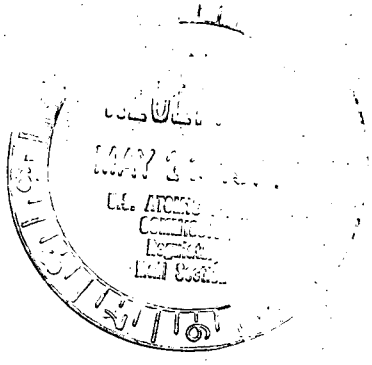
BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION



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In the Matter of :

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

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INTERVENORS' REPLY BRIEF

STATEMENT

By a letter of April 27, 1971, the Chairman of the Atomic Safety and Licensing Board in this proceeding invited Intervenors, HRFA and EDF, to submit a reply brief on their motion for an order to consider environmental issues. In the course of the letter, the Chairman of the Board stated that

> "what is really at issue, is the scope of the authority extended by the Commission in the Calvert Cliffs case to permit a preparation of a record of evidence, and of what kind, to be submitted to the Commission to consider whether the validity and application of Appendix D should be reexamined in the light of additional evidence developed in a particular proceeding."

This brief addresses itself first to the issues posed by the Chairman's letter. It also replies to a number of points and distinctions raised by the Staff and the Applicant, Con Edison, in their answering briefs dated April 21, 1971, and April 22, 1971, respectively.

POINT I

SCOPE OF RECORD UNDER CALVERT CLIFFS

In the Calvert Cliffs decision,* the Atomic Energy Commission stated that it would allow

> "a licensing proceeding challenge to the validity of a Commission regulation, on limited grounds, if the contested regulation relates to an issue in the proceeding. By limited grounds we mean, whether the regulation was within the Commission's authority; whether it was promulgated in accordance with applicable procedural requirements; and, as respects the Commission's radiological safety standards, whether the standards established are a reasonable exercise of the broad discretion given to the Commission by the Atomic Energy Act for implementation of the statute's radiological safety objectives. See, Power Reactor Development Co. v. Electrical Workers, 367 U.S. 396 (1961); Siegel v. Atomic Energy Commission, et al., 400 F.2d 778 (CADC, 1968).
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> We would couple the above comments with the enjoinder that, if a board believes there is a substantial question presented on the record as to the validity of a challenged regulation, the board should certify that question to the Commission for guidance prior to rendering an initial decision."

The Commission lays out three issues that can be raised in challenging a Commission regulation:

1. Is the regulation within the Commission's authority?
2. Was the regulation promulgated in accordance with applicable procedural requirements?

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* In the Matter of Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 2 CCH Atom. En. L. Rep. ¶11,578.02 (1969).

3. Is the regulation a reasonable exercise of the Commission's discretion in the light of the governing statute?*

Parties to a proceeding may challenge an applicable regulation on the basis of one or more of the three tests. The challenger must present the Board "on the record" with a substantial question as to the validity of the challenged regulation. If the challenger does so, the issue raised by the challenge is to be certified to the Appeals Board. If any of the three questions laid out in Calvert Cliffs is answered in the negative, the challenged segment of the Commission's regulations would be ruled invalid.

In the motions before the Board, Intervenors seek an order for the hearing of non-radiological environmental issues presently excluded from this proceeding by Appendix D to 10 CFR Part 50. Intervenors seek to present evidence and argument for the modification in this proceeding of the challenged portions of Appendix D on two grounds. First, challengers contend that the disputed portions of Appendix D are invalid under the National Environmental Policy Act of 1969 (NEPA). Second, challnegers contend that application of the general rule of Appendix D in the factual circumstances of Indian Point No. 2 would be improper and inappropriate. Calvert Cliffs contemplates such a general challenge

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* The phrasing of this last question, of course, puts the particular challenge in Calvert Cliffs in general language which applies to challenges of any Commission regulation.

within the context of a particular hearing. This is most obvious with the first and second tests under Calvert Cliffs since a ruling that a regulation exceeds the authority of the Commission or was promulgated in a procedurally improper manner would affect the validity of the regulation in all proceedings. The third test also allows a general challenge since a showing that the general radiological safety standards were defective with regard to one plant would demonstrate that they failed to meet the general standards of safety for all plants.

