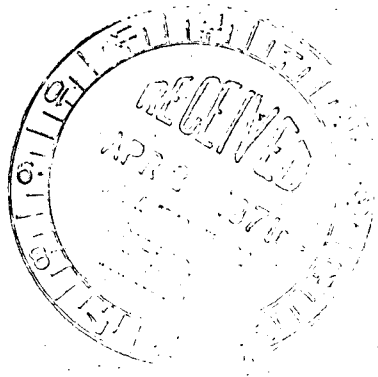

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
Consolidated Edison Company of New York, Inc. (Indian Point Station Unit No. 2)	)	Docket No. 50-247

MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S ANSWER IN OPPOSITION TO MOTION OF HUDSON RIVER FISHERMEN'S ASSOCIATION AND ENVIRONMENTAL DEFENSE FUND, INC. FOR DISCOVERY

April 22, 1971

INTRODUCTION

This Memorandum of Law is submitted in support of Applicant's answer, dated April 1, 1971, in opposition to the motion of Hudson River Fishermen's Association ("HRFA") and Environmental Defense Fund, Inc., ("EDF") for discovery with respect to the Atomic Energy Commission, and Applicant's supplemental answer dated April 13, 1971. It responds to the following documents:

1. Memorandum of HRFA and EDF dated April 2, 1971;

2. Memorandum of Law of HRFA and EDF dated April 8, 1971;

3. Letter, dated April 12, 1971, from counsel for EDF to the Chairman of the Atomic Safety and Licensing Board ("Board") adopting the April 8 Memorandum of Law and raising an additional matter; and

4. Letter, dated March 30, 1971, from the Chairman of the Board to counsel for EDF and HRFA requesting that they submit a brief on certain subjects, with answers later from the other parties.

SUMMARY OF ARGUMENT

I. The present record in this proceeding is adequate for the Atomic Safety and Licensing Appeal Board to rule on the issues raised by intervenors in their motions of February 26, 1971 and March 2, 1971, respectively.

II. The AEC in promulgating 10 CFR 50 Appendix D complied with all requirements of law as to the scope and extent of the rule making procedure and the extent of the public record involved, as well as any requirement of similarity between the proposed rule and the adopted rule.

III. The AEC complied fully with the requirements of law that the basis for 10 CFR 50 Appendix D be stated.

IV. The discovery sought by intervenors as to the basis for 10 CFR 50 Appendix D is not permissible.

V. The applicability to the Indian Point No. 2 proceeding of the provisions of 10 CFR 50 Appendix D exempting proceedings noticed before March 4, 1971 from certain requirements is not affected by events in the Vermont Yankee proceeding.

I. The present record in this proceeding is adequate for the Atomic Safety and Licensing Appeal Board to rule on the issues raised by intervenors in their motions of February 26, 1971 and March 2, 1971, respectively.

Applicant considers that it is inappropriate that the prospect of an evidentiary challenge to 10 CFR 50 Appendix D, now be raised in view of the expressed position of the parties that the question presented is a legal one. On page 19 of their Memorandum of Law dated April 8, 1971, intervenors reiterate that they "...have presented the Board with an essentially legal question:...." Further, intervenors state that "If the issue before the Board is considered to be a strictly legal one, the present record should be adequate for a ruling...."

The intervenors appear to have construed statements made by the Chairman of the Board at the March 24, 1971 hearing as somehow requiring them to seek to introduce evidence in this proceeding in order to present a proper record to the Atomic Safety and Licensing Appeal Board ("ASLAB") for purposes of certification of the question of the validity of the Commission's regulations in 10 CFR 50 Appendix D and in order for intervenors to prevail before the ASLAB with respect to such a certified question.

Applicant does not so construe the Chairman's statements at the March 24th hearing and understands these statements to connote no more in this respect than that the determination of the method of challenging the Commission's regulations rests with the intervenors (Tr. 704-705). Applicant accordingly finds no warrant in a determination by the Board to justify the discovery sought in the intervenors' April 2, 1971 motion.

The intervenors further note that they could in these circumstances rest on their legal arguments and await the outcome of the Commission's decision and court review. The intervenors go on, however, to base their present request for discovery upon the theory that it would be desirable to develop an evidentiary record of the reasons behind Appendix D now rather than waiting for a reviewing court to remand to the Commission for developing a fuller record and statement of reasons for Appendix D, assuming arguendo that the intervenors' court challenge to Appendix D is sustained.

Applicant believes that it would be a serious error to undertake a long and complex course of action before the Board on the speculative assumption that a court might in the future take a course of action which, so far as Applicant has been able to determine, is unprecedented in the review of the validity of

a rule. Moreover, such a course of action would be wasted motion in the light of the fact that the legal questions raised by intervenors in this proceeding are already before the U.S. Court of Appeals for the District of Columbia Circuit in the Calvert Cliffs' appeal (No. 24,871) in the context of a direct review of the rule making proceeding. The development of such a record was not undertaken for that court case [1/] and it is not necessary for this proceeding.

On page 6 of Applicant's answer, dated April 1, 1971, there are listed the briefs and other papers now before the Board with respect to the underlying issues raised by the intervenors. This list has since been supplemented by the reply brief filed by petitioners in the Calvert Cliffs' appeal, which was submitted to the Board on April 5 by counsel for EDF as its reply brief in this proceeding, together with all the papers filed concerning the intervenors' April 2, 1971 motion. Applicant reaffirms its position that, assuming the Board does not agree with the position expressed in Part 1 of Applicant's answer and supporting memorandum, dated March 10, 1971, the present record in this proceeding is more than adequate for certification to the ASLAB of the legal issues concerning 10 CFR 50 Appendix D raised by intervenors.

1/ Furthermore, petitioners before the court have not requested any relief involving the development of such a record.

II. The AEC in promulgating 10 CFR 50 Appendix D complied with all requirements of law as to the scope and extent of the rule making procedure and the extent of the public record involved, as well as any requirement of similarity between the proposed rule and the adopted rule.

The Atomic Energy Act of 1954, the Administrative Procedure Act (sometimes hereinafter referred to as "APA") and the Rules and Regulations of the Commission (Subpart H of the Commission's Rules of Practice, 10 CFR 2.800 et seq.) govern rule making proceedings by the AEC. The APA and the AEC's regulations provide that in promulgating a regulation the Commission will publish a notice of proposed rule making in the Federal Register and that the notice will include the authority under which the regulation is proposed; the terms or substance of the proposed regulation or specification of the subjects and issues involved; the manner and time within which interested members of the public may comment thereon; a statement of the availability of such comments in the Public Document Room; and such explanatory statement as the Commission may consider appropriate.

Moreover, the Commission is required to publish in the Federal Register a notice of adoption of a regulation and the text of the regulation which is being adopted together

with a concise, general statement of the basis and purpose thereof.

The procedures which the Commission followed in promulgating 10 CFR 50 Appendix D are outlined in detail on pages 3 through 9 of the brief for respondents in the Calvert Cliffs' appeal, which was filed by the AEC Regulatory Staff in this proceeding on March 29, 1971. Briefly, the proposed Rule was published in June 1970; was identified as being in implementation of the National Environmental Policy Act of 1969 ("NEPA"); set forth in detail the text of the general policy and procedure which the Commission proposed as its implementation of NEPA; and was accompanied by a description of the procedure by which, and the time within which, all interested persons could submit comments for consideration by the Commission and by a statement of the availability of such comments in the Public Document Room. It was also accompanied by an extensive explanatory statement.

Written comments were received and placed in the public record of the rule making proceeding. The public record also contains the rule which was finally adopted, together with a statement of considerations. The scope and content of the public record in this proceeding therefore complies with the requirements of law.

Furthermore the statement of considerations accompanying 10 CFR 50 Appendix D meets all requirements of administrative law that a basis and purpose be given in support of the adopted rule. This will be shown in the succeeding section where the cases cited by the intervenors on pages 7 through 11 of their April 8 memorandum are discussed.

Finally, the rule which was adopted complies with any requirement of similarity in scope and content to the proposed rule. To the extent that there is such a requirement it arises from the provisions of 5 U.S.C.A. §553 (1967). That section requires that the agency give general notice of the proposed rule making. Such notice shall include "... either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C.A. §553(b).

The courts have construed this requirement to mean that the relationship between the proposed rule and the adopted rule "... is sufficient if ... [the notice of the proposed rule] ... provides a description of the subjects and issues involved."[2/]

2/ California Citizens Band Association, Inc. v. United States, 375 F.2d 43, 49 (9th Cir. 1967).

