

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)
)
Philadelphia Electric Company) Docket Nos. 50-35206
) 50-35306
(Limerick Generating Station,)
Units 1 and 2))

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USNRC

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OFFICE OF SECRETARY
COMMISSION & BOARD
WASHINGTON, D.C.

APPLICANT'S PETITION FOR REVIEW OF ALAB-785

Summary of the Decision Below

Applicant Philadelphia Electric Company ("Applicant") petitions the Commission to exercise its authority under 10 C.F.R. §2.786 to review important issues of law and Commission policy arising from ALAB-785, which has created an unwarranted intrusion by the NRC into the fundamental responsibilities of three federal agencies in conducting their separate reviews and issuing separate permits and approvals regarding the Limerick Generating Station ("Limerick").

These questions arise in the context of ALAB-785,^{1/} which reviewed and, with two exceptions discussed below, affirmed a partial initial decision ("PID") of the Atomic Safety and Licensing Board.^{2/}

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC _____ (September 26, 1984).

2/ The PID decided favorably to Applicant two contentions related to environmental impacts associated with the supplementary cooling water system for Limerick. Limerick, supra, LBP-83-11, 17 NRC 413 (1983). Following a hearing, the Licensing Board ruled that withdrawal of water from the Delaware River at Point Pleasant, Pennsylvania to be used as cooling water for Limerick would have no adverse environmental impact. The issues for which Commission review is sought also relate to the supplementary cooling water system.

Although it agreed with the Licensing Board's factual findings and sustained most of its legal conclusions, the Appeal Board held that the Licensing Board erred in rejecting two contentions proposed by intervenor Del-Aware Unlimited, Inc. ("Del-Aware"): (1) the impact of withdrawals of water at Point Pleasant for Limerick on the salinity of the Delaware River,^{3/} and (2) the impact of the Point Pleasant pumping station on the Point Pleasant Historic District.^{4/}

The Appeal Board, rather than exercising its authority to determine whether these two points constituted only harmless error because they would not affect the NEPA cost/benefit balance, remanded the proceeding to the Licensing Board for the purpose of determining whether more hearings should be held.

Legal Error Assigned

The Appeal Board committed serious legal error on two points by creating a conflict between the NRC and sister federal agencies in the performance of their respective statutory duties. The first point pertains to responsibilities assigned by statute to the Delaware River Basin Commission ("DRBC") and the United States Army Corps of Engineers ("Corps of Engineers"), which have been directly involved with the water diversion project at Point Pleasant in their separate reviews of the

^{3/} ALAB-785 at 26-33.

^{4/} Id. at 42-45. The Appeal Board afforded Del-Aware an opportunity to reformulate its contentions in light of the specific information included in the Limerick FES. ALAB-785 at 32, 45. In an Order dated October 10, 1984, the Appeal Board denied Del-Aware's motion for reconsideration of ALAB-785, which sought to expand the salinity issue and permit litigation of the alternatives issue.

project.^{5/} The second point involves duties assigned by statute to the the Advisory Council on Historic Preservation.

A third point relates to the Appeal Board's determination that the proceeding must be remanded to provide the intervenor with the opportunity to seek another hearing. Assuming arguendo that the Licensing Board in fact erred in its rulings on the two contentions noted above, the Appeal Board should have determined whether litigation on these points could have affected the ultimate NEPA cost/benefit analysis. It seems clear from the Appeal Board's own references to the reviews made by DRBC, the Corps of Engineers, the Advisory Council on Historic Preservation and the regulatory Staff itself that these impacts, even construed most favorably to the intervenors, would be de minimis.

1. Salinity Impacts. Essentially, the Appeal Board failed to appreciate the preemptive effect of Section 15.1(s)1 of the DRBC Compact when, as here, the federal representative to DRBC voted to approve its action, i.e., approve the Point Pleasant project. The Licensing Board correctly held that matters which are inextricably related to "the operative allocation decision" by DRBC cannot be reviewed by the NRC because of the preemptive effect of the federal representative's concurrence.^{6/} Thus, the Appeal Board failed to follow the Licensing Board's valid distinction between the NRC's customary NEPA review of "all

^{5/} The DRBC issued Docket No. D-79-52 CP on February 18, 1981, granting its final approval to the Point Pleasant project, which authorized the withdrawal of approximately 46 million gallons per day for Limerick. On October 25, 1982, the Corps of Engineers issued a "dredge and fill" permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, and Section 404 of the Clean Water Act, 33 U.S.C. §1344.

