10-30-72

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 ANSWER OPPOSING INTERVENOR'S REQUEST THAT THE FINAL ENVIRONMENTAL STATEMENT FOR INDIAN POINT 2 BE RULED INADEQUATE AND THAT FURTHER EVIDENCE BE SUBMITTED

I.

Introduction

In its motion filed on October 16, 1972 the Hudson River Fishermen's Association ("HRFA") requested that the Atomic Safety and Licensing Board ("the Board") rule that the Final Environmental Statement for Indian Point 2[1/] is inadequate on the ground that the Regulatory Staff did not include in its evaluation the environmental impact of the Bowline and Roseton Plants. HRFA further requested that the Board rule that additional evidence on Bowline and Roseton is admissible and must be submitted.

1/ 37 Fed. Reg. 20,346 (Sept. 29, 1972).

HRFA's motion demonstrates a basic misinterpretation of the National Environmental Policy Act of 1969 ("NEPA") and the regulations of the Atomic Energy Commission ("the Commission").[2/] The argument which HRFA has created results from a misinformed reading of judicial decisions as well as a disregard for recent determinations of the Atomic Safety and Licensing Appeal Board ("Appeal Board"). Applicant requests that the Board either deny HRFA's motion in its entirety for the reasons set forth below or, in the alternative, certify the question raised by HRFA's motion to the Atomic Safety and Licensing Appeal Board for its determination pursuant to 10 CFR § 2.718.

II.

NEPA Does Not Require That The Environmental Impact of Bowline and Roseton Be Considered In The Indian Point 2 Proceeding

In Section 102(2)(C) of NEPA Congress declared that for "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible

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2/ In addition, HRFA's motion contains a number of inaccurate statements which should be noted. On page 1 of its motion, for example, HRFA alleges that the Final Environmental Statement for Indian Point 2 "is inadequate under 10 CFR 50, App. D, § D.1." Section D.1 does not discuss the scope of the environmental review required by NEPA. On page 5 of its motion HRFA inaccurately characterizes the role of the Board in this proceeding. Section A.11 of Appendix D to Part 50 requires that in a proceeding for the issuance of an operating license the Board "will decide those matters in controversy among the parties."

official on--(i) the environmental impact of the proposed action" shall be prepared.[3] In its implementation of NEPA the Commission mirrored this mandate of Congress.[4] The plain meaning of these words is that the Commission must investigate and consider the impact of Indian Point 2 on the Hudson River. The "proposed action" in the instant case is the licensing of operation of Indian Point 2--not the licensing of the Bowline and Roseton Plants or a complex consisting of Indian Point 2 and all these other plants.

The scope of the subject matter of the environmental study to be conducted pursuant to NEPA and the Commission's regulations has already been delineated in the Vermont Yankee proceeding.[5] In ruling on a motion by the Natural

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[3] 42 U.S.C. § 4332(2)(C)(1972).

[4] 10 C.F.R. Pt. 50, App. D, §§ A.1 and A.8 (1972).

[5] Vermont Yankee Nuclear Power Corp., AEC Dkt. No. 50-271 (Memorandum and Order, June 6, 1972).

Resources Defense Council, Inc. the Appeal Board stated:

> "The scope of the inquiry required by Section 102(2)(C) is repeatedly defined, by the language of that section and as reflected in the language of Appendix D, as the impact, the consequences and the alternatives of 'the proposed action', which in the present case is the licensing of a specific nuclear power reactor. The language of Section 102 directs that the environmental statement shall be accomplished 'to the fullest extent possible'. But 'the proposed action' is the licensing of the Vermont Yankee reactor and not of other present and future facilities at other places, to be operated by other firms, and having at best a contingent and presently indefinable relation to this facility. Paragraphs A.3, A.4, and A.8 of Appendix D repeatedly refer to the environmental impact of 'the facility' as defining the scope of the analysis. Paragraph A.10 refers to 'the proposed licensing action', meaning the licensing of the particular facility which is before the Licensing Board and before us in a specific proceeding.
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> "The conclusion we reach is consistent with the 'Guidelines of the Council on Environmental Quality for Statements on

