

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)

CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)

Docket No. 50-247

(Indian Point Station, Unit No. 2))

AFFIDAVIT IN SUPPORT OF APPLICATION FOR
ATTORNEY'S FEES AND EXPERT WITNESS FEES.

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ANGUS MACBETH, being duly sworn, deposes and says:

1. I have been an attorney for the Hudson River Fishermen's Association ("HRFA") throughout the proceeding on Consolidated Edison's application for an operating license for the Indian Point 2 nuclear plant, In re Consolidated Edison Company of New York, Inc. (Indian Point No. 2), AEC Docket 50-247.

2. HRFA filed its petition to intervene in this proceeding in December 1970 and the petition was granted in

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January, 1971.

3. From the outset of its intervention, HRFA has taken the position that the Atomic Energy Commission was required by the terms of the National Environmental Policy Act to consider the environmental impact which would result from the operation of the Indian Point 2 facility and that pursuant to that review, the Commission was required to impose appropriate conditions for the protection of the environment in the operating license. HRFA took the position that such license terms should include the requirement that a closed cycle cooling system be installed at the plant and that the operation of the plant be restricted during certain periods of the year until such time as the closed cycle system was in operation. HRFA urged that these conditions were necessary to protect the aquatic biota of the Hudson estuary from entrainment and impingement at the plant which would have serious and continuing adverse impacts on the aquatic populations of the Hudson.

4. At the time when the petition to intervene was filed, both the Regulatory Staff and the Applicant took the position that no review of the plant under the National Environmental Policy Act was required. The company was proposing and the Regulatory Staff was supporting the issuance of a license without terms which would protect the environment of the Hudson estuary by the installation of a closed

cycle cooling system or any restrictions on the operation of the plant.

5. There was considerable briefing in this proceeding as to the applicability of NEPA, but the issue was resolved outside the proceeding by the decision of the Court of Appeals for the District of Columbia Circuit in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, (D.C. Cir. 1971). Both counsel for HRFA and for the Citizens Committee and the Environmental Defense Fund were counsel to the Coordinating Committee, and the briefs filed with the Court of Appeals were also filed in this proceeding in connection with the argument on the same points here. Under the Calvert Cliffs' decision, HRFA was fully successful in winning the initial legal issue presented in the proceeding: a full environmental review of the Indian Point 2 facility under the terms of the National Environmental Policy Act was required.

6. In its Environmental Report Supplement to the Commission presented in September, 1971 following the Calvert Cliffs' decision, Con Edison gave no indication that it believed that any license conditions for the protection of the environment would be needed or that any change should be made in its proposal that a full term, full power license be issued. This may partially have been due to the company's position at that time on the question of the entrainment of

the eggs and larvae of Hudson biota:

Of the six key fish species chosen by the Hudson River Policy Committee to be investigated and be used as ecological indicators, four (alewife, blueback herring, striped bass and American shad) spawn up river from Indian Point. Therefore, their eggs and larvae are not vulnerable to the intake and thermal plume at Indian Point. ERS at 2.3.6-5.

7. On December 1, 1971, HRFA served on the parties its detailed contentions in this proceeding in which it took the position that a substantial percentage of the annual production of striped bass in the Hudson would be taken by entrainment and impingement at Indian Point and that other species would be adversely affected. HRFA asked that the installation of a closed cycle cooling system be required at Indian Point.

8. In the fall of 1971, the company moved to obtain an interim operating license allowing operation up to 90% of full power. On the side of factual presentation, HRFA's experts prepared extensive testimony on the effects of plant operation in connection with this motion. The testimony was filed in this proceeding in April, 1972. Preparation was also made for the cross-examination of the company's witnesses. At the same time, HRFA opposed the company's motion on legal grounds. This opposition was ultimately

successful when the Licensing Board ruled that it would not hold hearings on Con Edison's request.

9. In April, 1972, the Regulatory Staff published its draft Environmental Impact Statement on the Indian Point 2 facility. The draft statement predicted that "up to 25% of the average number of eggs and larvae of certain species of fish that annually pass by the plant may be killed" IP2 DES at ii. In light of this possible damage, it was proposed that the company be required to carry on a research program.

