UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	Docket No. 50-247
	)	OL No. DPR-26
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	)	(Determination of Preferred Alternative Closed-Cycle Cooling System)
(Indian Point Station, Unit No. 2)	)	

HUDSON RIVER FISHERMEN'S ASSOCIATION SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICANT'S EXCEPTIONS

Sarah Chasis
Ross Sandler

(Natural Resources Defense Council, Inc.)
15 West 44th Street
New York, New York 10036
(212) 869-0150

Attorneys for Hudson River Fishermen's Association

March 4, 1977

Hearing jacket

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	Docket No. 50-247
	)	OL No. DPR-26
Consolidated Edison Company of New York, Inc.	)	(Determination of Preferred Alternative Closed-Cycle Cooling System)
(Indian Point Station, Unit No. 2)	)	

HUDSON RIVER FISHERMEN'S ASSOCIATION SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICANT'S EXCEPTIONS

On November 30, 1976, the Atomic Safety and Licensing Board (the "Licensing Board") issued a Partial Initial Decision in Reference to Stipulated Preferred Type of Closed-Cycle Cooling System and Receipt of Governmental Approvals ("Partial Initial Decision"). Consolidated Edison Company of New York, Inc. ("Con Edison"), the Applicant in the above-captioned proceeding, filed exceptions to the Partial Initial Decision on December 6, 1976 and submitted a Brief in support of these exceptions on December 21, 1976. On January 12, 1977 the Hudson River Fishermen's Association ("HRFA"), an intervenor in the proceeding, and the NRC Staff, filed briefs in opposition to Con Edison's exceptions.

On December 27, 1976, the Licensing Board issued a Supplemental Partial Initial Decision Concerning Issues of Date for Termination of Closed-Cycle Cooling and of Bird Monitoring. On January 5, 1977, Con Edison filed an exception to this decision and a brief in support thereof. HRFA and the NRC Staff filed

briefs in opposition to the Applicant's exception on January 21, 1977.

On February 9, 1977 this Board held oral argument on Con Edison's appeal. As a result of questions which arose at the oral argument, the Board gave the parties leave to file supplemental briefs on certain issues by March 1, 1977. This filing date was subsequently extended by order of the Board to March 4, 1977 at the request of NRC Staff and with the agreement of counsel for the other parties.

The issues set out for briefing are:

(1) The interplay of jurisdiction as between EPA and the NRC with respect to the regulation of the cooling system at Indian Point 2;

(2) Whether Con Edison proceeded with due diligence in its application to the Village of Buchanan for the zoning variances;

(3) The extent to which the NRC's decision to require cessation of once-through cooling at Indian Point 2, pursuant to NEPA, precludes action by the state or an agency thereof.

The HRFA submits the following brief on these points.

I

THE ROLES OF THE EPA AND THE NRC WITH RESPECT TO THE INDIAN POINT 2 COOLING SYSTEM

The Nuclear Regulatory Commission, acting pursuant to its mandate under the National Environmental Policy Act, (NEPA), 42 U.S.C. §§4321 et seq., and the Atomic Energy Act, 42 U.S.C. §§2011 et seq., and after extensive proceedings involving thousands of pages of expert testimony ordered that the existing Indian Point Unit No. 2 generating station could not operate after May 1, 1979 with a once-through cooling system. NRC Facility Operating License No. DPR-26, Amendment No. 6, issued on May 6, 1974. The NRC's requirement of closed-cycle cooling is final. Unless some form of closed-cycle cooling is installed by May 1, 1979, (now May 1, 1980) Con Edison will have to halt operation at Indian Point Unit No. 2 altogether. As with any other final requirement of a license, the requirement may be changed only by a license amendment. The contemplated or actual filing of an application for such an amendment, however, in no way makes the requirement less final or binding. Paragraph 2.E.(1)(c) of the License. The controversy between once-through and closed-cycle is ended, so far as the NRC is concerned, unless a wholly new proceeding is commenced and reaches a contrary conclusion based on new data. In re Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit 3), Docket 50-286, Memorandum and Order, CLI-75-14 (December 2, 1975).

After the NRC had extensively considered and made its decision to require closed-cycle cooling at Indian Point 2, the United States Environmental Protection Agency (EPA) issued on February 8, 1975 a National Pollutant Discharge Elimination System (NPDES) permit for Indian Points 1 and 2, pursuant to its authority under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251 et seq. (FWPCA). This permit requires that Con Edison cease once-through cooling at Indian Point 2 by May 1, 1979 based on Section 316(b) of the FWPCA, which requires that intake systems reflect the "best technology available for minimizing adverse impact," and upon the "Steam Electric Power Generating Point Source Category Effluent Guidelines and Standards" (Federal Register, October 9, 1974). Con Edison has requested an adjudicatory hearing on both the closed-cycle cooling requirement and the compliance schedule; Con Edison has also applied for an exemption from the Thermal Standards pursuant to Section 316(a) of the FWPCA.

The granting of Con Edison's request for an adjudicatory hearing has resulted in a stay of the permit conditions. 40 CFR 125.35(d)(2) provides:

> "If a request for an adjudicatory hearing is granted pursuant to §125.36(b) of this subpart, the effect of the contested provision(s) of the proposed permit, as determined by the Regional Administrator, shall be stayed and shall not be considered the final action of the Administrator for the purposes of judicial review pursuant to §509(b) of the Act, pending final agency action pursuant to §125.36 of this subpart."