^{6/} Limerick, supra, LBP-82-43A, 15 NRC 1423, 1484-85 (1982).

environmental questions arising from the diversion" and the Compact's preclusion of review by other federal agencies of those specific impacts which would necessarily involve the agency's "reevaluating the DRBC decision to allocate water to the Limerick facility operating in the river follower method."^{7/} Since "any salinity increase would be attributable to the total water withdrawal, not just withdrawal for Limerick," salinity impacts are necessarily "caused by the DRBC allocation decision," which the NRC is preempted from reviewing by virtue of the federal representative's favorable vote.

Acting under an intergovernmental Compact approved by Congress, DRBC is responsible for allocating Delaware River Basin water resources, and, following a review of the project which began in 1966, granted final approval for the project in 1981.^{8/} The Appeal Board agreed that Section 15.1(s)1 of the Compact precludes the NRC from reevaluating

^{7/} Id. at 1469.

^{8/} See ALAB-785 at 4-7. As noted by the Appeal Board, DRBC issued an environmental statement on the project in 1973 and subsequently performed another environmental review, resulting in an environmental assessment with a negative declaration in August 1980. In granting approval to the Point Pleasant diversion project, DRBC carefully considered, as the Appeal Board implicitly acknowledged, the potential impact that the withdrawal would have upon the downstream salinity gradient, but found that it would be negligible. See Applicant's Brief in Opposition to Exceptions by Del-Aware at 19 r.43 (October 3, 1983).

The fact that DRBC fully integrated its consideration of water quality issues with its allocation of water for Limerick is confirmed by reference to its approval of the allocation in DRBC Docket No. D-69-210 CP (March 29, 1973) at page 6, where DRBC established the basic requirement that withdrawals at Point Pleasant may not reduce the flow as measured at the Trenton gage below 3,000 cfs, absent release of an equivalent compensating flow from an upstream reservoir. DRBC imposed the same condition in granting final approval to the project in Docket No. D-79-52 CP at pages 5-6 (February 18, 1981).

DRBC's decision to allocate water for Limerick,^{9/} or from enlarging the allocation,^{10/} and that "the salinity of the water is a function of the total amount withdrawn."^{11/} Thus, the Licensing Board held that DRBC's analysis of salinity impacts was integral to its allocation of Delaware River water for Limerick, and that reevaluation by another federal agency and reduction of the volume of water permitted to be withdrawn would impermissibly interfere with DRBC's allocation function and violate Section 15.1(s)1 of the Compact because the DRBC federal representative voted in favor of the allocation decision.

The Appeal Board, however, conceived that the NRC could, in effect, reduce the allocation if it determined "that the amount of water that must be withdrawn from the Delaware River to permit safe operation of Limerick would nonetheless adversely affect the quality of the water to an unwarranted degree."^{12/} The Appeal Board held that, because the DRBC allocation for Limerick was "permissive, not mandatory,"^{13/} the

^{9/} ALAB-785 at 28.

^{10/} Id. at 29.

^{11/} Id.

^{12/} Id. There is no basis in the record for the apparent conclusion by the Appeal Board that any water withdrawn at Point Pleasant is required for the "safe operation" of Limerick. Water withdrawn from the Delaware River will supplement makeup water for Limerick's natural draft cooling towers withdrawn from the Schuylkill River and Perkiomen Creek, and will therefore only serve to optimize Station operations. See Limerick SER §2.4.11.1. The emergency cooling water supply, i.e., the ultimate heat sink for Limerick, consists of a nearby spray pond. SER §2.4.11.2.

