12/20/72

BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of

CONSOLIDATED EDISON COMPANY)
OF NEW YORK (Indian Point,) Docket No. 50-247
Unit No. 2))

ENVIRONMENTAL DEFENSE FUND AND
HUDSON RIVER FISHERMAN'S ASSOCIATION
MEMORANDUM WITH RESPECT TO
SECTION 511(C)(2) OF THE
FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1972

The Board has requested the parties to comment upon the applicability of Section 511(C)(2) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA of 1972) on this proceeding. It is our position that that Section does not affect this proceeding and that the proposal of the Staff and the Intervenors that Indian Point #2 only be issued a license to operate if a closed cycle cooling system is installed is within the authority of this Board to adopt.

I

Prior to the 1970, the AEC did not possess the authority to investigate or impose license conditions relevant to the non-radiological environmental impacts of nuclear power plants. New Hampshire v. Atomic Energy Commission, 406 F 2d 170 (C.A. 1st, 1969). After passage of NEPA and the Water Quality Improvement Act of 1970 (P.L. 91-225) the AEC obtained plenary

power to investigate and include license conditions with respect to all non-radiological environmental impacts. Calvert Cliffs Coordinating Committee v. Atomic Energy Commission 449 F 2d 1109 (C.A.D.C., 1971)

The new environmental concerns include air pollution, land use, pesticides, transmission lines, fish impingment and entrapment, noise, fog, recreational and aesthetic values, effluent limitation on discharges, and many others. In enacting Section 511(C)(2) Congress was concerned with only one of these environmental problems - effluent limitations on discharges. In both Section 511(C)(2)(A)&(B) the operative terms are "effluent limitation". Those terms are defined in Section 502(11) as follows:

> The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

It is quite clear that "effluent limitations" refer to discharges. See also Section 301(a) defining the prohibition on effluents in terms of discharges.

In this proceeding the central environmental issue is related to the water intake of the plant and the concomitant impingement and entrainment of fish and other living organism. The environmental damage is caused by impingement on the intake screens of

screenable organisms and death or severe damage within the condensers to the non-screenable organisms due to turbulence and heat. The discharge of condenser cooling water is not of paramount concern here and no effluent limitations (other than those imposed by the State of New York) is sought to be imposed by any party. In short, Section 511(c)(2) is irrelevant to this proceeding. 1/

Applicant struggles unsuccessfully with the clear language of Section 511(c)(2). It attempts to graft the words "entrainment and impingement" on to "discharges" (Brief p. 6) but Congress

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1/ Applicant's counsel here apparently agrees that the Indian Point #2 impingement and entrainment problem represents a substantial difference in determining the applicability of Section 511(c)(2). In a letter to Chairman Farmakides in the Omaha Public Power District (Fort Calhoun) Docket No. 50-285 Mr. Voigt advised that in his opinion the existence of entrainment and impingement problems at Indian Point #2 (which are not involved in Fort Calhoun) make the filing of identical briefs in both cases inappropriate. Letter from Voigt to Chairman Farmakides, dated December 1, 1972 (Docket No. 50-285).

made no such engraftment. Nor is there any relief for the Applicant in Section 316. Section 316(a) merely allows power plants some possible relief from the application of best practicable technology with respect to heated discharges. Section 316(b), wholly apart from effluent limitations, imposes a standard of best available technology with respect to intake design, location, construction and capacity. Applicant correctly reads the section to be referring to modifications, including alternatives to once through cooling, which will protect against entrainment and entrapment. These modifications are imposed independently of effluent limitations and are not listed under Sections 301 or 306 which list effluent limitations. They demonstrate more clearly that effluent limitations and discharges are in no way synonymous with problems of impingement and entrapment. Equally unavailing is Applicant's reliance on the floor debates involving a few members of Congress. Such statements are notoriously set up by legislators who seek to alter the clear language of what appears in a statute. See Senator Jackson, Congressional Record, (Daily Ed.) October 4, 1972, S16888. 2/

II

The discussion could end here, but in the interest of completeness we will discuss the possible affect of Section 511(c)(2) assuming that the present case did involve an

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2/ The Applicant correctly observes (Brief p.8) that where statutory language is clear there is no need to look to legislative history. Calvert Cliffs, supra. That is the case here and no review of legislative history is warranted.