10. During the comment period on the draft environmental statement, HRFA largely through its attorneys and expert witnesses, developed and submitted extensive comments to the AEC on the fishery and cooling system issues. A day-long meeting was held in Bethesda at which HRFA made a detailed presentation of its criticisms to the Regulatory Staff. At the same time, HRFA brought the draft statement to the attention of various government departments and public officials in order to insure that a full public response was made to the major threat to the Hudson fishery which the operation of the facility presented. This effort was largely successful as is shown by the extensive and reasoned comments published in the second volume of the Final Environmental Statement.

11. In September, 1972, the Regulatory Staff issued its

Final Environmental Statement. This document represented a marked advance in the analysis undertaken by the Staff, and it was now concluded that:

"during June and July of most years from 30 to 50% of the striped bass larvae which migrate past Indian Point from upstream spawning areas are likely to be killed by entrainment. There is a high probability that the combined effects of entrainment and impingement will also result in a similar decrease in recruitment to the adult population of striped bass in the New York, New Jersey, and New England regions." IP2 FES at iii-iv.

On the basis of the damage to the aquatic biota of the Hudson, the Staff recommended that once-through cooling be permitted only until January 1, 1978 and that thereafter a closed-cycle cooling system be required.

12. Evidentiary hearings on the major issues in the environmental review of the Indian Point 2 facility began in December, 1972. By that time, the Staff had moved to share the position originally urged by HRFA that closed cycle cooling was required at the plant. The company still opposed that position, contending that a full-term, full power license should be issued without conditions, but promising that the company would undertake its own research program and, on that basis, would take any necessary future remedial measures.

13. The environmental portion of the Indian Point 2 hearings were lengthy and hard fought, taking more than 25

days of hearing time between June, 1972 and April, 1973. HRFA submitted testimony through three witnesses on the major environmental issues before the Licensing Board. Of all the witnesses appearing before the Licensing Board, John Clark, presented by HRFA, was singled out for special mention and commendation:

"The Board finds that \$20 million per year is a reasonable value to assign to the present product of the Middle Atlantic striped bass fishery for use in cost-benefit analyses. This value is based on a total annual catch of approximately 3 million striped bass which is the upper end of the Staff's estimate. The value and catch are about half of the HRFA estimates. This one half is utilized because the HRFA witness recognized that his estimates might be high by a factor of two. In view of his extensive experience and familiarity with the Atlantic coastal striped bass fishery, the Board believes that considerable weight can be given to the method used by the HRFA witness to estimate the value of the fishery and to his assessment of the accuracy of the fishery statistics. He was co-founder of the Sandy Hook Marine Laboratory and Assistant Director for many years. He has done considerable research and published numerous papers on the ecology and life patterns of salt water fish, including striped bass, in the Hudson River and coastal fisheries and has been involved in the gathering and analysis of fishing statistics." Consolidated Edison Company of New York, Inc. (Indian Point 2)
RAI-73-9 751, 770.

The record also shows that although the Staff, the Environmental Defense Fund and the Attorney General of New York took positions in this proceeding similar to that of HRFA on the environmental issues, it was HRFA that took the lead and shouldered most of

the burden in cross-examining Con Edison's witnesses and, apart from the Staff, was the only one of these parties to present testimony before the Licensing Board.

14. By the end of the evidentiary hearings, the major position taken by HRFA had clearly been persuasive; Con Edison itself now agreed that the record showed that closed cycle cooling was necessary and proposed the following condition in its proposed license terms:

"The Board has concluded that the Staff's summary of the benefit-cost analysis is modified to provide that operation of Indian Point 2 with its presently designed once-through cooling system will be permitted until September 1, 1981. Unless otherwise authorized by an amendment to Applicant's operating license following the review of the results of Applicant's ecological study program, operation shall be permitted after September 1, 1981 only if a closed-cycle cooling system shall have been installed by that date." Applicant's Proposed Findings of Fact and Conclusions of Law at 245 (May 17, 1973).

