12/8/72

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

APPLICANT'S MEMORANDUM ON THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972

Introduction

At a conference of the Atomic Safety and Licensing Board held on November 22, 1972, the Board, through Chairman Jensch, propounded to Applicant and the other parties several questions related to the effect of the Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter cited as FWPCA), on this proceeding. On November 29, 1972, the Chairman addressed a letter to all counsel expanding one of the questions raised at the hearing. Other comments were made by the Board on December 4, 1972.

General Position of Applicant

Applicant has made no motion or request for consideration by this Board of the effect of the FWPCA in this licensing proceeding. This Memorandum is thus submitted in response to the Board's expression of interest in the legal problems involved and the conclusions reached in the Memorandum should not be taken as Applicant's view as to how water use and quality ought to be regulated.

For several years Applicant has urged and continues to urge a single ("one-stop") hearing on all aspects of power plant operation. It is the belief of Applicant that acceptance of the principle of a single hearing is more important than the choice of forum for such a hearing. Certainly, Applicant would not oppose the selection of the Commission as the forum for all such hearings on nuclear power plants. Unfortunately, it appears to be impossible to read FWPCA as vesting such one-stop authority in the Commission. On the contrary, the statute must be read either as creating duplicating jurisdiction over water use and water quality matters in EPA (and the states) and in the Commission, or it must be read as assigning exclusive authority over such matters to EPA and the states, with the Commission retaining authority only over the

radiological effects of water use and quality. As pointed out below, the language, structure and legislative history point toward the latter interpretation of the statute as reflecting the intention of Congress. If that was the intention, the statute constitutes a step toward the concept of a one-stop hearing related to a particular subject matter rather than a step toward the concept of a one-stop hearing related to a particular plant.

If valid procedures could be formulated (either through interagency agreements, reorganization plans or new legislation) which: (1) assigned to the Commission exclusive authority to determine such matters of water use and quality in its licensing proceedings, (2) provided for joint hearings, or (3) established transitional regulatory mechanisms (especially worthwhile for proceedings in which issues were formulated and hearings begun prior to the enactment of FWPCA) pending the establishment of requirements under the new statute, Applicant would welcome them. Of course, no such procedures now exist. Without awaiting such procedures or without speculating whether they could be formulated or are being formulated, there is no reason to delay the accumulation of a full record in this proceeding which has been in progress two years.

Relevant Statutory Provisions

Section 511(c)(2) of the 1972 Act, which became effective on October 18, 1972, provides:

> "(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to--
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> > "(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or
> >
> > "(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act."

Section 104 of NEPA declares that:

> "Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."

Meaning of the Statute

Prior to 1970, the Commission possessed no jurisdiction under the Atomic Energy Act of 1954 to consider or

determine claims that a license should be denied or that safeguards were required to protect against nonradiological environmental effects of a nuclear plant. New Hampshire v. AEC, 406 F.2d 170 (1st Cir. 1969). When NEPA was enacted, the Commission conceded that NEPA expanded its jurisdiction but, after enactment of the 1970 amendments to FWPCA, determined that § 104 of NEPA relieved it of any obligation to review water quality matters because Congress had assigned that responsibility to other agencies under § 21(b) of FWPCA.

In Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), the Commission's view of the relationship between § 21(b) of the FWPCA and § 104 of NEPA was rejected. The court held that "Section 104 [of NEPA] can operate to relieve an agency of its NEPA duties only if other 'specific statutory obligations' clearly preclude performance of those duties." Id. at 1125. The court found the language of § 21(b) insufficient to accomplish this result because the section did "not preclude the Commission from demanding water pollution controls over its licensees which are more strict than those demanded by the . . . certifying agency." Id. at 1124 (footnote omitted; emphasis in original). The failure of § 21(b) to include such an express prohibition led

the court to conclude that "the specific mandate of NEPA must remain in force." Id. at 1125.

FWPCA speaks directly to this holding. Section 511(c)(2) prohibits an agency such as the Atomic Energy Commission from imposing "any effluent limitation" pursuant to NEPA that is more stringent than a limitation established pursuant to FWPCA.[1/] Therefore, the combined effect of § 511(c)(2) of the FWPCA and § 104 of NEPA is that the "mandate of NEPA" is no longer "in force" with respect to matters governed by effluent limitations under the FWPCA.