Not every provision of the finally adopted rule must have been referred to in the notice of proposed rule making. In deciding that the notice requirement of the APA had been complied with by the FCC when that agency promulgated its distant signal rules the Court of Appeals for the District of Columbia Circuit held that there was no failure to adequately specify the substance of the proposed rules and stated:

> "We cannot agree with Buckeye that the failure to mention 'grandfather rights' is a fatal defect in the Notice. The Administrative Procedure Act requires only that the notice contain 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' 5 U.S.C.A. §553(b)(3)(1966)." 3/

The proposed rule for establishing Appendix D certainly bears this requisite relationship with the finally adopted rule. 4/ As already indicated, in its notice of proposed rule making published June 3, 1970 the Commission noted that it was contemplating the addition of Appendix D to Part 50

3/ Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 226 n.26 (D.C. Cir. 1967). See also Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954); Owensboro on the Air, Inc. v. United States, 262 F.2d 702, 708 (D.C. Cir. 1958), cert. denied, 360 U.S. 911, 79 S.Ct. 1296, 3 L.Ed.2d 1261 (1959); and Lazar v. Benson, 156 F. Supp. 259.

4/ On page 18 of their April 8 Memorandum of Law the intervenors state that there was not so great a disparity between the proposed rule of June 3 and the published rule of December 4 that the December 4th promulgation was void for lack of notice.

of its regulations, such appendix to be entitled "Statement of General Policy and Procedure: Implementation of the National Environmental Policy Act of 1969 (Public Law 91-190)." The Commission made clear that its proposed Appendix D indicated how it would exercise its responsibilities under NEPA with respect to the licensing of power reactors. The rule as finally adopted was published in the Federal Register on December 4, 1970 and makes clear that it reflects the Commission's final decision on the same subject and issues involved in the proposed rule. Indeed, as indicated by the Commission's statement published at 35 Federal Register 18169, in many respects the final rule did not differ from the proposed rule.[5]

The Applicant, therefore, contends that the finally adopted rule bears sufficient similarity to the proposed rule that it complies with applicable legal requirements.

5/ With respect to the Indian Point 2 proceeding, which falls within the operation of the March 4 transition period, there is certainly no problem of lack of notice since this proceeding is treated similarly under both the proposed rule and the adopted rule.

III. The AEC complied fully with the requirements of law that the basis for 10 CFR 50 Appendix D be stated.

Intervenors contend that in the promulgation of 10 CFR 50 Appendix D the Commission failed to meet the requirements of administrative law in that it did not show that it had considered all material factors and that otherwise its stated basis for Appendix D is inadequate.[6] In this section it will be shown that the Commission's statement of considerations accompanying the December publication of Appendix D not only meets but far exceeds the requirements of law.

The applicable requirement is that the notice of adoption of a regulation be accompanied by a concise general statement of the basis and purpose of the rule being adopted.

6/ Memorandum of Law of intervenors, dated April 8, 1971, on questions raised by the Board, at 16. Intervenors' argument in that memorandum appears to rest in part on the theory that the National Environmental Policy Act of 1969 imposes some special requirement with respect to the showing which the Commission must make in this respect (at 14). It is Applicant's contention that the question of the nature of the requirements imposed by NEPA upon the AEC with respect to the promulgation of 10 CFR 50 Appendix D goes to the heart of the principal legal questions posed in the intervenors' motions of February 26 and March 2, 1971 and the above-referenced Calvert Cliffs' appeal. Applicant accordingly does not deal with them further in this memorandum since they have been fully addressed in the papers referred to on page 5, supra.

This requirement is contained in both the Administrative Procedure Act and the Commission's Rules.[7]

The requirement that a concise basis be stated for a regulation is not the equivalent of the findings based upon record evidence which are required in adjudications. This distinction is no accident but pervades the very structure of the Administrative Procedure Act. As the United States Court of Appeals for the District of Columbia Circuit has stated:

> "... rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and ... such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making."[8]

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[7] Section 4 of the Administrative Procedure Act states in part: "(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C.A. § 553. The Commission's rules and regulations at 10 CFR Section 2.806 read:

> "Sec. 2.806. Commission action.-The Commission will incorporate in the notice of adoption of a regulation a concise general statement of its basis and purpose, and will cause the notice and regulation to be published in the Federal Register or served upon affected persons."

[8] American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966).

The court then went on to say that the requirements of Section 4 of the APA are limited requirements geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. It quoted from the Attorney General's Manual on the Administrative Procedure Act to the effect that the typical issues in a rule making proceeding relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts and that the object of rule making is the implementation or prescription of law or policy for the future. The court also quoted from the Attorney General's manual that "[n]ot only were the draftsmen and proponents of the bill aware of [a] realistic distinction between rule making and adjudication, but they shaped the entire Act around it." 9/

Another expression as to the nature and scope of the rule making process was presented in Flying Tiger Line, Inc. v. Boyd, where the court stated:

> "The final contention advanced in behalf of the plaintiff is that the record of the hearings before the Board does not sustain the validity of the regulation or the need therefor. This contention seems to be based on a misconception of the nature of a rule-making proceeding. Rule-making is a legislative process. It is neither judicial, administrative, nor quasi-judicial. An agency performing a legislative

9/ Id. at 629-30.

> function need not proceed on evidence formally presented at hearings. It may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions. The regulation ultimately promulgated need not be sustained by evidence. The purposes of rule-making hearings are to give an opportunity to interested parties to submit data and facts, and to present their views. Consequently, the Court does not review a record of such hearings as it does records in judicial or quasi-judicial proceedings. Such hearings are analogous to hearings conducted by Congressional Committees. An Act of Congress need not be supported by formal evidence introduced at hearings." 10/

The courts have ruled specifically on the adequacy of concise general statements. Automotive Parts & Accessories v. Boyd 11/ involved the validity of regulations promulgated under the National Traffic and Motor Vehicle Safety Act concerning the requirement for head restraints in newly manufactured automobiles. The court stated that there was no need for detailed findings but that the Administrative Procedure Act required a concise general statement of the basis and purpose of the regulation.

10/ 244 F.Supp. 889, 892 (D.D.C. 1965). See also Pacific Coast European Conference v. United States, 350 F.2d (9th Cir. 1965); 1 K.C. Davis, Administrative Law Treatise 285 (1958).

11/ 407 F.2d 330 (D.C. Cir. 1968).

It cautioned against an overly literal reading of the statutory terms "concise" and "general" and stated that it expected that the statement "... will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." In addition the court held that "[t]he paramount objective [of judicial review] is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."[12/] The statement in support of these regulations which qualified under the court's decision as a "concise general statement" under Section 4 of the Administrative Procedure Act reads as follows:

> "This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions." [13/]

Another holding on the concise, general statement of basis and purpose required by the APA appears in Foreign Freight Forwarders & Brokers Association v. FMC,[14/] where the court was asked to determine whether

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12/ Id. at 338

13/ Id. at 338 n. 12.

14/ 337 F.2d 289 (2d Cir. 1964).

this requirement had been complied with by the Federal Maritime Commission when it noticed the adoption of proposed rules in the Federal Register. The Court's comment on the contention that the general statement was inadequate was as follows:

> "But the order promulgating the rules meets the statutory requirement in stating that they implement the 1961 Law 'and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and ocean-going common carriers in the conduct of their business affairs.'" 15/

In the face of such rulings intervenors' assertions that the statement of considerations accompanying Appendix D does not meet the requirements of administrative law cannot be taken seriously. That statement, which occupied four pages of the Federal Register, is reproduced and attached as Appendix A to this Memorandum. It goes to considerable length in discussing comments received by the Commission; both those which were incorporated in the adopted rule and those which the Commission, in the exercise of its discretion, chose not to adopt. It also explains in some depth the rationale which it used (and the facts on which that rationale

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15/ Id. at 296; see also Van Curler Broadcasting Corp. v. United States 236 F.2d 727, 730 (D.C. Cir. 1956).

was based) in balancing the public interest in the protection of the natural environment, and the public interest in an adequate supply of electric power.