15. In its Initial Decision, the Licensing Board accepted the keystone of HRFA's position - that closed cycle cooling had to be required at Indian Point 2 on a timely schedule. The license required that operation with once-through cooling cease by May 1, 1978. Consolidated Edison Company of New York, Inc. (Indian Point 2) RAI-73-9 751. Con Edison took a massive appeal from this decision, arguing that it should be allowed to operate with once-through cooling.

during four more spawning seasons. Although the Appeals Board criticized various factual findings of the Licensing Board, it was unwilling to grant such relief to the company and merely extended the period of once-through operation through one more spawning season. Consolidated Edison Company of New York, Inc. (Indian Point 2) RAI-74-4 323.

16. HRFA was not only successful in winning its major issue before the AEC, but its effort before the AEC has been of benefit to the protection of public interests elsewhere. The analysis which was carried out in connection with the Indian Point 2 proceeding and facts developed there have been used by HRFA to assure that effective environmental review was carried out with regard to other threats to the Hudson fishery posed by other plants on the river. First, the analysis and facts developed by HRFA at Indian Point 2 served as the basis on which HRFA petitioned the Federal Power Commission to reexamine the fishery issue in connection with the proposed Storm King pumped storage project. The FPC denied this petition, but the Second Circuit Court of Appeals vacated that order and remanded the issue to the FPC for immediate hearings. Hudson River Fishermen's Association v. Federal Power Commission, - F.2d -, 6 ERC 1545 (2d Cir. 1974). Second, also on the basis of the facts developed in connection with Indian Point 2, HRFA sued the Army Corps of Engineers over its failure to carry out full NEPA reviews of Bowline and Roseton, the two fossil fuel plants going into operation

on the Hudson. HRFA v. Orange & Rockland Utilities, Inc. 72 Civ. 5460 (S.D.N.Y. 1972); HRFA v. Central Hudson Gas & Electric Co., 72 Civ. 5459 (S.D.N.Y. 1972). Both of those cases have been settled on terms which require the Corps to carry out environmental reviews of the plants and which restricted the operation of the Bowline plant during the spawning seasons in 1973 and 1974 (Roseton was not operating during those periods). Finally, the draft environmental statement on Indian Point 3 reflects the contribution which HRFA made to the analysis of power plant impacts on the Hudson fishery.

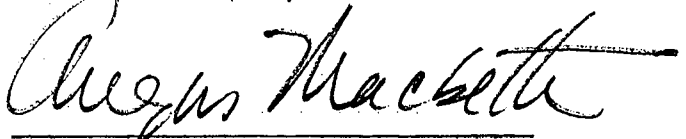
17. HRFA has incurred significant direct expenses in connection with this proceeding. Over the course of the last three and a half years, substantial services in connection with this case have been provided to HRFA by John Clark, a fisheries biologist, who was HRFA's chief witness in the proceeding and an essential consultant in preparing and presenting HRFA's case to the AEC. Clark worked at rates well below those that a man of his experience and expertise could command. HRFA has paid Clark \$18,062.54 for his services in connection with this case over that period of time.

18. I have not kept detailed time records of the hours spent on this proceeding as a salaried employee of the Natural Resources Defense Council. Nor have such time records been kept by Sarah Chasis and Richard M. Hall, also salaried employees of NRDC, who have assisted me from time to time in

the development and presentation of the case. This affidavit gives little more than the barest indication of the time which has been expended on this case. I have appeared before the Licensing Board or the Appeals Board on more than 35 occasions. There has been extensive preparation of legal briefs on a large number of issues, the preparation of witnesses for testimony and review of prepared testimony, consultations with experts in preparation for cross-examination, both formal and informal discovery against the Applicant and the Staff and numerous meetings with the other parties in working out the procedure and presentation for the environmental issues in the proceeding. The record in the case runs to more than 50,000 pages, and I believe that at least half of the record is directly involved with environmental matters. There can be no question that over the past four years, I have put in a minimum of at least 1,000 hours in preparation and presentation of this case.

19. I estimate that if my time were billed to clients by a fee-charging firm, my hourly rate would be at least \$30.00 per hour. In Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F.Supp 669, 672 (D.D.C. 1973), the Court found a rate of \$30.00 an hour to be a "bedrock minimum." For 1,000 hours, my time charges would total \$30,000.

CAROL ANN HINE
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-4512742
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975
Sworn to before me this
13th day of December, 1974.


ANGUS MACBETH