What are those matters? Among other things, effluent limitations under the FWPCA will be established to protect the Nation's waters from the environmental effects of discharges, entrainment and impingement.

Under § 301(b) of FWPCA, discharges of "heat" and other wastes will be subject to effluent limitations which

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1/ Section 511(c)(2) refers to "any effluent limitation other than any such limitation established pursuant to this Act." Clearly, more stringent as well as less stringent limitations are covered by this language. A document entitled "Highlights of the House-Senate Conference Report," introduced into the record by the House floor leader for the bill affirms the plain meaning of this section: "The Conference agreement provides that nothing in [NEPA] may be construed as the basis for the establishment . . . of more stringent controls on the discharge of pollutants than those provided under this Act . . . ." 118 Cong. Rec. H9120 (daily ed. Oct. 4, 1972).

require the application of the "best practicable control technology currently available" by 1977 and the "best available technology economically achievable" by 1983.

Section 303(g) of the FWPCA requires that water quality standards "relating to heat" must be consistent with § 316 of the FWPCA. That is, the standards must "assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife . . . ." It is clear that these standards must provide protection against the environmental effects of both thermal additions and entrainment. If a "best practicable" limitation is not sufficient to provide such protection, more stringent effluent limitations[2/] must be met by July 1, 1977. FWPCA § 301(b)(1)(C).

Section 316(b) of the FWPCA requires that "[a]ny standard [i.e., effluent limitation] established pursuant to section 301 . . . . and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."

2/ Limitations less stringent than "best practicable" or "best available" may be set on a case-by-case basis if the less stringent limitation "will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on" the body of water into which the discharge is made. FWPCA § 316(a).

The Board has raised the question of the effect of legislative history on statutory interpretation. When a statute is clear on its face, there is no need to resort to the debates or other legislative history, under the familiar "plain meaning" rule. United States v. Oregon, 366 U.S. 643, 648 (1961); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947). On the other hand, when there is a dispute as to the meaning of the statutory words, reference to the legislative history is often necessary and appropriate. E.g., United States v. Donruss Co., 393 U.S. 297, 303 (1969). Frequently, a court or other decision-making body will support its conclusion that a law is clear on its face by cross-checking its understanding against the available legislative materials. E.g., Shackleford v. United States, 383 F.2d 212, 215 n.6 (D.C. Cir. 1967). Indeed, in most instances, the decision on whether the enactment suffers from facial ambiguity will itself be not so much a product of a pure reading of the words used, but rather the result of the tribunal or agency's broad understanding of the language used, the stated and unstated intent of the legislature, the need the Act was intended to fill, developments in cognate areas of the law, and numerous other considerations only some of which may be expressly acknowledged in the decision reached. Certainly, the purpose of any examination of an Act of Congress

should be to determine and advance "the aim and nature of the specific legislation." FTC v. Bunte Bros., 312 U.S. 349, 351 (1941) (Frankfurter, J.).

The legislative history of the FWPCA pushes one sharply toward an interpretation that the AEC has no further jurisdiction under NEPA to regulate matters governed by the FWPCA.

Senator Buckley, referring to news reports describing the AEC staff recommendation in this proceeding to require the installation of a closed-cycle cooling, inquired of Senator Muskie whether passage of the conference bill "will preclude the right of other agencies to insist on other standards, or the rights of in-depth environmental groups to go to court and insist that the AEC maintain standards more stringent than those employed by the EPA . . .?" Senator Muskie responded, "Yes; that is correct." 118 Cong. Rec. S16884-85 (daily ed. Oct. 4, 1972).

Senator Jackson, the "father" of NEPA, expressed a similar interpretation:

> ". . . I read 511(c)(2)(B) as prohibiting the AEC-Indian Point action. It is my worry that 511(c)(2)(B) will bar environmentalists from ever intervening in AEC licensing procedures in order to obtain tougher effluent limitations -- perhaps to protect wetlands,

> wildlife refuges, etc. -- than the limitations prescribed by the standards of the EPA-run water quality program." Id. at S16887.