The precise form of the record in a particular proceeding may vary according to which of the Calvert Cliffs tests the challenger relies on. In this proceeding, Intervenors challenge is based on two of the three tests laid out in Calvert Cliffs. Under the first test, Intervenors argue that the challenged parts of Appendix D exceed the authority of the Commission in that they violate the clear directives of NEPA. EDF Brief of February 26, 1971; HRFA Brief of March 2, 1971. In regard to the second test, neither the Intervenors nor the other parties argue that there were sufficient procedural irregularities in the promulgation of Appendix D to rule it invalid. Intervenors Brief of April 8, 1971; Staff Brief of April 21, 1971; Con Edison Brief of April 22, 1971. Under the third test, Intervenors argue that the challenged parts of Appendix D are an abuse of any discretion which the Commission may have under NEPA. EDF Brief of February 26, 1971; HRFA Brief of March 2, 1971.

The question is now posed of what is an appropriate record for a challenge under the first and third tests in Calvert Cliffs. Intervenors contend that the authority and the discretion of the Commission are controlled by the terms of NEPA which Appendix D implements. Therefore, Appendix D must be measured against the clear language and intent of NEPA, and if a substantial question is presented as to whether the authority and discretion granted to the Commission by NEPA have been exceeded, the challenge should be certified to the Appeals Board. Intervenors contend that this is first a legal question and that a record of legal briefs and contentions is necessary for the certification of the challenge. That record has been made by the EDF Brief of February 26, 1971; the HRFA Brief of March 2, 1971; the Con Edison Brief of March 10, 1971; the Staff Briefs of March 10, 1971, and March 11, 1971; the EDF Brief of March 12, 1971; the HRFA Brief of March 22, 1971; the Con Edison Brief of March 22, 1971; the record of oral argument at the March 24, 1971 hearing; the Staff Brief of March 29, 1971; the EDF letter of March 29, 1971; the EDF letter and Brief of April 5, 1971 and HRFA letter of April 8, 1971.

The Board has suggested that besides the legal issues, there are factual issues underlying Intervenor's challenge to Appendix D which should be developed in the light of this particular proceeding. The Board has ruled that the burden of developing such a record lies with the Intervenor challengers.

By the terms of the December 4, 1970 publication in the Federal Register, the Commission has based its promulgation of the challenged March 4th date in Appendix D on factual considerations of (1) the need for a period of orderly transition, (2) the need for electric power, (3) the need for environmental protection.* By the notice of hearing in Vermont Yankee, the Commission has shown either (1) that when the balance of these elements varies from the general norm or (2) that, as Staff and Applicant suggest, for other unexplained reasons extraneous to the promulgated basis of the rule, exceptions will be made to the March 4th date.

In order to establish a factual basis for the challenge to the Commission's deviation from NEPA, Intervenors must, first, establish the details of the justifications described above and, second, establish the facts which make these justifications inapposite to the case before the Board. In this way the general facts which led to the promulgation of the March 4th date can be measured both against whatever discretion was granted the Commission by NEPA and against the particular facts of Indian Point No. 2. In addition the facts of Indian Point No. 2 can be measured against the rationale of the Vermont Yankee exception.

Intervenors seek to provide one major bloc of that evidentiary record--the detailed justification for the Commission's deviation from NEPA--through the discovery, interrogatories and

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* The Commission has balanced the considerations of environmental protection against the first two considerations. 35 Fed. Reg. at 18472.

depositions which they requested in the motion of April 2, 1971. The information sought there should establish with specificity the standards by which the Commission struck the balance of the considerations before it and should provide the bulk of factual information on the issue of the need for an orderly transition period. Discovery would also provide the rationale of the Vermont Yankee exception. Intervenors wish to make it clear that they are not pursuing an inquiry into the mental processes of the Commission's officers and employees, but are seeking to establish the factual basis and circumstances within which the decisions were made.

The discovery which the Board allowed the Citizens Committee for the Protection of the Environment to make of Con Edison by its order of April 13, 1971, should provide the bulk of information on the need for electric power connected to this particular proceeding, although some discovery from the Commission may be necessary on this point.

The Intervenors will also need to test the other side of the Commission's balance: the need for environmental protection. In order to develop a fuller factual record on this issue, Intervenors will have to make discovery of Con Edison.* For

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* This was suggested but not explicitly spelled out in Intervenors briefs of April 2, 1971 and April 8, 1971. In light of the Board's ruling that "it is not ... a violation of a regulation by a preparation of evidence for such a record," Intervenors remain convinced that this is the proper course to pursue.

instance, HRFA would wish to introduce evidence on the predictable effects of Indian Point No. 2 on the ecology of the Hudson River and particularly on Hudson River fish, which, as HRFA pointed out in its brief of March 2, 1971, have been killed in very substantial numbers at the intakes to Indian Point No. 1. That has not been contested by Con Edison. Discovery on this point is now proceeding in another piece of litigation, People of the State of New York v. Consolidated Edison Company of New York, Inc., N.Y. Supreme Court, Index No. 41228/1970. In that action the Attorney General is seeking $5,000,000 in damages from Con Edison for the killing of fish at Indian Point No. 1 and an injunction restraining the operation of the plant until it can be operated so as not to kill fish and other marine life and damage the ecology of the Hudson River. The Attorney General has recently propounded 33 interrogatories to Con Edison in that action, and Con Edison has been ordered by the court to answer them. A copy of the interrogatories are attached to this brief as Appendix A. Thus Con Edison should be prepared promptly to provide Intervenors in this proceeding with information on the effect of the Indian Point No. 1 plant on the fish, marine life and ecology of the Hudson River.

