Before the
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

- - - - - - - - - - - - - - - - - X

In the Matter of :

CONSOLIDATED EDISON COMPANY
of New York, Inc. : Docket No.

(Indian Point Unit No. 2) : 50-247

- - - - - - - - - - - - - - - - - X

MOTION OF HUDSON RIVER FISHERMEN'S ASSOCIATION AND ENVIRONMENTAL DEFENSE FUND FOR THE TAKING OF INTERROGATORIES, PRODUCTION AND COPYING OF DOCUMENTS AND TAKING OF DEPOSITIONS.

Hudson River Fishermen's Association and Environmental Defense Fund, intervenors, present the following motions to this Board:

1. Intervenors move the Board for an order allowing them to address interrogatories to the Commission to discover the persons involved in the promulgation of the challenged regulations of Appendix D, the documents or discussions on which the promulgation was based, and other matters related to the reasonableness of the Commission's implementation of NEPA.

2. Intervenors move the Board for an order allowing them to demand the production and copying of any documents relative to the promulgation of the disputed regulations in Appendix D.

3. Intervenors move the Board for an order allowing them to take the depositions of those employees or officers of the Commission identified by the interrogatories as responsible for the decision to apply Appendix D only to hearings noticed after March 4 and to limit the scope of issues under Appendix D in the manner challenged by the intervenors in the motions on environmental issues.

A memorandum of law is submitted in support of these motions.

Dated: New York, New York
April 2, 1971.

Angus Macbeth

ANGUS MACBETH

RICHARD M. HALL
(Natural Resources Defense Council, Inc.)
Attorneys for Hudson River Fishermen's Association, Intervenor
36 West 44th Street
New York, New York 10036
(212) 986-8310

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

----------X

IN THE MATTER OF :

CONSOLIDATED EDISON COMPANY : DOCKET NO. 50-247
OF NEW YORK, INC.
(Indian Point Station Unit No. 2) :

----------X

MEMORANDUM IN SUPPORT OF INTERVENORS' MOTION FOR THE TAKING OF INTERROGATORIES, PRODUCTION AND COPYING OF DOCUMENTS AND THE TAKING OF DEPOSITIONS

STATEMENT

Intervenors HRFA and EDF have moved the Board to consider non-radiological environmental questions in the operating license hearings on Indian Point Unit No. 2. Specifically the intervenors challenged the AEC's regulations promulgated in Appendix D to 10 C.F.R. Part 50 (35 Fed. Reg. 18469) which limit the consideration of non-radiological environmental matters to hearings noticed after March 4, 1971(¶ 11(a)); and, where environmental standards established by other governmental agencies apply, limit the Board to requiring compliance with such standards (¶ 11(b)).

This motion was opposed by the Applicant, Con Edison, and by the Regulatory Staff of the Commission with a variety of arguments.

Oral argument on the motion was heard by the Board on March 24, 1971. In their papers and at argument HRFA and EDF took the position that an essentially legal question was presented: the clear statutory language of the National Environmental Policy Act ("NEPA") required the Commission to comply fully with the terms of the Act from the date of its enactment; the challenged regulations in Appendix D did not comply with NEPA, and therefore the Board should certify this challenge.

The Board made it clear that particularly in light of the Commission's memorandum in Calvert Cliffs, regularity in the Commission's regulations would be presumed and the burden of any evidentiary showing of irregularity, arbitrariness or illegality fell on the party challenging the regulation (Trancript 701-702).

On the basis of that ruling, HRFA and EDF informed the Board by telegram on March 26th that they were moving for an order allowing the

taking of interrogatories, production and copying of documents and taking of depositions. This memorandum is presented in support of that motion.

NATURE OF EVIDENCE SOUGHT ON THE MARCH 4th DATE(PARAGRAPH 11(a) OF APPENDIX D)

The Commission's reasons for its regulation that non-radiological effects will be considered only in hearings noticed after March 4, 1971, are included in its statement of December 3, 1970, on Appendix D:

> "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." 35 Fed. Reg. 18470.

The Commission here justifies its selection of the March 4th date on two grounds: the need for an orderly transition period and the need for electric power. The Commission amplifies the consideration of the need for electric power in later paragraphs, citing statements apparently made to other governmental bodies or the public by Chairman

Nassikas of the Federal Power Commission; Paul W. McCracken, Chairman of the Council of Economic Advisers and General George A. Lincoln, Director, Office of Emergency Preparedness; and a report of the Energy Policy Staff of the Office of Science and Technology. The Commission also refers to "Various authoritative statements and reports" which remain unspecified. 35 Fed. Reg. 18472.