Intervenors have been unable to cite a single case in which a rule was invalidated or remanded for failure to state a sufficient basis for the rule. The cases they do cite include other types of agency action where there are independent reasons for requiring the agency to supply a more extensive basis for the action.[16/] Recognizing this fact, they attempt to argue by analogy that the necessity of a developed record and of a reasoned decision is even more important in

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16/ Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d. Cir. 1965); Greater Boston Television Corp. v. FCC, No. 17,785 (D.C. Cir. Nov. 13, 1970) and Public Service Comm'n. v. FPC, 436 F.2d 904 (D.C. Cir. 1970) involved judicial review of administrative adjudications for which hearings, detailed findings, and supporting evidence were required. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), contrary to the implication to be drawn from intervenors' memorandum, the requirement that the Board consider all relevant factors rested upon the fact that such factors were required to be considered by a relevant statute and not upon any characterization of this particular rate making action as rule making. EDF v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) and Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970) involved proceedings for which there was no basis given in support of the administrative determination which could permit effective judicial review. In EDF v. Ruckelshaus, 2 ERC 1114 (1971), the Court observed that no regulations of general applicability were formulated, and statements of the Court imply that if regulations had been promulgated it would not have been necessary to make detailed findings.

rule making than in cases of contested adversary proceedings. The intervenors are in effect construing the "concise general statement" requirement of the APA as involving the same kind of findings and supporting evidence as is required for adjudications. As we have shown, it is well established that this is not the case.[17]

Nor is review of a rule impossible without a more extensive statement, as intervenors suggest. There is no requirement that an agency rule be supported by a preponderance of the evidence. Rather, the test is whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[18] The type of supporting statement called for by the APA in cases of rule making is appropriate for this standard of review, since the review function is to determine whether a rational basis exists for the agency's conclusions.

Intervenors assert that in the statement neither the judgment on electric power need nor the consideration underlying the period of orderly transition are spelled out

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17/ Cases cited notes 8, 10 and 11 supra; see also Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954).

18/ California Citizens supra note 2; Tidewater Express Lines, Inc. v. United States, 281 F.Supp. 995 (D. Md. 1968); Borden v. Freeman, 256 F.Supp. 592 (D. N.J. 1966).

with sufficient clarity for intervenors to be entirely sure what the Commission's basis for the regulations was. The relevant portion of the statement of considerations is reproduced below:

> "In its consideration of Appendix D, the Commission has recognized the public interest in protecting the environment as well as the public interest in avoiding unreasonable delay in meeting the growing national need for electric power.
>
> "The public is demanding substantially more electric power, and it is expecting the power to be available, without shortages or blackouts. Electric power use in the United States has been doubling about every 10 years. If prevailing growth pattern and pricing policies continue, electric power capacity may need to triple or quadruple in the next two decades. Meanwhile during the coming winter and summer and for the next few years, there is a real electric power and fuel crisis in this country.4

"4 Chairman Nassikas of the Federal Power Commission stated, at hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, on August 3, 1970: 'The current situation is such that little leeway remains for additional delays if the country is to avoid critical future shortages in meeting anticipated real power needs.'

"In a 'Statement on the Fuel Situation for the Winter of 1970-71,' Paul W. McCracken, Chairman, Council of Economic Advisers, and General George A. Lincoln, Director, Office of Emergency Preparedness, said:

"'We have continued to study the energy supply situation and find that as winter approaches the nation faces a potential shortage in the supplies of natural gas, residual fuel oil and bituminous coal. The potential shortage appears to be more serious in some regions of the country than in others, but no section is completely immune from concern.'" (Footnote included in statement of considerations)

"Various authoritative statements and reports have stressed that the urgent near term need for electric power requires that delays be held to an absolute minimum. Also reports looking to the implementation of improved institutional arrangements on siting of power plants recommend procedures for expediting the process consistent with protection of the environment. Thus in the Report 'Electric Power and the Environment' published by the Energy Policy Staff of the Office of Science and Technology in August 1970, in which all of the Federal agencies responsible for environmental and power programs participated, the Basic Findings stated:

"New public agencies and review procedures must take into account the positive necessity for expediting the decision-making process and avoiding undue delays in order to provide adequate electric power on reasonable schedules while protecting the environment.

"The Commission believes that revised Appendix D takes into account the necessity for avoiding undue delays in order to provide adequate electric power and that it reflects a balanced approach toward carrying out the Commission's environmental protection responsibilities under the National Environmental Policy Act of 1969 and the Atomic Energy Act of 1954, as amended. Its main concern here has been to find out and strike a reasonable balance of those considerations in the overall public interest. The Commission expects that revised Appendix D will be implemented to that end."

If intervenors' inflexible standards are to be met, it would be impossible to write a concise general statement within any reasonable definition of that term.

The concise statement being adequate on the point of the March 4 transition date, it would not be necessary or appropriate to be concerned in this proceeding with its adequacy with regard to the reliance of the Commission on environmental standards set by others. Yet review of the statement of consideration will show here too that the "concise general statement" requirement has been met. Applicant respectfully submits that, regardless of their characterization, intervenors' fundamental position is that they disagree with the stated basis, not that they do not understand it.

IV. The discovery sought by intervenors as to the basis for 10 CFR 50 Appendix D is not permissible.[19/]

Intervenors seek leave to discover both the mental deliberations of AEC officials and the documents within their purview which formed the basis for the December 1970 Appendix D. Applicant's position is that the stated basis for Appendix D, which has been shown to satisfy the requirements of applicable law, contains all that is necessary or desirable to permit review of the rule. The very purpose of the concise general statement requirement is to provide a basis for review of the regulation, under the scope of review applicable for rule making.

Intervenors in effect seek discovery for the purpose of assessing the quantum and quality of the evidence underlying the statement of considerations in support of the rule. To allow such discovery as a general matter would effectively abolish the established distinction between rule making and adjudication and would render the requirement of a concise general statement illogical. Stated another way, to apply as

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19/ This section of Applicant's memorandum specifically responds to the Board's desire, expressed in its March 30, 1971 letter, that Applicant submit a brief concerning the authority, if any, for any interrogation to be made respecting the decisional process undertaken by a regulatory commission in the adoption of a rule.

a general matter in an adjudication where a rule is under challenge, as in this proceeding, a standard of evidentiary basis for the rule that is more rigorous than that required in the rule making procedure would render much of the rule making procedure as presently conceived by the APA so much wasted motion.

Cases on this subject which involve rule making are rare. However, that precedent which does exist supports Applicant's position. In California Citizens [20/] the Court denied the production of "other" evidence relied upon by the agency in promulgating its rule. In that proceeding petitioner argued that the amendments were "... not supported by a preponderance of the evidence before the Commission, and that the Commission erroneously resorted to outside sources of information. In this connection petitioner ... moved for an order requiring the Commission to produce the 'other evidence' upon which it relied in making its

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20/ Supra note 2.

decision to amend the rules."[21] In answer the Court replied:

> "[P]ursuant to 5 U.S.C. §553(c), it was not necessary for the Commission to receive any evidence, as such, in this rule making proceeding. It was necessary only for the Commission to provide opportunity for, and consider, 'written data, views, or arguments with or without opportunity for oral presentation,' and this it did....
>
> "When, as here, a statute does not require that a particular kind of rule making be on a record made after a public hearing, the Commission is not confined to evidence presented in some formal manner. It may act not only on the basis of the comments received in response to its notice of rule making, but also upon the basis of information available in its own files, and upon the knowledge and expertise of the agency.
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> "Accordingly, we deny petitioner's motion that the Commission be ordered to produce in this court the other evidence upon which it relied in making its decision to amend the rules."[22]

Intervenors cite Toilet Goods Association, Inc. v. Celebrezze[23] for the proposition that their requested discovery of AEC officials is permissible. That case, which intervenors identify as "the most pointed and forceful case that we can cite on this question," does not support their position.

21/ Id. at 53.

22/ Id. at 54.

23/ 235 F.Supp. 648 (S.D.N.Y. 1964).

The Toilet Goods case was a declaratory judgment action before a U.S. District Court concerning the validity of certain provisions of regulations promulgated by the Commissioner of the Food and Drug Administration, the plaintiffs contending that the challenged regulations exceeded the authority of the FDA given by statute. The regulation and the questions of statutory interpretation involved "complicated and technical issues," 24/ leading the court to deny a motion for summary judgment. The court stated:

> "Since the papers already submitted by the parties raise substantive issues outside this court's ordinary sphere of competence, it would be unwise to make a determination on the merits at this stage without the aid of 'live,' expert testimony." 25/

It was the complex technical nature of the issues above which led to the need for expert testimony. The clear implication is that in the absence of this factor the expert testimony is not necessary or appropriate. In the present case the issue of the validity of 10 CFR 50 Appendix D does not involve unusually complicated technical issues, much less ones beyond the competence of this Board or a reviewing court to consider. The court went on to say:

> "To be sure, the essential questions presented in this action are ones of statutory interpretation; whatever competence the court and counsel may have in this area generally, however,

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24/ Id. at 652.