The combined results of these various lines of discovery and enquiry should lay before the Board a fuller record of the facts on two issues. First, they will establish the factual basis of the Commission's promulgation of the March 4th date and the circumstances which permitted the Vermont Yankee exception to the rule.

Second, they will develop the particular factual context of Indian Point No. 2. On the basis of this record, Intervenors should have a factual basis on which to argue that (1) either or both of the considerations of electric power need and orderly transition are impermissible under the authority and discretion granted the Commission by 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 Appendix D; or (3) the particular factual situation at Indian Point Unit No. 2 differs sufficiently from the general factual background considered by the Commission in the promulgation of Appendix D so that on reconsideration the Commission might well choose to consider non-radiological environmental issues in this proceeding. The discovery, inspection and copying, and depositions which Intervenors asked for in their April 2, 1971 motion are fundamental to establishing the factual basis for these arguments.

Calvert Cliffs allows a challenge to Commission regulations based on the contention of the improper exercise of authority and/or discretion. The Commission, by its December 4th promulgation has injected both legal and factual issues into the present challenge to the March 4th date. The legal issues have already been briefed. If the factual issues are to be explored and developed on the record, Intervenors must logically begin with the discovery which they requested in their April 2, 1971 motion.

A similar analysis may be made of the challenged sections of Appendix D which require deference to Federal, state and regional environmental standards. Intervenors have discussed the legal insufficiency of those standards in the briefs of February 26, March 2 and April 5, 1971. Intervenors will not discuss the whole cycle of evidence necessary to a full factual record on those standards, both because the logic of the analysis is parallel to that laid out on the promulgation of the March 4th date and because the March 4th date raises a threshold question and, if the Intervenors are unable to prevail on the March 4th date, the question of what standards to apply becomes moot.

POINT II

ADMINISTRATIVE LAW REQUIRES THE COMMISSION, IN THE PROMULGATION OF THE MARCH 4TH DATE, TO CONSIDER ALL MATERIAL FACTORS AND EXPRESS ITS CONCLUSIONS IN A REASONED AND ARTICULATED STATEMENT

Intervenors have contended in their brief of April 8, 1971 that administrative law governing the promulgation of the March 4th date requires the Commission to take into account all material factors and to state their conclusions in a reasoned and articulated manner so that the relationship between the conclusion and the material factors can be understood and analyzed. Intervenors contend that this requirement applies both in rule making and in adjudication. Intervenors brief of April 18, 1971.

Con Edison argues that such a requirement may apply in adjudications, but it does not apply in rule making where only a concise general statement is necessary, and that therefore the Commission has complied with the requirements of law and any further inquiry is unnecessary and improper. Even if Con Edison's looser standard is taken as the norm--and Intervenors contend it should not-- the particular circumstances of the rule making in this case require judgment by the stricter standard of adjudication.

Definition of a rule in the Administrative Procedure Act puts emphasis on the future effect of the agency promulgation on regulated activity: '"Rule" means the whole or a part of an agency statement on general or particular applicability and future effect designed to implement, interpret or prescribe law or policy...' 5 U.S.C. §551(4). Since rules may be both general and particular in their applicability, it is future effect of a rule that differentiates it from an adjudication.

Looking only at its formal aspect, there is no element of the December 4th promulgation that makes it more clearly a rule that the inclusion of the March 4th date which pinpoints the time in the future when the regulation becomes effective. Paradoxically, Intervenors contend that it is precisely the inclusion of the March 4th date that brings Appendix D closest to adjudication. The actual effect of the inclusion of the March 4th date has been to allow the Commission to adjudicate the environmental issues of a small number of proceedings in the guise of issuing a rule.