Statements on the floor of the House are to the same effect. Mr. Jones of Alabama (who submitted the Conference Report) stated his understanding that "Section 511(c)(2) is intended to obviate the need for other Federal agencies to duplicate the determinations of the States and EPA as to water quality considerations." Id. at H9119. Mr. Dingell confirmed that "Section 511(c)(2) seeks to overcome that part of the Calvert Cliffs decision requiring AEC or any other licensing or permitting agency to independently review water quality matters." Id. at H9127.

Senator Jackson expressed himself in even more sweeping terms in another portion of the debates when he said:

> "As I read the new language contained in clause 511(c)(2) all water quality considerations are barred from the impact statement analyses. If this is true, this exemption not only frees EPA from the environmental impact statement requirement (in clause 1) but also (in clause 2) makes that requirement useless to all other Federal permitting and licensing agencies whose activities touch on water quality." Id. at S16888 (emphasis in original).

Senator Muskie, on the contrary, speaking more or less to the same point denied that anything in Section 511(c)(2) should

> "in any way be construed to discharge any federal licensing or permitting agency, other than EPA, from its full range of NEPA obligations to make a systematic balancing analysis of the activity proposed to be licensed or permitted. For example, if, in making a NEPA analysis in connection with the proposed issuance of a license or permit to a source that is or will be in lawful compliance with an EPA effluent limitation and a State water quality standard, such an agency were to conclude that the environmental impact of the source, including impact on water quality, exceeded the benefits to be derived, section 511(c)(2) should not be construed as authorizing such an agency to ignore or fail to give full weight to any impact on water quality in making its final decision as to whether or not a license or permit should issue." Id. at S16878.

Similarly, Mr. Jones of Alabama said in the House:

> "Section 511(c)(2) is not intended in any way to relieve any Federal licensing or permitting agency other than EPA from its full responsibilities under NEPA to include water quality considerations in any balancing analysis that may be made of any major Federal action as required by that act." 118 Cong. Rec. H9119 (daily ed. Oct. 4, 1972).

There is little point in pretending that all these statements can be reconciled. The real question is whether the Commission can continue to exercise an effective independent evaluation of water quality matters when the teeth have been drawn from its licensing authority over such matters by a provision as emphatic as Section 511(c)(2). Even if it is assumed that impotence to condition a license for water reasons -- and that lack of power is indisputable under the language of Section 511(c)(2) -- does not carry with it

impotence to deny a license, it is hardly credible that the Commission would or should deny a license when FWPCA requirements have been met, especially since the limitations and requirements imposed under FWPCA will result in an environmentally acceptable use of water. Compliance with those requirements must be treated as a "credit" rather than a "debit" in the environmental "accounts" of a particular plant.

In summary, Applicant's position on FWPCA as applied to this proceeding is as follows:

1. The structure, purpose, language and legislative history of FWPCA and its relationship to NEPA are persuasive that the Commission no longer has authority to evaluate water quality matters in connection with its licensing proceedings.
2. Applicant urges that these hearings proceed on the basis of a full evaluation by the Board of all environmental considerations pending further consideration by the Commission of the effect of FWPCA.

Some further clarification of the new statute may be forthcoming from statements of policy or procedures issued by

either the Council on Environmental Quality, EPA, or the Commission, or jointly by two or more of those agencies. Certainly, the plan for administration of the statute by the responsible agencies should be given weight in reaching conclusions as to its meaning.

Compliance With House Rules

The Board has raised the question of whether the House of Representatives complied with its own Rules since Section 511(c)(2) was a substantially new provision inserted by the House and Senate Conferees. A review of the course of this Section and the entire bill reported out by the Conferees shows that the Rules of the House were scrupulously observed in that any point of order based on a technical parliamentary irregularity concerning Section 511(c)(2) was waived by formal House action, and further, was cured by the legislation's subsequent passage and ultimate repassage over the Presidential veto. Repassage by both Houses with the necessary signatures of the Speaker and acting President pro tem, and filing with the Administrator of General Services, represented a certification of due passage in compliance with all applicable rules.

