-201 OLA

DEPARTMENT OF ENERGY BRIEF IN OPPOSITION TO DR. BROSS'
APPEAL OF THE ASLB MEMORANDUM AND ORDER DATED APRIL 30, 1982

On April 30, 1982, the Atomic Safety and Licensing Board issued a Memorandum and Order in this proceeding which, inter alia, denied Dr. Irwin D.J. Bross' request for a hearing on Changes No. 31 and 32 to License No. CSF-1 on the ground that the NRC lacks jurisdiction to adjudicate the issues Dr. Bross sought to litigate. Dr. Bross appealed that decision to the Atomic Safety and Licensing Appeal Board (Appeal Board) by Memorandum and Notice of Appeal and Supporting Brief dated May 7, 1982, with respect to his request for a hearing on Change No. 32. Pursuant to 10 C.F.R. §2.715(d), the Department of Energy (DOE) filed a Motion for Leave to File a Brief Amicus Curiae. The motion was granted on May 25, 1982, and the DOE hereby files this brief in opposition to Dr. Bross's appeal.

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I. STATEMENT OF THE ISSUE

Whether the Nuclear Regulatory Commission (NRC) has jurisdiction to review DOE's conduct of the West Valley Demonstration Project in a formal adjudicatory proceeding.

II. STATEMENT OF FACTS

The West Valley Demonstration Project Act (West Valley Act), Pub. L. No. 96-368, authorizes the DOE to carry out a high-level radioactive waste management demonstration project at the Western New York Service Center in West Valley, New York (West Valley Site). 1/ The purpose of this research and development project is to demonstrate solidification techniques that can be used for preparing high-level radioactive waste for disposal. 2/

As required by section 2(b)(3)(D) of the West Valley Act, and consistent with the National Environmental Policy Act (NEPA), the DOE prepared a Draft Environmental Impact Statement (EIS) on the project. 3/ The Draft EIS was distributed on July 31, 1981, and public hearings on the Draft EIS and on the project were held at the West Valley Central School on September 26, 1981. 4/

1/ Sec. 2(a), West Valley Act (42 U.S.C.A. §2021a note).

2/ Id.

3/ Draft Environmental Impact Statement on Long-Term Management of Liquid High-Level Radioactive Wastes Stored at the Western New York Nuclear Service Center, West Valley, DOE/EIS-0081D (July, 1981).

4/ Dr. Bross received a copy of the draft EIS which included an announcement of the September 26, 1981 public hearings. He submitted written comments to DOE after the hearing. Dr. Bross' substantive comments are being considered in the preparation of the Final EIS on the project which is to be issued by DOE.

On September 30, 1981, the NRC issued Change No. 31 to License No. CSF-1. The Amendment authorized the co-licensees, New York State Energy Research and Development Agency (NYSERDA) and Nuclear Fuel Services, Inc. (NFS), as their respective interests under the license appear, to transfer possession of the NRC licensed portions of the West Valley Site to DOE for the purpose of carrying out the demonstration project.

NFS opposed the implementation of Change No. 31 and filed a Motion to Postpone the Effectiveness of the License Amendment and a Request for Hearing on October 13, 1981. Dr. Bross also requested a hearing with respect to Change No. 31 in a letter to the Secretary of the NRC, dated October 16, 1981.

On November 6, 1981, The Commission's Order and Notice of Hearing (CLI-81-29) instructed the Chairman of the Atomic Safety and Licensing Board Panel to --

"...establish a Licensing Board to conduct an adjudicatory hearing in accordance with 10 CFR Part 2, Subpart G pursuant to the request of NFS, and to review Dr. Bross' request for a hearing." (emphasis added).

Subsequently, in order to resolve matters in litigation, ^{5/} NYSERDA and NFS negotiated a procedural agreement, and drafted a Settlement Agreement that was submitted to the U.S. District Court for the Western District of New York. As a result of the

fn. continued

The September 26 public hearings also were utilized to inform residents of the area in which the Center is located of the activities proposed to be undertaken under the project and to receive their comments on the project. (West Valley Act, Section 2(b)(1)). Dr. Bross did not comment at the hearings.