Con Edison has pointed out that the Commission promulgated Appendix D with knowledge that this particular proceeding would be affected by the March 4th date. "The Commission was aware of the posture of this proceeding when it adopted Appendix D." Con Edison Brief of April 22, 1971 at 32. One may assume that the Commission had similar knowledge of other proceedings pending at the time of promulgation. Since the promulgation of December 4th, no hearings have been noticed which did not instruct the Atomic Safety and Licensing Board to consider non-radiological environmental matters. Thus the effect of the March 4th rule has been simply to exempt pending proceedings from the requirements of Appendix D. In a large number of those hearings, the applicability of NEPA has been raised as an issue in the hearing, e.g., Thermal Ecology v. A.E.C., 433 F.2d 524 (D.C. Cir. 1970); Thermal Ecology v. A.E.C., 2 E.R.C. 1405 (7th Cir. 1970); Lloyd Harbor v. Seaborg, 2 E.R.C. 1380 (E.D.N.Y. 1971); Calvert Cliffs Coordinating Committee v. A.E.C., No. 24,871 (D.C. Cir.). The effect of the March 4th rule has been to use the rule-making procedure to deal with controversies pending before Atomic Safety and Licensing Boards. The rule looks to the future only in form. In fact, it attempts to deal with existing and active controversies.

Not only is it clear from the circumstances that the March 4th date dealt with issues pending before the Commission at the time of the December 4th promulgation, but the Commission itself rationalizes the rule on facts of a present rather than a

future nature. The need for a period of orderly transition and the need for electric power are considerations which were problems of the present for the Commission.

Since rule-making looks to the future, the statements which accompany the publication of a rule may not have the detail and developed intricacy of an order which adjudicates concrete adverse interests. But surely the closer the rule comes to dealing with live controversies presently being adjudicated by an agency, the closer its rule-making statement should come to standards clearly required in adjudication.

Intervenors contend that the thrust of administrative law from Scenic Hudson to Greater Boston puts a burden on the Commission in rule-making to take into account all material factors and to reach articulated and reasoned conclusions. Intervenors Brief of April 8, 1971. Con Edison virtually says as much itself when it discusses the position of courts in dealing with a challenge to a rule: the "review function is to determine whether a rational basis exists for the agency's conclusions." Con Edison Brief of April 22, 1971, at 18. Such a review demands that the court be able to see that all material factors have been considered and that the conclusions are rationally related to the facts before the agency. Nevertheless, Con Edison contends that concise general statements of rule-making need not achieve that standard. That is not so.

The Calvert Cliffs memorandum emphasizes this point. If a factual record is to be developed on the reasonable exercise of the agency's discretion, as the third Calvert Cliffs test allows, the challenger must be able to probe the factual considerations on which the exercise of discretion rests. That is necessary in order to focus the challenge in a particular proceeding on the general standard which a rule establishes. The challenger must know the factual considerations and be able to understand the reasoning from fact to conclusion in order to adduce evidence which is relevant and focused on the issues as they were understood by the Commission.

POINT III

NEPA SEVERLY LIMITS THE DISCRETION OF THE COMMISSION AND ANY QUASI-LEGISLATIVE ACT DELAYING THE IMPLEMENTATION OF NEPA IS IMPROPER AND INPERMISSABLE

Con Edison argues that the Commission was engaged in action of a legislative nature in promulgating Appendix D and that, therefore, a looser standard of explication applies than would in adjudication. The short answer to that contention is that the Commission has no power to legislate; its proper role is to interpret, implement and enforce the laws passed by Congress. That point has been put forcefully by the Supreme Court in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress expressed by the statute. A regulation which does not do

this, but operates to create a rule out of harmony with the statute, is a mere nullity." At 134.

Judge Holtzoff placed the same precept in a wider context in American President Lines v. Mackey, 120 F. Supp. 897 (DC 1953), a case challenging rules promulgated by Immigration and Naturalization Service:

> "One must bear in mind that the rule-making power is not a power to legislate. It is not a power to add to a statute. It would be contrary to the Constitution and contrary to the genuis of our institutions to permit executive or administrative officials to legislate. The rule-making power is merely power to fill in details within the limitations of the statute." At 899.

See also Skelly Oil Co. v. F.P.C. 375 F.2d 6 (10th Cir. 1967), affirmed in part, reversed in part on other grounds, 390 U.S. 747 (1968); Commissioner v. Clark, 202 F.2d 94 (7th Cir. 1953).

Where a statute gives an agency the power to exercise discretion, the agency may, of course, exercise its judgment in quasi-legislative manner within the terms of discretion granted it. But there is no quasi-legislative function to be fulfilled under NEPA. NEPA contains no suggestion that its implementation is to be delayed one day past January 1, 1970. Intervenors have contended in their briefs of February 26, 1971 and March 2, 1971, with considerable case law support, that any delay in implementation is an abuse of discretion and exceeds the authority of the Commission. In the face of Con Edison's suggestion, Intervenors further contend that any legislating by the agency on this point would be impermissable and an unconstitutional violation of the separation of powers.