Under the Rules of the House of Representatives, last revised following adoption of the Legislative Reorganization Act of 1970, 84 Stat. 1140:

> "Whenever a disagreement to an amendment in the nature of a substitute has been committed to a conference committee it shall be in order for the Managers on the part of the House to propose a substitute which is a germane modification of the matter in disagreement, but the introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement. Moreover, their report shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee." H.R. Rule XXVIII, cl.3, reprinted in L. Deschler, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. Doc. No. 439, 91st Cong., 2d Sess. 525 (1971).

The effect of this Rule is to make any non-germane matters added by a conference subject to a point of order by a Member. Thus, it has been said that

> "[i]n the House of Representatives the Speaker may rule out a conference report if it be shown that the managers have exceeded their authority . . . . In the House points of order against reports are made or reserved after the report is read and before the reading of the statement . . . , or consideration begins . . . , or the report has been agreed to . . . ; and in case the statement is read in lieu of the report the point of order must be made or reserved before the statement is read . . . " Annot., Jefferson's

Manual of Parliamentary Practice § 547 in L. Deschler, supra, at 270-71 (citations omitted).

In the case of Public Law 92-500, the Conference Report added Section 511(c)(2). H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 149 (1972); see also 118 Cong. Rec. H9115 (daily ed. Oct. 4, 1972). As a result, a point of order could have been made from the floor of the chamber. No member, however, raised such a point of order, nor did the Speaker rule out the report on the ground that the managers exceeded their authority. Instead, Representative O'Neill submitted a resolution to waive any objections to S. 2770, the measure under consideration. H. Res. 1146, 92d Cong., 2d Sess. (1972). This resolution provided that "all points of order against said conference report for failure to comply with clause 3, Rule XXVIII are hereby waived." Id. In support of the resolution it was pointed out by Illinois' Representative Anderson that the motion was offered pursuant to a request of the Committee on Public Works that all points of order be waived. 118 Cong. Rec. H9115 (daily ed. Oct. 4, 1972) (remarks of Mr. Anderson of Illinois). Thereupon Mr. Anderson elaborated on these points of order for which a waiver was sought by submitting a memorandum listing twelve matters in which the House Conferees exceeded their authority in inserting new provisions.

Section 511(c)(2) is not among these twelve points, but it is essential to note that the Anderson memorandum was intended only to illustrate the Rule XXVIII, cl. 3 problems. The memorandum on its face does not seek to enumerate each such discrepancy: it refers to a point of order based on "at least" the twelve specific instances. (Emphasis in original.) Because of the language used in the House Resolution ("all points of order") and the fact that the Anderson list in no way purported to be a complete listing, any objection to the substitution of Section 511(c)(2) by the conferees was waived when House Resolution 1146 was carried a few moments later. 118 Cong. Rec. H9116 (daily ed. Oct. 4, 1972). The Conference Report was approved by the House not long after, id. at H9134-35, thus providing a second opportunity for members to express any dissent over the Rule XXVIII questions. The vote to approve S. 2770 was 366 "for" to 11 "against", with 53 not voting. Id.

There followed a Presidential veto message which did not refer to any Rule XXVIII issue. Veto Message to the Senate on S. 2770, 118 Cong. Rec. H10266 (daily ed. Oct. 18, 1972), and a second House vote, representing a third opportunity for Members to show disagreement on Rule XXVIII grounds. That vote, too, carried overwhelmingly. Id. at H10272 (247 to 23, 1 "present", 160 not voting).

Under the circumstances, the House of Representatives had ample opportunity to review -- and did in fact review -- the issue of compliance with its Rules. In conformity with those same Rules, any irregularity in the Conference Report as to Section 511(c) was cured.

Finally, with the official signatures of Speaker Albert and acting Senate President pro tem Moss, the certificates of the Secretary of the Senate and the Clerk of the House that the Constitutional two-thirds majorities had been achieved, U.S. Const. art. I, § 7, cl.2, and filing with the Administrator of General Services, 1 U.S.C. § 106a (1970), S. 2770 must be treated as "complete and unimpeachable." Field v. Clark, 143 U.S. 649, 672 (1892) (Harlan, J.). Section 511(c)(2) is, therefore, the law of the land.

Respectfully submitted,

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