^{13/} ALAB-785 at 30. The Appeal Board erred in stating at that point that Applicant is not required to make any withdrawals. Under the terms of the allocation, Applicant must withdraw and pump Delaware water into the East Branch Perkiomen Creek sufficient to maintain a

(Footnote Continued)

Commission could take action which would not substantially conflict with the DRBC allocation and thus violate Section 15.1(s)1 of its Compact.^{14/} The Appeal Board failed to appreciate, however, the Licensing Board's understanding that the plenary authority of the DRBC to make allocations must be construed in pari materia with the preemptive effect of the federal representative's concurrence in the allocation, which commits the allocation and integrally related matters (i.e., salinity impacts) to the discretion of DRBC.^{15/} As the federal district court stated in reviewing DRBC's actions:

The record shows constant and thorough study and consideration of the salinity problems of the Delaware River. Although experts, as well as laymen, may disagree as to a "safe" rate of flow, DRBC is the agency charged with this decision, and it, not this court, has the necessary expertise to make that determination. It is clear from the record that DRBC was well aware of the problem, carefully considered it, and had, through various

(Footnote Continued)

flow of 27 cfs during natural low flow periods and to maintain a flow of 10 cfs at other times. See Docket No. D-79-52 CP at page 6 (February 18, 1981). The DRBC stated that these enhanced flows were "for the protection of aquatic life in Perkiomen Creek and its East Branch." Id. at 5. This requirement further demonstrates that DRBC's allocation of water is integral to its assessment of environmental impacts as related to flow levels.

14/ Id. at 30-31.

15/ Even if salinity levels in the downstream reaches of the Delaware were a problem, the situation could not be equitably or practically addressed by focusing on withdrawals for Limerick. Applicant is only one of many users along the Delaware with a DRBC allocation. It is the DRBC, not any other agency, which has the experience, expertise and responsibility in allocating these water resources and in determining whether competing uses best serve the public interest, taking associated environmental impacts into account. Accordingly, whether withdrawals from the Delaware adversely affect salinity levels must be evaluated by DRBC on the basis of all users, not just Applicant. Only DRBC can perform this overview function. In any event, the concurrence of the federal representative under Section 15.1(s)1 of the Compact preempts NRC evaluation.

studies and documents, been provided with voluminous information and data, and was fully informed.^{16/}

DRBC determined that Applicant's use of its full allocation will not result in adverse salinity impacts. The Appeal Board's logic, that a reduction of water withdrawal by the NRC would not conflict with DRBC's decision because PECO is not required to withdraw its full allocation, is incongruous. All water allocations are only entitlements. To say that there is no conflict if the entitlement is conditioned or reduced by another federal agency is to render the allocation illusory. Reductio ad absurdum, since an NRC license to operate a power reactor is also "permissive, not mandatory," the Appeal Board's logic would permit the DRBC to reduce the power level of a facility licensed by the NRC.

2. Historic District Impacts. Similarly, the Appeal Board seriously erred in ignoring consultation between the Corps of Engineers and Advisory Council on Historic Preservation and the adoption of a Memorandum of Agreement defining all measures necessary to eliminate or mitigate possibly adverse impacts to the Point Pleasant Historic District. Although it acknowledged that the Corps of Engineers has complied with Section 106 of the National Historic Preservation Act, the Appeal Board inexplicably held that the NRC must nonetheless provide the opportunity to litigate the same issues in a hearing. No legal basis exists for requiring this redundancy. Moreover, allowance of this litigation could

^{16/} Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 42 n.25 (E.D. Pa. 1981), aff'd mem., 681 F.2d 805 (3d Cir. 1982).

interfere or conflict with the terms of the Agreement already approved by the Advisory Council. As the Limerick FES states:

With regard to the Point Pleasant pumping station, a memorandum of agreement was signed by the U.S. Army Corps of Engineers, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation. This agreement concerns the permit application by the Neshaminy Water Resources Authority for the station and stipulates the conditions the Corps was required to have included in its permit so that adverse construction and operation impacts of the station on the properties listed or eligible for listing in the National Register may be avoided, minimized, or mitigated.^{17/}

The federal courts have reviewed the actions of the Corps of Engineers in discharging its statutory responsibilities under the National Historic Preservation Act, and have determined that the Memorandum of Agreement satisfies all such obligations.^{18/} The Appeal Board gave no reason as to why the conditions adopted under the existing Memorandum of Agreement, approved by the Advisory Council on Historic Preservation, would not be binding on the NRC if it chose to evaluate impacts on the Historic District independently.^{19/} Although it referred to the federal district court decision on this point, the Appeal Board

^{17/} Limerick FES at §5.7.