25/ Id. at 653.

> can only be enhanced by a particular understanding to be obtained with expert assistance, of the technical problems involved. Additionally, since professionally qualified respresentatives of both plaintiffs and defendants were present during the hearings and debates which preceded the passage of the 1960 Color Additive Amendments, it would be helpful to hear their testimony relative to legislative intent, which, presumably, they had an important role in shaping and assisting." 26/

The expert advice sought was from representatives of the parties with technical expertise who had participated in the legislative hearings and debates preceding the law in question, for the purpose of assisting the court in understanding the technical aspects of legislative history. It was not sought from the decision-makers themselves who, in that case, would have been the legislators. 27/ In the present case intervenors seek discovery of the decision-makers themselves.

The present case, like Toilet Goods, involves a question of statutory interpretation on which the validity of a regulation rests. Yet the intervenors have not, as Toilet Goods might indicate, sought discovery or expert advice from those involved in the legislative history of NEPA, in

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26/ Id. at 653

27/ Id.

order to shed light on the meaning of that statute. They have instead sought discovery of the basis for the AEC's implementing regulation. Moreover, there is no dispute here as to the meaning or interpretation of the regulation itself on which expert testimony might conceivably shed light under the rationale of Toilet Goods; the question is one of validity, which, as previously discussed, is to be judged on the rule making record, including its stated basis.

A basic reason supporting Applicant's position is the undesirability of extensive interrogation of administrative decision-makers after the fact except in unusual circumstances. United States v. Morgan [28/] stands for this proposition. It is true, as intervenors point out, that this case involved a situation in which the administrator who had been questioned in court about his decision had been acting in a quasi-judicial role. Yet the logic of these cases applies equally to agency officials acting in a quasi-legislative role as well. The concept of formal interrogation of legislators as to the reasons underlying their enactment of legislation is as objectionable as (and perhaps even more unheard of than) the interrogation of judges.

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28 / 298 U.S. 468; see also Shaughnessy v. Accardi, 349 U.S. 280, 290 (dissenting opinion of Justice Black)

Intervenors rely on Citizens to Preserve Overton Park, Inc. v. Volpe[29] to establish that the mental processes of agency personnel may be probed in this case. That case involved a decision of the Secretary of Transportation with respect to the granting of Federal highway funds for a particular project. His action was required to meet a statutory standard that such funds could not be used for highways through public parks if a "feasible and prudent" alternative route existed. If no such route was available, the statute permitted the Secretary to authorize the funds only if there had been "all possible planning to minimize harm to the park." The action was one which was not subject to the hearing and finding requirements of Sections 556 and 557 of the APA, although a subsequently promulgated Department of Transportation regulation requiring formal findings may have influenced the court's decision. The court remanded the case to the District Court because its prior review had been based only on litigation affidavits rather than the full administrative record.[30] It went on to state that to the extent that the record was not sufficient to disclose the factors that were

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29/ _____U.S._____ 39 L.W. 4287 (March 2, 1971).

30/ In the words of Justice Black in his separate opinion:

> "I regret that I am compelled to conclude for myself that, except for some too-late formulations, apparently coming from the Solicitor General's Office, this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress." Id. at 4293.

considered by the Secretary the District Court should be permitted to require some explanation of the Secretary's actions.

In its decision the court reaffirmed the principle established by the Morgan case that "...such inquiry into the mental processes of administrative decisionmakers is usually to be avoided..." [31] and observed that where formal findings had been made, as in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made.

In the Overton case neither the requirement of formal findings nor the requirement of a "concise general statement" applied. The court went out of its way to observe that rule-making was not involved. [32] Where rule making is involved, and where the "concise general statement" applies and serves a statutory function, we submit that the considerations outlined in the Morgan case also apply here.

Intervenors correctly recognize that Overton Park is not on all fours with the matter presently before this Board, since it involved a particular adjudicative decision of an agency. Intervenors again go on however to argue that

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31/ Id. at 4293.

32/ Id. at 4291.

the requirement of a fully articulated and reasoned statement is even more important in rule making than in cases of contested adversary proceedings.

It is in this attempt at analogy that intervenors' argument breaks down. Intervenors have been unable to cite any cases to support this analogy. As has been previously shown, the analogy flies in the face of the concept of rule making and its relationship to adjudication embodied in the APA.

Counsel for EDF in his letter to the Chairman dated April 12, 1971 stated that the motion for discovery was submitted in the exercise of a right of a party under the APA "to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[33] This provision does not of course whisk away in one stroke the legal prerequisites to and limitations on the right to discovery.[34] In the present case the requested discovery is neither necessary nor desirable since a legally adequate basis for the rule has been stated and it is this stated basis upon which the validity of the rule in the present case is properly judged.

33/ 5 U.S.C. § 556 (d)

34/ See Freeman v. Seligson, 405 F.2d 1326, 1338-9.

V. The applicability to the Indian Point No. 2 proceeding of the provision of Appendix D exempting proceedings noticed before March 4, 1971 from certain requirements is not affected by events in the Vermont Yankee proceeding.

Intervenors argue that they must have discovery of the reasons behind the Commission's inclusion of non-radiological environmental issues in the notice of hearing in the Vermont Yankee proceeding which, although noticed shortly before March 4, 1971, was not exempted from consideration of those issues as provided by Appendix D. They argue that this is necessary for establishing a "rationale of the Vermont Yankee exception to the Appendix D regulations," against which the Indian Point No. 2 proceeding can be measured. Applicant does not believe that it is a proper function of discovery to delve into the reasons behind a notice in another proceeding in order to establish legal precedent for this proceeding. The exemption contained in Appendix D is a rule of general applicability which applies to this proceeding in a clear and unambiguous way and such application is proper without further justification.

This is particularly true since, unlike the Vermont Yankee notice which was published only a few days before

March 4, the notice in this proceeding was published over five months ago, on November 17, 1970. Appendix D was not published in final form until December 4, 1970. The Commission was aware of the posture of this proceeding when it adopted Appendix D, and no further consideration of whether the Appendix should or should not be applied is appropriate.

Nevertheless, if explanation of the Vermont Yankee action is called for, such explanation has already been given by counsel for the AEC Regulatory Staff at the hearing on March 24. Counsel there stated that the reason for the Vermont Yankee exemption was the fact that the hearing was noticed earlier than normal in the AEC regulatory process. (Tr. 649) This explanation is also found in the Brief for Respondents in the Calvert Cliffs' Appeal (p.48) where it represents the position of the General Counsel of the Commission. That brief has been submitted as a part of the AEC Staff's response in this proceeding to the motions of intervenors concerning Appendix D. The explanation shows that the exception bore no relation to the stated basis for Appendix D and was made because of circumstances that do not apply in this case. As already indicated, the record of this proceeding shows that the notice of hearing for Indian Point No. 2

was issued in this proceeding on November 17, 1970, about six weeks after issuance of the ACRS letter, which is normal timing for such cases.

Intervenors dismiss Counsel's explanation on the ground that it is not evidence and therefore cannot be considered by the Board in this context. This ignores the fact that the process of distinguishing cases is one which is within the traditional competence of counsel to perform. If this alone is not considered sufficient, the explanation is corroborated in a compelling way by facts as to the timing of the Vermont Yankee notice in relation to other cases which are obtainable from the public records of the Commission and of which official notice could be taken if that is considered necessary.

This conclusion is not affected by the cases cited by intervenors. Those cases [35/] stand only for the proposition that where an adjudication was required to rest on findings based on evidence subsequent rationalizations by counsel cannot be a substitute for such findings and evidence. In the

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35/ Trailways of New England, Inc. v. CAB, 412 F.2d 926 (1st Cir. 1969); National Air Carriers Association v. CAB, 436 F.2d 185 (D.C. Cir. 1970); Public Service Comm'n. v. FPC, 436 F.2d 904 (D.C. Cir. 1970).