> Proposed Federal Actions Affecting the Environment' (36 F.R. 7724, April 23, 1971). Although the 'actions' subject to the Guidelines 'are not limited to' those enumerated explicitly in Paragraph 5, it is evident on reading the Guidelines as a whole that each environmental impact statement should be about a specific 'project . . . involving a Federal . . . license' (e.g., par. 5(a)(ii), 5(b) or a specific 'action' par. 6(a)(i)(ii) (iv)). The Guidelines do not contemplate that the comprehensive environmental review of every 'project' or 'action' is required to include other 'projects' or 'actions'. They thus speak of the effect of the proposed change upon 'the area in question'. (Par. 6(a)(ii); cf. pars. 9, 10). The 'project . . . involving a Federal . . . license' (par. 5(a)(ii)) which we have before us is the operation of the Vermont Yankee reactor." 6/

HRFA's argument that the future effects of the Bowline and Roseton Plants must be analyzed to determine what the environment will be during the operation of Indian

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6/ Id. at 10-13.

Point 2 is simply wrong. Neither NEPA nor the cases which have defined that statute require that possible future environmental impacts from planned facilities need to be factored into the environmental review of the particular facility being considered. The fact that Indian Point 2 will operate at a time when the Bowline and Roseton Plants may also have an effect on the environment does not mean that the effects of the operation of Bowline and Roseton are part of the "environment" which is to be considered in this proceeding.

"NEPA . . . does not require 'crystal ball' inquiry."[7/] It is illogical to conclude that because a facility is scheduled or planned it should be a proper subject for immediate consideration in this proceeding. Plans and schedules are subject to change. Projects have been modified at every stage of completion. The present design of facilities scheduled to be completed may be changed, thus altering their environmental impact. To determine under what conditions Indian Point 2 should operate on the basis of such "crystal ball inquiry" would result in a speculative, unrealistic analysis of environmental impact, benefits and costs which would be contrary to the

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7/ Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972).

requirements of NEPA and the Commission's implementing regulations and to the "common sense" approach advocated by HRFA.

NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible."[8] The statute therefore requires that a reasonable approach be followed in determining what constitutes the "environment" upon which Indian Point 2 will have an impact. If the time frame for the purpose of establishing the make-up of the environment to be considered were not reasonably limited, an indefinable series of factors interacting with the environment of the facility would have to be considered. An essentially endless cycle would be established, a cycle which would effectively halt the licensing process for all facilities everywhere NEPA was applicable.

The court in Conservation Council v. Froehlke[9] established a reasonable approach to follow. The plaintiffs in Froehlke argued that the Corps of Engineers had failed to comply with NEPA because in its impact statement for the

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8/ Id. at 837.

9/ 340 F.Supp. 222 (E.D.N.C. 1972), aff'd, __F.2d__ (4th Cir. 1972), 4 ERC 1044.

New Hope Dam the Corps did not consider the effect of two nuclear power plants and a highway passage which upon completion and operation would have an impact on the environment on which the New Hope Dam would operate. In denying the plaintiffs' motion for a preliminary injunction the court ruled that the three projects had been developed subsequent to the New Hope Dam project and that the Corps of Engineers was correct in not considering the environmental effect of the three projects in its impact statement.

The factual situation in this proceeding requires a similar determination of HRFA's motion. The Application for Licenses for Indian Point 2 was filed with the Commission in December, 1965. Construction commenced after the Commission issued a construction permit for Indian Point 2 on October 17, 1966 and the facility was originally scheduled for operation in 1969. Since the Bowline and Roseton Plants were developed subsequent to Indian Point 2, the Froehlke case upholds the Regulatory Staff's determination not to consider the Bowline and Roseton Plants in the Final Environmental Statement for Indian Point 2.

The cases cited by HRFA do not support the allegation that the Final Environmental Statement for Indian Point 2 is inadequate. What HRFA has done is to misplace legal

precedent in its attempt to demonstrate that the law requires that the cumulative impact of other projects planned for the area must be considered.

Natural Resources Defense Council v. Grant[10] does not support HRFA's proposition that a "rational decision" can be reached on Indian Point 2 only if the Regulatory Staff considers "the effects of the Bowline Point and Roseton plants which will change, both in the short and long run, the environment on which Indian Point 2 will have its effect."[11] The court in Grant stated that the cumulative impact with other projects must be considered when determining whether or not a particular project is a "major Federal action significantly affecting the quality of the human environment." Whether the licensing of Indian Point 2 is such a "major Federal action" is not in issue here. Moreover, the Regulatory Staff did consider the cumulative impact of Indian Point 2 together with other preexisting projects on the Hudson River (e.g., the Indian Point 1, Lovett and Danskammer plants) to the extent appropriate. The Regulatory Staff properly did not consider the cumulative impact of projects developed subsequent to Indian Point 2.