It was the duty of the Commission to implement NEPA on January 1, 1970. Delay in implementation cannot be justified on grounds of administrative convenience. Nor can it be justified by calling the Commission's implementation an act of a legislative nature. Congress writes the laws. The Commission must enforce them.

CONCLUSION

Intervenors' motions should be granted in their entirety.

Respectfully submitted,

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Dated: New York, N. Y.
May 6, 1971

APPENDIX A

Interrogatories provided by Attorney General to Con Edison in People of the State of New York v. Consolidated Edison Company of New York, Inc.:

1. Indicate the dates upon which Indian Point #1 actually operated as an electrical generating plant from the time it was first built until the present.

2. Indicate the maximum generating capacity of Indian Point #1.

3. Indicate the names and addresses of all employees at Indian Point #1 who have held a managerial or supervisory position and indicate their positions and the period during which the positions were held.

4. Indicate whether fish and other forms of marine life have been killed or injured in the vicinity of Indian Point #1.

5. If the answer to Interrogatory #4 is yes, indicate the kinds of fish and other forms of marine life that have been killed in the vicinity of Indian Point #1.

6. Indicate whether reports are kept as to the kills of fish and other marine life occurring at Indian Point #1.

7. If the answer to Interrogatory #6 is yes, indicate the dates upon which fish were killed in the vicinity of Indian Point #1 and the approximate number, size and type of each kill from the time Indian Point #1 first opened to the present.

8. Indicate whether in its operations Indian Point #1 discharges water into the Hudson River at a greater temperature than it withdraws water from the river.

9. Indicate whether records are kept as to the temperature of the water withdrawn from and discharged into the Hudson River.

10. Indicate the difference in water temperature between the water withdrawn from the Hudson and the water discharged into the Hudson River for every day water has been discharged from Indian Point #1, indicating the dates and time of day and the temperatures on each such date.

11. Indicate whether in its operations Indian Point #1 discharges chemical substances into the Hudson River.

12. If the answer to Interrogatory #11 is yes, list the chemical substances.

13. Indicate whether records are kept as to the dates of chemical discharges, their composition and their concentration.

14. If the answer to Interrogatory #13 is yes, indicate the dates of each chemical discharge, the chemical discharged and the concentration thereof for each date chemicals have been discharged from Indian Point #1.

15. Indicate the name of the person or persons who have been in charge of monitoring the chemical discharges into the Hudson River, also indicating the dates of their employment.

16. Indicate the name of the person or persons who have been in charge of monitoring the water temperature in the vicinity of Indian Point #1, also the dates of their employment.

17. Indicate the name of the person or persons who have been in charge of monitoring the fish kills which have occurred at Indian Point #1, also the dates of their employment.

18. Indicate whether Consolidated Edison has attempted to determine the cause of death of the fish that have been killed in the vicinity of Indian Point #1.

19. If the answer to Interrogatory #18 is yes, indicate the names of the persons or firms which have been retained to study the causes of the death of fish and the dates of their employment.

20. Referring to the studies mentioned in Interrogatory #19, indicate the type of study and the tests undertaken by each person or firm and the dates of each.

21. Indicate the conclusions of each retained person or firm as to the causes of the fish kills occurring in the area of Indian Point #1.

22. Indicate the conclusions of Consolidated Edison itself and to the causes of fish kills occurring at Indian Point #1.

23. Indicate whether Consolidated Edison admits that fish have been killed in the vicinity of Indian Point #1 as a result of chemical discharges.

24. Indicate what corrective steps have been taken to eliminate harmful chemical discharges into the Hudson River.

25. Indicate whether Consolidated Edison admits that fish have been killed in the vicinity of Indian Point #1 as a result of the discharge of heated water into the Hudson River.

26. Indicate what corrective steps have been taken to eliminate harmful discharges of heated water into the Hudson River.

27. Indicate the different types of screening devices that have been used at the intake bays of Indian Point #1,

indicating the dates of each type of screening was in use.

28. Indicate whether records have been kept as to the velocity of the water at the intake screens.

29. If the answer to Interrogatory #28 is yes, indicate the average velocity of the water at the intake screens each day water has been taken into the plant.

30. Indicate the names of the persons in charge of monitoring the screens at the intake bays, also the dates of their employment.

31. Indicate whether Consolidated Edison admits that fish have been killed in the vicinity of Indian Point #1 as a result of the intake screens.

32. Indicate what corrective measures have been taken to eliminate the killing of fish at the intake screens.

33. Indicate what additional measures are planned within the next three years to eliminate the fish kills which have occurred in the vicinity of Indian Point #1.