AEC regulatory process there is no requirement for a notice of hearing to be supported by findings. For these reasons the discovery requested by intervenors of the reasons in back of the Vermont Yankee determination will serve no permissible and useful purpose and should be denied.

Respectfully submitted,

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APPENDIX A to "Memorandum of Law in Support of Applicant's Answer in Opposition to Motion of Hudson River Fishermen's Association and Environmental Defense Fund, Inc. for Discovery"

Title 10—ATOMIC ENERGY

Chapter I—Atomic Energy Commission

PART 50—LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

Implementation of the National Environmental Policy Act of 1969

On June 3, 1970, the Atomic Energy Commission published for comment in the FEDERAL REGISTER proposed amendments to its regulations in 10 CFR Part 50, Appendix D, a statement of general policy that indicates how the Commission will exercise its responsibilities under the National Environmental Policy Act of 1969, Public Law 91-190, with respect to the licensing of power reactors and fuel reprocessing plants (35 F.R. 8594). The proposed amendments would revise Appendix D to reflect (1) the guidance of the Council on Environmental Quality, and (2) the enactment of the Water Quality Improvement Act of 1970.

REVISED APPENDIX D AS PUBLISHED FOR COMMENT

Under revised Appendix D set out in the notice of proposed rulemaking, applicants for construction permits for nuclear power reactors and fuel reprocessing plants would be required to submit with the application a separate report on specified environmental considerations. Applicants for operating licenses for such facilities would be required to submit a report discussing the same environmental considerations, to the extent that they differ significantly from those discussed in the report submitted at the construction permit stage.

Copies of such reports would then be transmitted by the Commission, with a request for comments, to Federal agencies designated by the Council on Environmental Quality as having "jurisdiction by law or special expertise with respect to any environmental impact involved" or as "authorized to develop and enforce environmental standards" as the Commission determines are appropriate. A summary notice of availability of such reports would be published in the FEDERAL REGISTER, with a request for comment on the proposed action and on the report from State and local agencies of any affected State (with respect to matters within their jurisdiction) which are authorized to develop and enforce environmental standards.

After receipt of the comments of the Federal, State, and local agencies, the Commission's Director of Regulation or his designee would prepare a Detailed Statement on the environmental considerations, including, where appropriate, a discussion of problems and objections raised by such agencies and the disposition thereof. In preparing the Detailed Statement, the Director of Regulation or his designee could rely, in whole or in part, on, and incorporate by reference, the appropriate Applicant's Environmental Report, and the comments thereon submitted by Federal, State, and local agencies, as well as the regulatory staff's radiological safety evaluation.

Revised Appendix D as published for comment provided that both the Applicant's Environmental Reports and the Detailed Statements would be required, with respect to water quality aspects of the proposal covered by section 21(b) of the Federal Water Pollution Control Act, to include only a reference to the certification issued pursuant to section 21(b) or to the basis on which such certification is not required. License conditions imposed under Appendix D, requiring observance of standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved, would not apply to matters of water quality covered by section 21(b) of the Federal Water Pollution Control Act.

The types of materials licenses to which procedures and measures similar to those for nuclear power reactors and fuel reprocessing plant licenses would be applied were indicated in the notice of proposed rulemaking.

All interested persons were invited to submit written comments and suggestions for consideration in connection with the proposed amendments within 30 days after publication of the notice of proposed rulemaking in the FEDERAL REGISTER on June 3, 1970. The Commission has received a number of comments reflecting a variety of, and sometimes conflicting, points of view. All comments have been carefully considered. A number of the comments received are discussed below. Upon consideration of these comments and other factors involved, the Commission has adopted the revised Appendix D set out below.

SIGNIFICANT CHANGES FROM PROPOSED APPENDIX D

Before discussing the new or amended provisions of Appendix D as adopted by the Commission, it is considered appropriate to point out, by way of background, that the Commission, under the Atomic Energy Act of 1954, as amended, is required to hold a public hearing at the construction permit stage for, among other facilities, each nuclear power reactor and fuel reprocessing plant. This

hearing is required whether or not there is a contest regarding the issuance of the permit. At the operating license stage there is opportunity for a further public hearing at the request of any person whose interest may be affected by the proceeding. A central purpose of these hearings under the Atomic Energy Act of 1954, as amended, is to provide an open, public review of the radiological effects of the facility on the environment.

In section 102 of the National Environmental Policy Act of 1969, the Congress authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in that Act. While this provision does not specifically refer to Federal licensing of private activities, the Commission has interpreted it to embrace licensing to the extent and in the manner described below. Consequently, in implementing the National Environmental Policy Act of 1969, attention has been directed to nonradiological environmental effects as well as radiological effects.

With respect to nuclear power plants, the principal environmental effects are radiological effects, and the thermal effects of cooling water discharges. There are other environmental effects as well—for example, in the areas of noise, recreation, esthetics, etc. In view of the Commission's new responsibilities under the National Environmental Policy Act of 1969, it has recognized that some environmental amenities and values are presently quantified and that some are as yet unquantified. The Commission has sought to give appropriate recognition to both categories, as well as to take into account the traditional role played by State and local governments in the protection of the environment.

The significant new or amended provisions of Appendix D as adopted by the Commission are:

1. The Commission believes that the preservation of environmental values can best be accomplished through the establishing of environmental quality standards and requirements by appropriate Federal, State, and regional agencies having responsibility for environmental protection. In the case of water quality, the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, has established a system of federally approved State standards for water quality and a requirement that Federal licensing agencies be provided a certification from the appropriate State, interstate, or Federal authority that there is reasonable assurance that the activity to be licensed will be conducted in a manner which will not violate applicable water quality standards. The Commission urges the appropriate agencies to proceed promptly to establish standards and requirements for other aspects of environmental quality.

2. In a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or fuel reprocessing plant, any party to the proceeding may raise as an issue whether the issuance of the permit or license would be likely to result in a significant, adverse effect on the environment. If such a result were indicated, in accordance with the declaration of national policy expressed in the National Environmental Policy Act of 1969, consideration will be given to the need for the imposition of requirements for the preservation of environmental values consistent with other essential considerations of national policy, including the need to meet on a timely basis the growing national requirements for electric power.

With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose. In any event, there will be incorporated in construction permits and operating licenses a condition to the effect that the licensee shall observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved.

3. In order to provide an orderly period of transition in the conduct of the Commission's regulatory proceedings and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power, the issues described in paragraph 2 above may be raised only in proceedings in which the notice of hearing in the proceedings is published on or after March 4, 1971.

4. The issues described in paragraph 2 above would not apply to (a) radiological effects since radiological effects are considered pursuant to other provisions of Part 50 or (b) matters of water quality covered by section 21(b) of the Federal Water Pollution Control Act.[1]

[1] Under section 21(b) the Commission is generally prohibited from issuing a construction permit or operating license for a facility discharging effluents into navigable waters without having received a certificate from the State or interstate water pollution control agency or the Secretary of the Interior, as appropriate, that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards. (Under Reorg. Plan No. 3 of 1970, the function of the Secretary of the Interior in this regard will be exercised by the Administrator of the Environmental Protection Agency.) In addition, as noted in paragraph 7c, the AEC will include a condition in construction permits and operating licenses for power reactors and fuel reprocessing plants to the effect that the licensee shall comply with all applicable requirements of section 21(b).

If any party raised any issue as described in paragraph 2 above, the Applicant's Environmental Report and the Detailed Statement would be offered in evidence.

5. If no party to such a proceeding, including AEC staff, raised any issue as described in paragraph 2 above, those issues would not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review process, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process.

6. If any of the issues described in paragraph 2 above were properly raised by a party to the proceeding, the atomic safety and licensing board would make findings of fact on and resolve the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license could be granted, denied, or appropriately conditioned to protect environmental values.

7. In addition, revised Appendix D will:

(a) Require, as soon as practicable, the filing of Environmental Reports by holders of construction permits and preparation of Detailed Statements in cases where a Detailed Statement has not previously been prepared;

(b) Provide for the inclusion of a condition to the effect that the licensee shall observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved, in construction permits and operating licenses previously issued which do not contain such condition;

(c) Provide for the inclusion of a condition to the effect that the licensee shall comply with all applicable requirements of section 21(b) of the Federal Water Pollution Control Act, in construction permits and operating licenses whenever issued; [2]

(d) Require the discussion of water quality aspects of the proposed action, whether or not covered by section 21(b) of the Federal Water Pollution Control Act, in Environmental Reports and Detailed Statements;

(e) Provide that, after receipt of an Environmental Report, the Director of Regulation or his designee will prepare a draft Detailed Statement which, with the Environmental Report, will be circulated to cognizant agencies for comment, and that a final Detailed Statement will be prepared after receipt of comments on the draft Statement and Report.