"effluent limitation" problem. Section 511(c)(2)(A) is not a problem for the AEC inasmuch as current regulations do not in any way authorize a "review" of state water quality standards. Pursuant to Section 21(b) of the Water Quality Improvement Act of 1970 (33 U.S.C. §1171(b)) the AEC does require receipt of a certficate of compliance with state standards, does include the potential environmental impact of the plant when operating in conformity with the certificate in its cost-benefit analysis and does consider imposition of conditions more stringent than those imposed by the State. 10 CFR, Part 50, Appendix D, Paragraph A-8. The state water quality standards are general and do not apply to a particular point source which is the subject of the AEC action. Thus the AEC, even if imposing more stringent standards is not attempting to review the water quality standards of the state involved.

Section 511(c)(2)(B) does by its terms apply to the imposition of effluent limitations by the AEC on particular plants. Section 511(c)(2)(B) is intended to prevent an agency from establishing an effluent limitation other than one established by EPA or the states. However, effluent limitations, as such, have not yet been established under the FWPCA as amended and it is necessary to look elsewhere in the act to determine the appropriate procedures during the period prior to the imposition of effluent standards.

Section 4(b) of the FWPCAA of 1972 provides:

> All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act.

Pursuant to this provision Appendix D of the AEC's regulations insofar as it relates to water quality matters under the FWPCA remains in full force and effect. The language in Paragraph A-8 of Appendix D, which refers specifically to the FWPCA, was the direct outgrowth of the Calvert Cliffs, case which involved an interpretation of the interaction between NEPA and the FWPCA. Insofar as Appendix D treats water quality, the action authorized to be taken under Paragraph A-8 is pursuant to both NEPA and the FWPCA and thus that regulation remains in full force and effect until superseded by EPA or state action under the new legislation. Even were this result not specifically required by statute it would be the only sensible course of action. Congress would not have intended to leave a hiatus during which the AEC and similar

agencies would be without authority to impose limitations on effluent discharges when neither EPA nor the States had begun to impose such limitations. 3/

Section 4(a) of the FWPCAA of 1972 also provides transition rules which are applicable to this case. That Section provides:

> No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendment made by section 2 of this Act... (Emphasis added)

3/ Under prior law water pollution was controlled exclusively by establishing water quality standards. The new legislation shifts the emphasis and while retain water quality standards also requires that each source of an effluent discharge use best practicable or available technology to control pollutant discharge. Thus the new law focuses on doing the best you can rather than on maintaining existing water quality standards. There is little doubt that had EPA now implemented the new bill it would require this plant to utilize closed cycle cooling. See EPA comments included with FES. It would obviously be a gross perversion of the intent of the FWPCAA of 1972 to allow this plant to operate without complying with either the current AEC regulations or the new law. To the extent the new law usurps the AEC jurisdiction, it does so only after the new law is implemented.

The current proceeding was commenced by the AEC prior to enactment of the FWPCAA of 1972 and the Staff FES, including its recommendation for closed cycle cooling was filed prior to that date. Thus this case involves a proceeding lawfully commenced by an official of the United States prior to October 18, 1972 and the provisions of Section 2 of the FWPCAA of 1972, which includes Section 511(c)(2)(B) cannot be the basis for abatement of this proceeding or any part of it.