10/ 341 F.Supp. 356 (E.D.N.C. 1972).

11/ HRFA's Motion and Memorandum of Law ("Memorandum") at 12.

III.

The Informational Aspects of NEPA Do Not Require An Environmental Evaluation Of Bowline and Roseton in the Indian Point 2 Proceeding

By arguing that "[w]hat is needed and required is the information which will inform other, appropriate groups of the factual situation in the environment of the Hudson so that they can take appropriate action at Bowline Point and Roseton,"[12/] HRFA is in effect providing for the environmental evaluation of three projects in this licensing proceeding. While HRFA does not expect the Commission to take final action on Bowline and Roseton, HRFA does expect the Commission to conduct the environmental review for these two plants. HRFA would thus convert the Commission into an environmental review agency for the entire Hudson River and, to the extent this is a precedent for other cases, eventually for the entire country. This is indeed a singular interpretation of NEPA.

NEPA requires the full disclosure of the proposed action under consideration. The purpose of Section 102(2)(C) is to "advise the public of the environmental consequences of the proposed action. The requirement seeks to insure

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12/ Memorandum at 15.

that each agency decision-maker has before him, and takes into proper account, all environmental impacts of a particular project."[13/] In this proceeding the proposed action for which full disclosure is necessary is the licensing of Indian Point 2--not the licensing of the Bowline and Roseton Plants.

The cases cited by HRFA neither state nor indicate that one agency should be required to prepare an environmental evaluation of an action to be taken by another agency, as HRFA suggests. Even if the discussion of alternatives in Morton were relevant to the issue in this proceeding, the court itself in Morton distinguished that case by stating that "[t]he scope of this project is far broader than that of other proposed Federal actions discussed in impact statements, such as a single canal or dam."[14/] The court in Morton anticipated the use of other impact statements to aid in the discussion of alternatives beyond the jurisdiction of a particular agency only when "the proposed action is an integral part of a coordinated plan to deal with a broad problem . . . ."[15/] The Morton case is inapposite to this proceeding.

13/ Environmental Defense Fund v. TVA, 339 F.Supp. 806, 810 (E.D.Tenn. 1972).

14/ 458 F.2d at 835.

15/ Id.

The Bowline and Roseton Plants are subject to environmental review in accordance with applicable regulations and statutes in connection with their applications for discharge permits from Federal and State agencies.[16/] When the requisite environmental reviews are concluded at both the State and Federal levels, the incremental impact of those plants, in relation to an environment which the preexisting facilities already affect, will to the extent considered necessary have been examined by the reviewing agencies. The recently enacted Federal Water Pollution Control Act Amendments of 1972[17/] will further assure that a comprehensive approach will be utilized in the environmental reviews of the Bowline and Roseton Plants.

In any event, if HRFA considers the reviews for Bowline and Roseton inadequate, the proper forum for such discussion is not this licensing proceeding. Regardless of the wisdom or desirability of having a single agency evaluate and plan the development of the Hudson River, it is obvious

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16/ A Draft Detailed Statement for the Bowline Plant has been circulated and comments have been received from appropriate agencies. Roseton will be reviewed in accordance with statutory obligations and regulations, in connection with its application for a discharge permit.

17/ Pub. L. No. 92-500 (Oct. 18, 1972).

that the Atomic Energy Commission is ill-suited to this task and has not been authorized to undertake it by any statute.

IV.

Conclusion

HRFA's allegation that the Final Environmental Statement for Indian Point 2 is inadequate because the Regulatory Staff failed to consider the environmental impact of the Bowline and Roseton Plants is neither supported in law nor logic. Rather, the law declares forcefully that Bowline and Roseton should not be considered in the NEPA review for Indian Point 2 either for determining the environment in which Indian Point 2 will operate or for informing the President, Congress and governmental agencies of the environmental impact of Bowline and Roseton for planning or other purposes. For this reason evidence on the environmental impact of either Bowline or Roseton should not be required in this proceeding.

Applicant requests that the Board deny HRFA's

motion in its entirety or, in the alternative, certify the question raised by HRFA's motion to the Atomic Safety and Licensing Appeal Board for its determination.

Respectfully submitted,

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October 30, 1972