[2] The Commission intends to issue a separate statement of general policy and procedure to indicate in greater detail how it intends to exercise its responsibilities under section 21(b) of the Federal Water Pollution Control Act.

DISCUSSION OF COMMENTS RECEIVED IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING PUBLISHED JUNE 3, 1970

One comment raised questions as to the wisdom of the policy which Appendix D implements, and of the applicability of that policy to AEC licensing actions. The Commission is of the view that the National Environmental Policy Act of 1969 requires the AEC to take appropriate action to implement that Act, and that Appendix D, both in its proposed form and in the form adopted, expresses a reasonable, although not necessarily the only possible, technique of implementing the goals set forth in the Act.

The suggestion was made in the comments of the Calvert Cliffs Coordinating Committee, National Wildlife Federation, and the Sierra Club that the Commission should apply the requirements of Appendix D to holders of construction permits issued without consideration of environmental factors who have not yet applied for an operating license, and suspend the construction permits pending investigation of the environmental impact of the facility.[3] Those comments also suggest that the Commission require "backfitting" of facilities—that is, the addition, elimination, or modification of structures, systems, or components of a facility after a construction permit has been issued—if it finds that such action will provide substantial, additional protection of the environment.

Scenic Shoreline Preservation Conference, Inc., suggested that full compliance with the National Environmental Policy Act of 1969 be required for major Federal actions taken after January 1, 1971, and, with respect to Federal actions taken between January 1, 1970, and January 1, 1971, that the AEC issue to the license or permit applicant an order to show cause why that Act should not be fully enforced.

As noted above, the Commission has modified Appendix D to require, as soon as practicable, the filing of Environmental Reports by holders of construction permits who have not filed an application for an operating license, and preparation of Detailed Statements, in cases where a Detailed Statement has not previously been prepared. Paragraph 10 of proposed Appendix D (redesignated as paragraph 9) has been amended to provide that the condition described in that paragraph (requiring permittees and licensees to observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved) will also be included in permits and licenses previously issued which do not contain such a condition.

The suggestion that construction permits issued without prior consideration of environmental factors by the Commission be suspended pending the investigation of the environmental impact of the facility has not been adopted. Whether suspension is appropriate is a matter to be determined pursuant to Subpart B of the Commission's rules of practice, 10 CFR Part 2, in the light of requirements established in Appendix D as herein adopted.

The suggestion that "backfitting" be required for facilities under construction or already operating has also not been adopted. In the Commission's program for the regulation of facilities, the primary times of decisionmaking are at the issuance of the construction permit, and at the issuance of the operating license. The pattern for implementation of the requirements of the National Environmental Policy Act of 1969 outlined in revised Appendix D contemplates that consideration of environmental impact in the Commission's decisionmaking process will be given primarily at the construction permit stage so as to afford the greatest latitude for early, appropriate action. Environmental matters differing significantly from those considered at the construction permit stage, or when the first Environmental Report is filed as described in paragraph 7a above, would, however, be considered at the operating license stage. The Commission believes that this approach affords the full review of environmental matters in connection with agency decisionmaking required by the National Environmental Policy Act of 1969 and, together with the condition described in redesignated paragraph 9 of revised Appendix D, reflects a reasonable balancing of the various public interest considerations involved.

Calvert Cliffs Coordinating Committee, National Wildlife Federation, and the Sierra Club also urged that since the Water Quality Improvement Act of 1970 (Public Law 91-244) only requires certification of compliance with applicable water quality standards for projects for which construction was begun after April 3, 1970, the Commission is constrained, under the National Environmental Policy Act of 1969, to determine what water quality standards should be applied to facilities under construction before April 3, 1970, and whether the facility will conform to them. The Commission remains of the view that the requirements of section 21(b) of the Federal Water Pollution Control Act supercede pro tanto the more general environmental requirements of sections 102 and 103 of the National Environmental Policy Act of 1969. It should be noted, however, that Appendix D has been revised to (1) indicate that water quality aspects of the proposed action should be discussed in Applicant's Environmental Reports and in Detailed Statements and (2) provide for the inclusion in construction permits and operating licenses of conditions requiring compliance with the applicable requirements of section 21(b).

One comment urged that the atomic safety and licensing board should hear evidence concerning environmental matters, pass on the adequacy of the Detailed Statement and make findings concerning environmental impact. Other comments pertained to the content of the Applicant's Environmental Report and the Detailed Statement, service of copies, notification of parties, and admissibility of such Reports, Statements, and other material relating to environmental protection in evidence. Under revised Appendix D, Environmental Reports, Detailed Statements, and other material dealing with environmental effects could be introduced in evidence and made a part of the record for decision in facility licensing proceedings under the above-described circumstances. If such material were offered and/or received in evidence, Commission rules pertaining to evidentiary material would, of course, apply. Copies of FEDERAL REGISTER notices of the availability of Environmental Reports and draft Detailed Statements and information pertaining to agencies receiving and requesting copies of such Reports and comments will be available on request, without specific provision in Appendix D.

It was also requested that the Federal, State, and local agencies having jurisdiction by law or special expertise with respect to environmental impact to which applicable Environmental Reports are submitted, and agencies authorized to develop and enforce environmental standards, be identified. The Commission does not consider it practical to do so in the regulation, since the particular agencies having expertise may not necessarily be the same in each case. With respect to State and local agencies, the notice provided in the FEDERAL REGISTER and the notice provided to the Governor of the State in which the facility is to be located are intended to assure that the appropriate agencies are notified.

Several comments evidenced some uncertainty concerning the statement in paragraph 5 of Appendix D to the effect that, with respect to the operation of nuclear power reactors, it is expected that in most cases the Detailed Statement will be prepared only in connection with the first licensing action that authorizes full power operation of the facility.

The intent of that statement was to identify the particular operating licensing action in connection with which the Detailed Statement would be prepared, not to imply that a Detailed Statement would be omitted at the construction permit stage. This has been made clear in revised Appendix D set out below.

One comment suggested that the requirement for the submission of Applicant's Environmental Reports be modified to permit submission as soon after the submission of the application as practicable. In view of the desirability of an early resolution of questions related to the environmental impact of nuclear facilities, as indicated in the interim guidelines published by the Council on

[3] The suggestions of those commentators were also the subject of a petition for rulemaking by the same persons. The petition was denied in a notice published in the FEDERAL REGISTER on Aug. 6, 1970 (35 F.R. 12566). The notice of denial stated that the Commission would consider carefully, and address itself to, the matter raised by the petition for rulemaking in the instant rulemaking proceeding. The same suggestions were also made by Scenic Shoreline Preservation Conference, Inc., in a petition for rulemaking filed July 13, 1970. The discussion herein is also applicable to the suggestions contained in that petition.

Environmental Quality on May 12, 1970 (35 F.R. 7390), it is not considered advisable to extend the time for filing such Reports.

The Atomic Energy Council of the State of New York and the General Electric Co., in their comments, requested clarification of proposed Appendix D with respect to determinations as to the applicability and validity of, and compliance with, State standards and requirements for the protection of the environment. Paragraphs 11, 12, and 13 in revised Appendix D clarify those matters.

A suggestion was made that comments on Applicant's Environmental Reports at the operating license stage be solicited from Federal and State agencies only as to environmental considerations that differ significantly from those discussed in the Environmental Report previously submitted with the application for a construction permit. Paragraphs 3 and 4 of revised Appendix D provide that such comments will be requested only as to environmental matters that differ significantly from those considered at the construction permit stage.

It may be noted that the Commission would, as a matter of practice, routinely send a copy of Applicant's Environmental Reports and of Detailed Statements to the Governor of any affected State(s) or his designee(s). It should also be noted that the Commission intends to provide appropriate guidance as to the scope and content of Applicant's Environmental Reports.

In its consideration of Appendix D, the Commission has recognized the public interest in protecting the environment as well as the public interest in avoiding unreasonable delay in meeting the growing national need for electric power.