The Commission's statements concerning Appendix D do not clarify the notion of an orderly transition period with any precision. It is unclear whether this period was thought necessary to increase Commission personnel, train staff, allow applicants for licenses to begin environmental studies or for other entirely different reasons.

Thus in the Commission's statement in Appendix D neither the judgment on national electric power need, relying on unidentified statements and reports, nor the considerations underlying the period of orderly transition are spelled out with sufficient clarity for the intervenors to be entirely sure what the Commission's basis for the

regulations was.

The situation is further complicated by the fact that on February 27th the Commission published the notice of hearing In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Station), AEC Docket 50-271. That notice of hearing states that the non-radiological environmental matters covered by Appendix D will be considered by the Licensing Board. This was done despite the fact that the notice of hearing was issued before March 4, 1971. The Vermont Yankee notice of hearing gives no explanation of why the Commission made this exception to its regulations. Since the justification of the March 4th date rested on the need for a period of orderly transition and the need for electric power one might well assume that either or both of those factors was not present in the case of Vermont Yankee. *

In making their evidentiary challenge to

* Counsel for the Regulatory Staff has offered the Board his explanation for the Vermont Yankee ex-

the March 4th date, there are a number of lines of inquiry which HRFA and EDF must pursue with the Commission. Generally stated, the most obvious consist of the following:

What is the entire record and what are the considerations which underlie the judgment of the need for electric power?

What are the precise considerations which led the Commission to decide that an orderly transition period was necessary?

What were the considerations which led the Commission to waive the March 4th date in the Vermont Yankee case?

On the basis of these inquiries and further evidence which they will supply directly or by

---

* ception: "that notice was published prior to the time when in the ordinary course of things a notice of hearing would be published. ...The purpose of that obviously is to permit the parties to engage in such pretrial activities as are required to become parties at an early enough date for them to adequately prepare for hearing." (Transcript at 649-50). That explanation raises some questions of its own, but, as Mr. Knotts pointed out, his remarks are not evidence in the proceeding. (Transcript at 642). More fundamentally, the Board must be interested in the Commission's reasons and "not the subsequent rationalizations of its counsel". Trailways of New England, Inc. v. CAB 412 F.2d 926, 931 (1st Cir. 1969); Public Service Commission of the State of New York v. F.P.C. 436 F.2d 904 (D.C. Cir. 1970).

questions to the other parties, HRFA and EDF should have a factual basis on which to argue that either 1) either or both of the considerations of electric power need and orderly transition are impermissible under NEPA; or 2) either or both of the considerations of electric power need and orderly transition are not applicable to Indian Point Unit No. 2 under the rationale of the Vermont Yankee exception to the Appendix D regulations.

NATURE OF EVIDENCE ON ENVIRONMENTAL STANDARDS TO BE APPLIED (PARAGRAPH 11(b) OF APPENDIX D)

The Commission's reasons for deferring to Federal, State and local standards in considering non-radiological environmental questions is set out in the statement covering Appendix D:

> "The Commission has sought to...take into account the traditional role played by State and local governments in the protection of the environment. ...
>
> 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." 35 Fed. Reg. 18470.

Thus the Commission's decision on the issue of despositive governmental standards for environmental protection rests on two grounds: tradition and the belief of the Commission as to what agencies should establish the standards by which the environmental interests at stake in particular hearings will be measured.

The Commission does not explicate the elements of the tradition it suggests and it does not elucidate the basis for its belief as to appropriate agencies. In order to challenge this ruling on an evidentiary basis, HRFA and EDF must inquire as to the foundation on which the judgments on tradition and belief rest so that the basis of those judgments can be measured against the language and intent of NEPA.

The general lines of inquiry which HRFA and EDF must pursue with the Commission on this point are fairly obvious. Generally put, they may be stated as follows:

What are the elements of the tradition on

which the Commission relied?

What is the basis of the Commission's belief that other governmental organs should set environmental standards to which the Commission should defer?

How did the Commission think the tradition and their beliefs related to the language and intent of NEPA?

On the basis of these inquiries and such further evidence as they may wish to supply, the intervenors should have a factual basis on which to argue that the deference shown the regulations of other Federal, State and regional agencies is impermissible under NEPA.