^{18/} Del-Aware Unlimited, Inc. v. Baldwin, No. 82-5115, Tr. 1454 (E.D. Pa. December 15, 1982), aff'd, 720 F.2d 661 (3d Cir. 1983), cert. denied, 104 S. Ct. 1274 (1984). Thus, the court expressly determined that "the language of the regulation is that the entering into a memorandum of agreement satisfies the obligations of the Advisory Council," and that, therefore, "[t]he Advisory Council has satisfied the requirements of the regulations." Id. at Tr. 1449-50.

^{19/} The Appeal Board agreed that the NRC Staff could properly rely upon the reviews of other agencies, but did not explain how the NRC could impose different conditions regarding such impacts than those already in place under the Agreement. ALAB-785 at 45 n.110.

apparently did not accept the Memorandum of Agreement as dispositive of all of the considerations raised by the various participants before the Advisory Council. The Appeal Board's decision would permit the imposition of new and different conditions by the NRC for the Historic District, which would usurp the function of the Advisory Council. Yet, that is the result apparently authorized by ALAB-785.

2. No Need for Hearings. Even if the salinity and Historic District contentions should have been admitted when proposed in 1981, their denial constitutes harmless error at this point in the proceeding, considering the state of the record reflected in the Limerick FES, including the findings of other agencies. As the Appeal Board acknowledged, the Staff has adequately treated each of these subjects in the FES. The Commission has repeatedly recognized that earlier omissions in the NEPA review may be corrected in the hearing process.^{20/} Given the discrete and limited concerns involved, it is virtually impossible that either impact would affect the cost/benefit analysis for Limerick.^{21/} Moreover, as the Appeal Board acknowledged, these issues had been heard before other agencies. Del-Aware, in particular, unsuccessfully challenged the actions of these agencies on salinity and Historic District

^{20/} E.g., Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 47 (1983).

^{21/} NEPA does not require hearings. Richland Park Homeowners Association, Inc. v. Pierce, 671 F.2d 935, 943 (5th Cir. 1982). Further, NEPA requires an agency to consider only the significant aspects of probable environmental impacts. E.g., Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916, 933 (N.D. Miss. 1972), aff'd, 492 F.2d 1123 (5th Cir. 1974). Thus, the NRC is not statutorily required to offer a hearing on salinity and Historic District impacts in deciding to issue an operating license for Limerick.

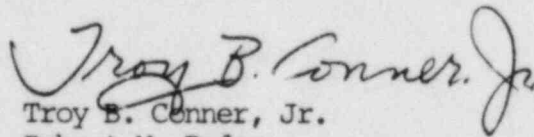
impacts in federal court.^{22/} Thus, the NRC is not required to accord Del-Aware yet another hearing. Even due process does not require multiple hearings on the same issues.

Exercising Discretion to Review

The Commission should exercise its discretion to review these important issues of Commission policy and federal law to avoid unnecessary conflicts and duplication in the environmental review by the NRC and other federal agencies for Limerick.^{23/} In reviewing and reversing ALAB-785 in this respect, the Commission would make clear its policy that its Staff and adjudicatory boards should not negate or simply duplicate the actions of coordinate federal agencies acting under separate statutory mandates.

Respectfully submitted,

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October 17, 1984

22/ See Del-Aware Unlimited, Inc. v. Baldwin, supra.

23/ The DRBC's historic concern over the preservation of its water management jurisdiction is demonstrated by its participation in In re Application of Philadelphia Electric Company, Docket No. A-00103956 before the Pennsylvania Public Utility Commission, filed February 1, 1984. In its amicus curiae brief, the DRBC asserted that the imposition of various conditions by the Pennsylvania PUC on the Point Pleasant withdrawal of Delaware River water for Limerick interfered with its management and allocation of water resources. A copy of DRBC Resolution No. 84-1, which authorized the filing of a brief on behalf of the DRBC, is attached.

UNITED STATES OF AMERICA
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Philadelphia Electric Company)	Docket Nos. 50-352
)	50-353
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Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Petition for Review of ALAB-785" dated October 17, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 17th day of October, 1984:

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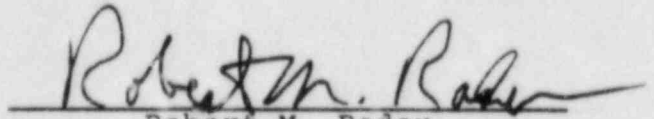
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