The public is demanding substantially more electric power, and it is expecting the power to be available, without shortages or blackouts. Electric power use in the United States has been doubling about every 10 years. If prevailing growth pattern and pricing policies continue, electric power capacity may need to triple or quadruple in the next two decades. Meanwhile during the coming winter and summer and for the next few years, there is a real electric power and fuel crisis in this country.[1]

[1] Chairman Nassikas of the Federal Power Commission stated, at hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, on August 3, 1970: "The current situation is such that little leeway remains for additional delays if the country is to avoid critical future shortages in meeting anticipated real power needs."

In a "Statement on the Fuel Situation for the Winter of 1970–71," Paul W. McCracken, Chairman, Council of Economic Advisers, and General George A. Lincoln, Director, Office of Emergency Preparedness, said:

"We have continued to study the energy supply situation and find that as winter approaches the nation faces a potential shortage in the supplies of natural gas, residual fuel oil and bituminous coal. The potential shortage appears to be more serious in some regions of the country than in others, but no section is completely immune from concern."

Various authoritative statements and reports have stressed that the urgent near term need for electric power requires that delays be held to an absolute minimum. Also reports looking to the implementation of improved institutional arrangements on siting of power plants recommend procedures for expediting the process consistent with protection of the environment. Thus in the Report "Electric Power and the Environment" published by the Energy Policy Staff of the Office of Science and Technology in August 1970, in which all of the Federal agencies responsible for environmental and power programs participated, the Basic Findings stated:

> New public agencies and review procedures must take into account the positive necessity for expediting the decision-making process and avoiding undue delays in order to provide adequate electric power on reasonable schedules while protecting the environment.

The Commission believes that revised Appendix D takes into account the necessity for avoiding undue delays in order to provide adequate electric power and that it reflects a balanced approach toward carrying out the Commission's environmental protection responsibilities under the National Environmental Policy Act of 1969 and the Atomic Energy Act of 1954, as amended. Its main concern here has been to find out and strike a reasonable balance of those considerations in the overall public interest. The Commission expects that revised Appendix D will be implemented to that end.

Pursuant to the National Environmental Policy Act of 1969, the Atomic Energy Act of 1954, as amended, and sections 552 and 553 of title 5 of the United States Code, the following amendment of Title 10, Chapter 1, Code of Federal Regulations, Part 50 is published as a document subject to codification, to be effective 30 days after publication in the FEDERAL REGISTER. The Commission invites all interested persons who desire to submit written comments or suggestions for consideration in connection with the amendment to send them to the Secretary of the Commission, U.S. Atomic Energy Commission, Washington, D.C. 20545, Attention: Chief, Public Proceedings Branch, within 60 days after publication of this notice in the FEDERAL REGISTER. Consideration will be given to such submission with the view to possible further amendments. Copies of comments received by the Commission may be examined at the Commission's Public Document Room, 1717 H Street NW., Washington, DC.

Appendix D is revised to read as follows:

APPENDIX D—STATEMENT OF GENERAL POLICY AND PROCEDURE: IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (PUBLIC LAW 91–190)

On January 1, 1970, the National Environmental Policy Act of 1969 (Public Law 91–190) became effective. The stated purposes of that Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Section 101(b) of that Act provides that, in order to carry out the policy set forth in the Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources toward certain stated ends.

In section 102 of the National Environmental Policy Act of 1969 the Congress authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in the Act. All agencies of the Federal Government are required, among other things, to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on certain specified environmental considerations. Prior to making the detailed statement, the responsible Federal official is required to consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Since the enactment of the National Environmental Policy Act of 1969, the President has issued Executive Order 11514, dated March 5, 1970, in furtherance of the purpose and policy of that Act, and the Council on Environmental Quality established by title II of that Act has issued interim guidelines to Federal departments, agencies and establishments for the preparation of the detailed statements on environmental considerations (35 F.R. 7390, May 12, 1970).

On April 3, 1970, the Water Quality Improvement Act of 1970 (Public Law 91–224) became effective. That Act redesignated section 11 of the Federal Water Pollution Control Act as section 21 and amended redesignated section 21 to require, in subsection 21(b)(1), any applicant for a Federal license or permit to conduct any activity, including the construction or operation of a facility, which may result in any discharge into the navigable waters of the United States, to provide the Federal licensing agency a certification from the State in which the discharge originates, or from an interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates, or the Secretary of the Interior, in cases where water quality standards have been promulgated by the Secretary under section 10(c) of the Federal Water Pollution Control Act or where the State or interstate agency has no authority to give such certification, that there is reasonable assurance, as determined by such certifying authority, that the activity will be conducted in a manner which will not violate applicable water quality standards.

The Commission expressly recognizes the positive necessity for expediting the decision-making process and avoiding undue delays in order to provide adequate electric power on reasonable schedules while at the same time protecting the quality of the environment. It expects that its responsibilities under the National Environmental Policy Act of 1969, as set out below, and the Federal Water Pollution Control Act, will be carried out in a manner consistent with this policy in the overall public interest.

Pending the issuance of further guidance by the Council on Environmental Quality

and consistent with the public interest in avoiding unreasonable delay in meeting the growing national need for electric power, the Commission will exercise its responsibilities under the National Environmental Policy Act and the Atomic Energy Act of 1954, as amended, as follows:

1. Each applicant for a permit to construct a nuclear power reactor or a fuel reprocessing plant shall submit with his application one hundred and fifty (150) copies, including one reproducible copy, of a separate document, to be entitled "Applicant's Environmental Report—Construction Permit Stage," which discusses the following environmental considerations:

(a) The environmental impact of the proposed action,

(b) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(c) Alternatives to the proposed action,

(d) The relationship between local short-term uses of man's environment and the maintenance and enchancement of long-term productivity, and

(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Each holder of a permit to construct a nuclear power reactor or a fuel reprocessing plant issued without the Detailed Statement described in paragraph 5 having been prepared, who has not filed an application for an operating license, shall submit one hundred and fifty (150) copies, including one reproducible copy, of an Environmental Report as soon as practicable.

2. Each applicant for a license to operate a nuclear power reactor or a fuel reprocessing plant shall submit with his application one hundred and fifty (150) copies, including one reproducible copy, of a separate document, to be entitled "Applicant's Environmental Report—Operating License Stage," which discusses the same environmental considerations described in paragraph 1, but only to the extent that they differ significantly from those discussed in the Applicant's Environmental Report previously submitted with the application for a construction permit, if any. The "Applicant's Environmental Report—Operating License Stage" may incorporate by reference any information contained in the Applicant's Environmental Report previously submitted with the application for a construction permit, if any. With respect to the operation of nuclear power reactors, the applicant, unless otherwise required by the Commission, shall submit the "Applicant's Environmental Report—Operating License Stage" only in connection with the first licensing action that would authorize full-power operation of the facility.[1]

3. After receipt of any Applicant's Environmental Report, the Director of Regulation or his designee will analyze the report and prepare a draft Detailed Statement of environmental considerations. The draft Detailed Statement may consist, in whole or in part, of the comments of the Director of Regulation or his designee on the Applicant's Environmental Report. The Commission will then transmit a copy of the report and of the draft Detailed Statement to such Federal agencies designated by the Council on Environmental Quality as having "jurisdiction by law or special expertise with respect to any environmental impact involved" or as "authorized to develop and enforce environmental standards" as the Commission determines are appropriate, with a request for comment on the report and the draft Detailed Statement within thirty (30) days.[2] Comments on an "Applicant's Environmental Report—Operating License Stage" and on the draft Detailed Statement prepared in connection therewith will be requested only as to environmental matters that differ significantly from those previously considered at the construction permit stage. The Commission may extend the period for comment if it determines that such an extension is practicable. If any such Federal agency fails to provide the Commission with comments within thirty (30) days after the agency's receipt of the report and draft Detailed Statement or such later date as may have been specified by the Commission, it will be presumed that the agency has no comment to make.

4. Upon receipt of any Applicant's Environmental Report and preparation of a draft Detailed Statement in connection therewith, the Commission will cause to be published in the FEDERAL REGISTER a summary notice of the availability of the report and the draft Statement. (In accordance with § 2.101(b) of Part 2, the Commission will also send a copy of the application to the Governor or other appropriate official of the State in which the facility is to be located and will publish in the FEDERAL REGISTER a notice of receipt of the application, stating the purpose of the application and specifying the location at which the proposed activity will be conducted.) The summary notice to be published pursuant to this paragraph will request, within sixty (60) days or such longer period as the Commission may determine to be practicable, comment on the proposed action and on the report and the draft Statement, from State and local agencies of any affected State (with respect to matters within their jurisdiction) which are authorized to develop and enforce environmental standards. Comments on an Applicant's Environmental Report—Operating License Stage and the draft Detailed Statement prepared in connection therewith will be requested only as to environmental matters that differ significantly from those previously considered at the construction permit stage. The summary notice will also contain a statement to the effect that a copy of the report and the draft Statement and comments of Federal agencies thereon will be supplied to such State and local agencies on request. If any such State or local agency fails to provide the Commission with comments within sixty (60) days of the publication of the summary notice or such later date as may have been specified by the Commission, it will be presumed that the agency has no comment to make.