If Section 511(c)(2)(B) were read to exclude the AEC from imposing more stringent effluent discharge limitations it would also create substantial administrative difficulties. It is quite clear that Section 511(c)(2)(B) does not affect any obligation of the AEC under NEPA to fully consider the adverse impact on the environment when the plant operates in conformity with effluent discharges limitations, to consider that impact in its cost-benefit analysis and if appropriate to reject the requested license where costs outweigh benefits. See H. Rep. No. 92-911, 92nd Cong., 2nd Sess, pp. 137-139; Congressional Record (Daily Ed.) S16878, October 4, 1972. Thus the AEC retains the NEPA obligation to see that the environmental impact hs been thoroughly explored. Environmental Defense Fund v. Corps of Engineers (E.D. Ark, 1971) 325 F. Supp. 728, Until EPA and the States have implemented the provisions of the FWPCAA of

1972, particularly the data gathering obligations of Section 304, the AEC will in fact have to do most of the work in gathering data on impact. Even after implementation of the FWPCAA of 1972 the AEC may find itself in the position of having to do all of the basic research work on effluent limitations in order to assure that it meets the NEPA obligation. Clearly the most sensible approach from an administrative stand point, at least until EPA and the States have implemented the FWPCAA of 1972, is for the AEC to be the lead agency with primary responsibility for preparing the detailed studies and setting effluent limitations.

In the instant case limiting the AEC's authority to a "yes or no" vote on the license without authority to impose any effluent limitation conditions (assuming that what is at issue is an effluent limitation) might very well produce a no vote or at least serious limitations on Applicant's authority to operate the plant at all times of the year. We suspect that because Applicant realizes that the entrainment and impingement problems are so severe that the license might be denied if no alternatives were available, it has not made a motion in this proceeding with respect to Section 511(c)(2) and its brief reflects substantial ambivalence with respect to the issue.

III

The legislative history of Section 511(c) is checkered, to say the least. As finally adopted it represented a major departure from the versions passed by the House and the Senate prior to the conference. It was inserted into the Conference Bill at the last minute and was the subject of a welter of conflicting and confusing floor speeches when the Conference Report came up for approval in each House. See Congressional Record (Daily Ed.) H. 9115-9135; S 16869-16895 (October 4, 1972) and National Journal, December 9, 1972, pp. 1871-1882. Its enactment was in violation of United States House of Representatives Rule XXVIII, clause 3 which absolutely prohibits a Conference Report including the addition of matters which were not the subject of the original Bill. Section 511(c) as finally adopted by the House of Representatives was non-germane which Applicant concedes (Brief, p. 15). Compare H. Rep. No. 92-911, supra, Section 511(d), p.59 with Section 511(c)(2) of the FWPCAA of 1972.

There are procedures within the House to correct such a defect. Whether those procedures were utilized properly is clearly a question which can be examined by this Board. In Wheeldin v. Wheeler 373 U.S. 647, 663 (1963) Justice Brennan in his dissenting opinion stated the following well accepted

legal principle [4]:

> Nor is it the case that a congressional rule (in the instant case contained in an Act of Congress) stands on a different footing, as respects judicial enforcement, from a rule respecting administrative, executive, or other conduct. It has long been settled that rules of Congress and its committees are judicially cognizable. Christoffel v. United States, 338 US 84, 93 L ed 1826, 69 S Ct 1447; United States v. Smith, 286 US 6, 76 L ed 954, 52 S Ct 475; United States v. Ballin, 144 US 1, 36 L ed 321, 12 S Ct 507. I therefore see no objection in principle to grounding a private action in such a rule.

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[4] Field v. Clark, 143 U.S. 649 (1892), relied upon by Applicant is not inconsistent. In that case the daily Journal was attempted to be used to show that a section of a bill approved by the Congress contained a provision not included in the enrolled bill. No rule of either House was allegedly violated nor did any party seek to rely on such a rule to hold an act illegal. At the same term the Court decided United States v. Ballin, supra where non-compliance with a rule of the House was considered proper allegation and even though all attestation of the bill's passage by officials of both houses had been obtained, the Court still looked to the daily Journal to ascertain if the House rules had been followed and it was determined that they had been.

It is clear from the cited language and the cases cited that even if a bill is subsequently approved by Congress and proper attestation of passage appears on the bill, a private party whose rights are affected by a portion of the act may challenge the validity of the act based upon alleged violations of the rules of Congress in its enactment.