^{5/} New York State Energy Research and Development Authority v. Nuclear Fuel Services, Inc., and Getty Oil Co., Civ. No. 81-18E (W.D.N.Y.); Nuclear Fuel Services, Inc. v. New York State Energy Research and Development Authority, Civ. No. 81-683E (W.D.N.Y.).

negotiated agreement, NFS, with a letter in support from NYSERDA, submitted an application for a license amendment to the NRC on February 1, 1982, which would terminate NFS' authority and responsibility as a licensee under License No. CSF-1 upon the happening of three events. 6/ On February 11, 1982, in response to the NFS application and upon a finding that the amendment involved no significant hazards consideration, the NRC Office of Nuclear Material Safety and Safeguards issued Change No. 32 to License No. CSF-1, providing for the requested termination of NFS' authority and responsibility as a licensee upon the happening of the three events.

In a letter to the Licensing Board, dated February 16, 1982, Dr. Bross requested a hearing on Change No. 32 "together with or separately from the hearing" on Change No. 31.

In furtherance of the West Valley Act, NYSERDA and NFS transferred possession of the West Valley site to DOE on February 25, 1982, pursuant to Change No. 31. 7/

6/ The three events are:

(1) acceptance of surrender of the West Valley facility by NYSERDA from NFS; (2) DOE's assumption of exclusive possession of the facility; and (3) the Settlement Date of a Settlement Agreement, Stipulation and Order in Civil Actions No. 81-18E and 81-683E in the U.S. District Court for the western District of New York. Events (1) and (2) have occurred; Event (3) has not yet occurred.

7/ In connection with the implementation of the West Valley Project, DOE has extended a nuclear hazards indemnity to West Valley Nuclear Services Co., its Operating Contractor, with respect to its West Valley Demonstration Project contract activities, pursuant to its authority under section 170d of the Atomic Energy Act of 1954, as amended. We note this for the Appeal Board's information in view of Dr. Bross' assertion that the public is not protected against injury or loss due to a nuclear incident while the DOE is in possession of the West Valley Site.

The Licensing Board in its Order granted NFS's request to withdraw its demand for a hearing on Change No. 31, and found that the Board lacked jurisdiction to consider Dr. Bross' claims regarding DOE's conduct of the West Valley Demonstration Project. 8/ The Board, therefore, denied Dr. Bross' requests for hearings on Changes No. 31 and 32. 9/ Dr. Bross appealed from that Order on May 7, 1982 with respect to his request for a hearing on Change No. 32. 10/

III. ARGUMENT

A. The Licensing Board Decision that the NRC has No Jurisdiction to Review DOE's Conduct of the West Valley Demonstration Project in a Formal Adjudicatory Proceeding is Correct

Dr. Bross' appeal contends that before Change No. 32 takes effect, NRC has jurisdiction to hold a "hearing on any issue involving the public health and safety of West Valley. This includes (if NRC so decides) the consideration of the fitness of DOE to have absolute control of health and safety aspects of a very tricky clean-up operation". 11/

As stated in the Licensing Board order, the NRC lacks jurisdiction to conduct formal adjudicatory hearings regarding the conduct by DOE of the West Valley Demonstration Project.

8/ Licensing Board Order at 2.

9/ Id. at 22.

10/ Supporting Brief for Appeal of Order of April 30, 1982. (Bross Supporting Brief).

11/ Bross Supporting Brief at 4.

This conclusion is mandated by the plain language of the West Valley Act. The West Valley Act sets forth with specificity the relationship between DOE and NRC required by Congress for the conduct of the West Valley Demonstration Project.

12/ This relationship does not include hearings. In fact, the Act specifically excludes such formal procedures from the DOE/NRC relationship. Section 2(c) of the West Valley Act provides that review and consultation with the NRC with respect to the project--

"...shall not include nor require formal procedures or actions by the Commission pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, or any other law."