5. After receipt of the comments requested pursuant to paragraphs 3. and 4., the Director of Regulation or his designee will prepare a final Detailed Statement on the environmental considerations specified in paragraph 1., including, where appropriate, a discussion of problems and objections raised by Federal, State, and local agencies and the disposition thereof. In preparing the Detailed Statement, the Director of Regulation or his designee may rely, in whole or in part, on, and may incorporate by reference, the appropriate Applicant's Environmental Report, and the comments submitted by Federal, State, and local agencies pursuant to paragraphs 3. and 4., as well as the regulatory staff's radiological safety evaluation. The Detailed Statement will relate primarily to the environmental effects of the facility that is subject to the licensing action involved.

Detailed Statements prepared in connection with an application for an operating license will cover only those environmental considerations which differ significantly from those discussed in the Detailed Statement previously prepared in connection with the application for a construction permit and may incorporate by reference any information contained in the Detailed Statement previously prepared in connection with the application for a construction permit. With respect to the operation of nuclear power reactors, it is expected that in most cases the Detailed Statement will be prepared only in connection with the first licensing action that authorizes full-power operation of the facility.[3]

6. With respect to water quality aspects of the proposed action covered by section 21(b) of the Federal Water Pollution Control Act, the Environmental Reports submitted by applicants pursuant to paragraphs 1. and 2. and the Detailed Statements prepared pursuant to paragraph 5. shall include a reference to the certification issued pursuant to section 21(b) or applied for or to be applied for pursuant to that section, or to the basis on which such certification is not required. Such reports and statements shall include a discussion of the water quality aspects of the proposed action, whether or not they are covered by section 21(b) of the Federal Water Pollution Control Act.[4]

7. The Commission will transmit to the Council on Environmental Quality copies of (a) each Applicant's Environmental Report, (b) each draft Detailed Statement, (c) comments thereon received from Federal, State, and local agencies, and (d) each Detailed Statement prepared pursuant to paragraph 5. Copies of such reports, draft statements, comments and statements will be made available to the public as provided by section 552 of title 5 of the United States Code, and will accompany the application through the Commission's review processes. After each Detailed Statement becomes available, a notice of its availability will be published in the FEDERAL REGISTER.

8. With respect to proceedings which take place in the transitional period required to establish the new procedures described in this appendix, it is recognized that the Detailed Statements may not be as complete as they will be after there has been an opportunity to coordinate these procedures with the other agencies involved, and, further, that some period of time may be required before full compliance with the procedures themselves can be achieved.

9. The Commission will incorporate in all construction permits and operating licenses for power reactors and fuel reprocessing plants, whenever issued, a condition, in addition to any conditions imposed pursuant to paragraphs 12 and 14, to the effect that the licensee shall observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved. This condition will not apply to (a) radiological effects since radiological effects are

[1] This report is in addition to the report required at the construction permit stage.

[2] A draft Detailed Statement will not be prepared in cases where the Applicant's Environmental Report has been transmitted to the cognizant agencies for comment prior to Dec. 4, 1970.

[3] This Statement is in addition to the Statement prepared at the construction permit stage.

[4] With respect to water quality aspects of the proposed action covered by said section 21(b), such a discussion need not be included in cases where the Applicant's Environmental Report has been submitted by the applicant prior to Dec. 4, 1970.

dealt with in other provisions of the construction permit and operating license, or (b) matters of water quality covered by section 21(b) of the Federal Water Pollution Control Act since the requirements of section 21(b) supersede pro tanto the more general requirements of sections 102 and 103 of the National Environmental Policy Act of 1969.[5] This condition shall also not be construed as extending the jurisdiction of this agency to making an independent review of standards or requirements validly imposed pursuant to authority established under Federal and State law.

10. The Commission believes that the preservation of environmental values can best be accomplished through the establishing of environmental quality standards and requirements by appropriate Federal, State, and regional agencies having responsibility for environmental protection. The Commission urges the appropriate agencies to proceed promptly to establish such standards and requirements.

11. (a) Any party to a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or a fuel reprocessing plant may raise as an issue in the proceeding whether the issuance of the permit or license would be likely to result in a significant, adverse effect on the environment. If such a result were indicated, in accordance with the declaration of national policy expressed in the National Environmental Policy Act of 1969, consideration will be given to the need for the imposition of requirements for the preservation of environmental values consistent with other essential considerations of national policy, including the need to meet on a timely basis the growing national requirements for electric power. The above-described issues shall not be construed as including (a) radiological effects, since radiological effects are considered pursuant to other provisions of this part or (b) matters of water quality covered by section 21(b) of the Federal Water Pollution Control Act. This paragraph applies only to proceedings in which the notice of hearing in the proceeding is published on or after March 4, 1971.

(b) With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose.

(c) In any event, there will be incorporated in construction permits and operating licenses a condition to the effect that the licensee shall observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved.

12. If any party to a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or a fuel reprocessing plant raises any issue described in paragraph 11, the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve, the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.

13. When no party to a proceeding for the issuance of a construction permit or an operating license for a nuclear power reactor or a fuel reprocessing plant raises any issue described in paragraph 11, such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process.

14. The Commission will incorporate in all construction permits and operating licenses for power reactors and fuel reprocessing plants, whenever issued, a condition, in addition to any conditions imposed pursuant to paragraphs 9 and 12, to the effect that the licensee shall comply with all applicable requirements of section 21(b) of the Federal Water Pollution Control Act.

Nothing in this Appendix shall be construed as affecting (a) the manner in which the Commission obtains advice from other agencies, Federal and State, with respect to the control of radiation effects, or (b) the other, and separate, provisions of the construction permit and operating license which deal with radiological effects.

Procedures and measures similar to those described in the preceding paragraphs of this appendix will be followed in proceedings other than those involving nuclear power reactors and fuel reprocessing plants when the Commission determines that the proposed action is one significantly affecting the quality of the human environment. The Commission has determined that such proceedings will ordinarily include proceedings for the issuance of the following types of materials licenses: (a) Licenses for possession and use of special nuclear material for fuel element fabrication, scrap recovery and conversion of uranium hexafluoride; (b) licenses for possession and use of source material for uranium milling and production of uranium hexafluoride; and (c) licenses authorizing commercial radioactive waste disposal by land burial. The procedures and measures to be followed with respect to materials licenses will, of course, reflect the fact that, unlike the licensing of production and utilization facilities, the licensing of materials does not require separate authorizations for construction and operation. Ordinarily, therefore, there will be only one Applicant's Environmental Report required and only one Detailed Statement prepared in connection with an application for a materials license. If a proposed subsequent licensing action involves environmental considerations which differ significantly from those discussed in the Environmental Report filed and the Detailed Statement previously prepared in connection with the original licensing action, a supplementary Environmental Report will be required and a supplementary Detailed Statement will be prepared.

(Sec. 102, 83 Stat. 853; secs. 3, 161; 68 Stat. 922, 948, as amended; 42 U.S.C. 2013, 2201)

Dated at Washington, D.C., this 3d day of December 1970.

For the Atomic Energy Commission.

W. B. McCool,
Secretary of the Commission.

[F.R. Doc. 70-16450; Filed, Dec. 3, 1970; 11:59 a.m.]

[5] Paragraph 14 provides for the inclusion of a separate condition requiring compliance with applicable requirements of section 21(b) of the Federal Water Pollution Control Act.

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)	)))	Docket No. 50-247

CERTIFICATE OF SERVICE

I hereby certify that I have served the attached document entitled "Memorandum of Law in Support of Applicant's Answer in Opposition to Hudson River Fishermen's Association and Environmental Defense Fund, Inc. for Discovery" including Attachment A, by mailing copies thereof first class and postage prepaid, to each of the following persons this 22nd day of April, 1971:

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