As noted earlier, it is conceded that Rule XXVIII, clause 3 of the House rules was violated. One obvious reason for such a rule is to prevent occurring precisely what did occur - i.e. modifying a bill previously approved by the House where the right to piecemeal amendment existed and then submitting the modified bill to the same body where no right of piecemeal amendment exists and where the bill must either be supported or opposed as a whole. See floor speech of Congressman Dingell, Congressional Record (Daily Ed.) H 9123 (October 11, 1972) as an example of the untenable burden this kind of "up or down" vote places on a Congressman. Section 511(c) as originally approved by the House (and denominated 511(d)) was materially different than the version approved by the Conference. See H. Rep. No. 92-911, supra, p. 59. If the House can ignore its Rule XXVIII, clause 3, the concerned public (in this case, environmentalists) will be denied a major opportunity to prevent the passage of unwarranted legislative provisions because the

offending modifications may be buried in a large legislative package which is generally favored by the concerned public.[5/] That of course is precisely what occurred here and the far reaching desirable reforms of the FWPCAA of 1972 were deemed more important by Congress than defeat of the modifications of Section 511(c).

The affect of Rule XXVIII, clause 3 can be eliminated if the Rule is waived. The purpose of the waiver resolution is to in effect allow a vote on the individual sections modified by the Conference Report through a vote on the procedural waiver. Viewed in this context it is extremely important that House members be

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5/ Whether the operation of the "up or down" vote on a conference report which modifies earlier provisions approved by the House violates the public's right to effectively petition the government under the First Amendment of the Constitution, need not be reached here. House Rule XXVIII, clause 3, was certainly in part an attempt to avoid that issue and its violation and subsequent vindication here preserves the Constitutional right.

apprised of precise provisions for which waiver has been sought. It was with this concern in mind that Congressman Anderson specifically identified twelve provisions which had been modified by the Conference. Congressional Record, supra H. 9115 Significantly Section 511(c) was not included and the waiver was ineffectual with respect to that Section.

Given the enormous significance of the waiver and the importance attached to 511(c) by members of both Houses, it would be particularly inappropriate to accept Applicant's argument that objection to 511(c) was waived by implication because the resolution passed by the House was worded in general terms and because the Anderson memorandum included the words "at least". Equally erroneous is Applicant's argument that the provisions of Rule XXVIII, clause 3, are deemed waived by the House if no members raise a point of order. The Rule itself contains no such proviso. Normally a rule is binding unless waived. Applicant's suggestion that the Rule is only binding if raised is without merit. In any event the statements by Congressman Dingell (Congressional Record, supra, H 9127) opposing Section 511(c) would certainly qualify as a point of order.

It is thus apparent that the House of Representatives in approving the FWPCAA of 1972 with the Conference Report modifications in the language of Section 511(c) did so in violation of

House Rule XXVIII, clause 3, that no explicit waiver of that rule was obtained as it applied to Section 511(c) and that therefore Section 511(c) as included in the FWPCAA of 1972 is invalid. 6/

CONCLUSION

For any of the reasons cited above we urge this Board to conclude that the AEC's regulation respecting the scope of the environmental review and in particular 10 CFR Part 50, Appendix D, Paragraph A-8, remain in full force and affect at least until EPA exercises its authority under the FWPCAA of 1972 to implement effluent limitations for nuclear power plants. It is inconceivable that Congress, which declared the objective of the FWPCAA of 1972 to be to (Section 101(a)):

> ...restore and maintain the chemical, physical and biological integrity of the Nation's waters...

intended that any provision of the act should be read to allow an applicant for a nuclear power plant license to escape from the imposition of any effluent limitations by the AEC prior to the

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6/ Due to the severability provision of the FWPCAA of 1972 (Section 512) the invalidity of Section 511(c) does not affect the validity of the remainder of the Act.

imposition of effluent limitations by EPA. As Section 101(f) makes clear, one purpose of the Act was to eliminate duplication of effort by federal agencies. Section 511(c)(2) was proposed in implementation of that directive. H. Rep. No. 92-911, supra, p. 138. Until EPA has implemented its effluent limitations, the imposition of such limitations by the AEC is not duplicative - it is essential. We urge this Board to so conclude.

Respectfully submitted,

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Dated: December 20, 1972