The above proviso was added to section 2(c) to--

"...[make] it clear that the review and consultation by the Nuclear Regulatory Commission will be performed on an informal basis and not require formal procedures or actions by the Commissioners themselves. This approach is in full keeping with the long-standing tradition of informal review by the nuclear regulators of Federal Government nuclear activities not intended to result in commercial activity." 13/

Thus, by its explicit terms the West Valley Act precludes the hearing Dr. Bross requested. 14/ Accordingly, this Appeal Board must affirm the decision of the Licensing Board.

12/ Sec. 2(c), West Valley Act.

13/ 126 CONG. REC. S12762 (daily ed. June 12, 1980).

14/ The Licensing Board Order, at pages 15-21, includes an excellent summary of the legislative history of the West Valley Act in support of this conclusion. Although the Department does not necessarily agree with all that the Licensing Board has said in its Order, the Board's decision is correct -- NRC does not have jurisdiction to conduct the hearings requested by Dr. Bross.

B. Denial of the Request for a Hearing Does Not Foreclose Consideration of the Issues Raised by Dr. Bross

In his hearing request, Dr. Bross attached the comments he had submitted to DOE regarding DOE's Draft EIS focusing primarily on technical issues involved in the conduct of the project. ^{15/} Those comments raise almost all the issues Dr. Bross seeks to have his alleged concerns addressed in two totally separate forums. In effect, he is asking the NRC, in a formal adjudicatory proceeding, to substitute its technical judgment for that of DOE regarding the conduct of this research and development demonstration project. Such an NRC action clearly would be inappropriate.

The conduct of the West Valley Project necessarily involves many highly technical research and development decisions. The framers of the West Valley Act recognized this fact, and recognized the need for public input into the DOE decision-making process. ^{16/} The NEPA process, the required public hearings, and the public notice provisions under the West Valley Act clearly are the appropriate, Congressionally approved, methods for public involvement in the decision-making process. DOE has received Dr. Bross' comments and is considering them in developing its Final EIS. The EIS then will be a major input to DOE's decisions

^{15/} See, fn. 4. supra.

^{16/} See, sections 2(b)(1) and 2(b)(3)(D) of the West Valley Act.

regarding the course of the West Valley Project. Through this process, Dr. Bross has had, and will have, his opportunity to air and have considered his concerns about the conduct of the West Valley Project. The Licensing Board's denial of Dr. Bross' request for a hearing has not foreclosed consideration of the concerns Dr. Bross has raised; rather, it permits these concerns to be considered in the manner Congress intended, by the agency responsible for conducting the Project.


IV. CONCLUSION

For the reasons stated above, the DOE urges that the Appeal Board affirm the Licensing Board Order.

Respectfully submitted,

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Dated June 3, 1982

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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NUCLEAR FUEL SERVICES, INC.)
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NEW YORK STATE ENERGY RESEARCH)
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(Western New York Nuclear)
Service Center))

CERTIFICATE OF SERVICE

I hereby certify that copies of the DEPARTMENT OF ENERGY BRIEF IN OPPOSITION TO DR. BROSS' APPEAL OF THE ASLB MEMORANDUM AND ORDER DATED APRIL 30, 1982, in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, postage prepaid, this 3rd day of June 1982.

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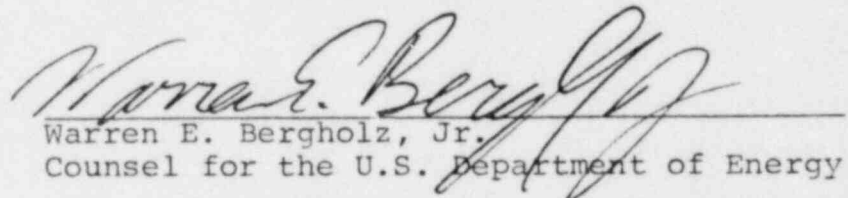
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