IT IS PERMISSABLE FOR INTERVENORS TO TAKE THE INTERROGATORIES, PRODUCTION AND COPYING AND DEPOSITIONS REQUESTED

The Commission has implemented NEPA through Appendix D to 10 C.F.R. Part 50. By the Board's ruling, the intervenors have the burden of presenting any evidentiary material which demonstrates that Appendix D is an illegal or improper implementation of NEPA. The most obvious way of approaching this question is to discover from those who promulgated the

regulations what the factual bases and elements of their decisions and judgments were. Those facts, judgments and decisions can then be measured against the language and intent of NEPA.

This is basically the method of procedure which was pursued in the Toilet Goods litigation. Toilet Goods Association, Inc. v. Celebrezze, 235 F. Supp. 648 (S.D.N.Y. 1964) modified sub. nom. Toilet Goods Association, Inc. v. Gardner, 360 F.2d 677 (2d Cir. 1966), aff'd, 387 U.S. 158 and 387 U.S. 167 (1967); Toilet Goods Association, Inc. v. Gardner, 278 F. Supp. 786 (S.D.N.Y. 1968), aff'd in part, reversed in part and remanded for modification of the decree sub. nom. Toilet Goods Association, Inc. v. Finch, 419 F.2d 21 (2d Cir. 1969).

In that case plaintiffs sought a declatory judgment as to the validity of certain regulations promulgated by the Commissioner of the Food & Drug Administration. Plaintiffs contended that the challenged regulations exceeded the authority vested in the F.D.A. by statute. In the course of its first opinion, the District Court took up the question of what evidence would be helpful to the resolution of the issue before it:

> "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, can only be enhanced by a particular understanding to be obtained with expert assistance, of the technical problems involved. Additionally, since professionally qualified representatives of both plaintiffs and defendants were present during the hearings and debates which preceded the passage of the 1960 Color Additives Amendments, it would be helpful to hear their testimony relative to legislative intent, which, presumably, they had an important role in shaping and assisting." 235 F Supp. at 653.

Thus the court directly said that it would be helpful to have testimony from representatives of the Food & Drug Administration when it was examining the facts of the situation in which the statute governing the challenged regulations was passed. The analogy to the present case is obvious: intervenors seek testimony from the Atomic Energy Commission on the facts of the situation in which the challenged regulations were promulgated. Intervenors seek the testimony of Commission's intent and decision-making from those who have had an important role in shaping the Commission's decisions.

This statement by the District Court was in no way questioned or modified on appeal to the Second Circuit Court of Appeals and to the U. S. Supreme Court, with the exception of the determination by the higher courts that one of the challenged regulations was not ripe for review.

From the Supreme Court, Toilet Goods returned to the District Court and the second District Court opinion lays out, in a few words, the course of discovery that was followed:

> "At [a pre-trial] conference, the parties, with the approval of this court, agreed that summary judgment based upon the pleadings, affidavits and depositions taken by plaintiffs of certain government witnesses was appropriate for resolution of the merits of plaintiffs' attack upon the Regulations in question." 278 F. Supp. at 787. (emphasis supplied).

Thus the court maintained that taking evidence from Food & Drug Administration witnesses was proper and it approved that action. The Second Circuit did not modify or reverse that position on appeal.

Toilet Goods is the most pointed and forceful case that we can cite on this question. It was a

hotly contested case with considerable review which extended over a long period of time. It directly faces the question of challenging agency regulations and approves the taking of evidence from government witnesses by the party challenging the regulation.

If one takes the analogous case of review of an agency adjudication, there are repeated statements from courts that the agency, and not its counsel, must explain the reasons for agency action. Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931 (1st Cir. 1969); Public Service Commission of the State of New York v. F.P.C. 436 F.2d 904 (D.C. Cir. 1970);National Air Carrier Association v. CAB, 436 F.2d 185, 195 (D.C. Cir. 1970). The point of these cases is that it is at the level of administrative proceedings that the agency's reasons for action should be developed and explored. That is an opportunity that is presently open to the Board in this case. The rulings of the courts suggest it is an opportunity which the Board should take.

CONCLUSION

It is permissible under the law for the

intervenors to engage in the discovery, production and taking of depositions for which they have moved. The taking of that evidence is necessary if an evidentiary basis for considering the propriety and legality of the Commission's implementation of NEPA is to be developed.

The motions of intervenors HRFA and EDF should be granted in their entirety.

Respectfully submitted,

ANGUS MACBETH

(Natural Resources Defense Council, Inc.)
Attorney for Hudson River Fishermen's Association
36 West 44th Street
New York, N. Y. 10036

Dated: New York, N. Y.
April 2, 1971