Not until after the adjudicatory hearing is held, therefore, will EPA make a final decision regarding closed-cycle cooling at Indian Point 2.*

The question for discussion is what effect do EPA actions have on the NRC's decisional authority under NEPA. First, subsequent action by EPA does not affect a pre-existing NRC determination. Section 511(c)(2) of the FWPCA was not intended to alter or undercut in any way pre-existing determinations of federal agencies made under NEPA.

Section 511(c)(2) must be viewed in the light of the overall intent of the FWPCA:

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." §101(f), 33 U.S.C. §1251(f) (emphasis added).

To this end, Congress delegated to EPA exclusive jurisdiction over water quality issues, notwithstanding other agencies' independent obligations under NEPA:

---

*As the result of a prehearing conference held on February 22, 1977, a schedule for the EPA hearings has been set. This schedule which commences with the filing of testimony by Con Edison and the other utilities on July 1, 1977 extends into early 1978.

> "(2) Nothing in the National Environmental Policy Act of 1969 shall be deemed to--
>
> (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 chapter or the adequacy of any certification under section 1341 of this title; 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 chapter. FWPCAA §511(c)(2), 33 U.S.C. §1371 (c)(2)."

The same section also provides:

> "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States not inconsistent with this chapter..." §511(a)(1), 33 U.S.C. §1371(a)(1).

The NRC has already been through years of hearings on this very question, has developed an exhaustive record and has reached a final decision prior to EPA's ever entering the field. Needless duplication and delay would result if all of that were put aside in order to allow EPA to make its final determination.

The clear intent of Section 511(c)(2) is to deal with prospective licensing decisions of federal agencies, called upon to act after EPA has made determinations related to the plant sought to be licensed. These agencies are precluded from independently reviewing effluent limitations or other requirements "established" by EPA and from imposing effluent limitations other than those established by EPA. The intent here is to vest in EPA, the agency

with special expertise in environmental protection, final authority over water quality related issues and to prevent other agencies from second-guessing EPA on such issues, thus avoiding wasteful, duplication of effort.* Where an agency has already acted, however, the intent of Section 511(c)(2) is best served by allowing that agency's decision to stand.

The legislative history of the FWPCA makes clear that the preemption intended by §511(c)(2) is of agency imposition in future licensing proceedings of water quality conditions different from those already prescribed by EPA. See e.g., Senate consideration of the Report of the Conference Committee in Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972, (1973) at 196-199. For example, this floor debate points to the fact that the NRC's decision to require closed-cycle cooling at Indian Point 2, a specific topic of discussion, was not seen as affected by passage of the FWPCA. Id.

Because the NRC has already imposed a closed-cycle cooling requirement at Indian Point 2, it is not reviewing effluent limitations or other requirements established by EPA nor is it imposing effluent limitations other than those required by EPA. Thus, even were EPA to decide at some subsequent date that closed-cycle cooling was not required at Indian Point, the NRC's license requirement

---

*Federal agencies' obligation under NEPA to conduct an overall balancing of environmental costs and benefits, however, would remain unaffected.

would be unaffected and would stand as is.

Second, because final action has not been taken by EPA to date, i.e. no final 402 permit for Indian Point 2 has been issued, HRFA believes that the NRC is not constrained by Section 511(c). This is consistent with the position taken by the Appeal Board In the Matter of Public Service Company of New Hampshire et al. (Seabrook Station, Units 1 and 2), ALAB-366, Memorandum and Order (January 21, 1977). If anything, there is less reason to defer to an EPA decision here than there was in Seabrook. The cases represent two completely different time frames. At Indian Point 2, the NRC imposed controls long before EPA ever entered the field. The assumption was never made that EPA's final determination would be made prior to the NRC's issuance of the construction or operation license for Indian Point 2, in contrast to the situation in Seabrook.

In conclusion HRFA believes that any pre-existing license requirements imposed by the NRC pursuant to NEPA are unaffected by subsequent determination by EPA and second, until EPA has acted with finality, the NRC is free to review the limitations it has imposed under the license it has issued.

II

THE RECORD OF THE BUCHANAN ZONING PROCEEDINGS DEMONSTRATES THAT CON EDISON DID NOT ACT WITH "DUE DILIGENCE" AND THEREFORE IS NOT ENTITLED TO EXTENSION OF THE TERMINATION DATE.

HRFA supports the position of the Licensing Board that the issue of due diligence is not relevant since the Village of Buchanan's approval is not a government approval "required to proceed with construction of the closed-cycle cooling system." However, this Board has directed that the parties brief the issue and HRFA in compliance with this direction sets forth its position.

The License requires Con Edison to act with "due diligence" in seeking "all governmental approvals required to proceed with construction of the closed-cycle cooling system" (License Condition 2.E(1)(b)). The overt purpose of the term is to ensure that an extension of the termination date, because of failure to obtain all necessary approvals, will not result from any delay attributable to Con Edison's own lack of efforts. The wisdom of the term is evident. Con Edison, which has tenaciously fought closed-cycle cooling, must, pursuant to the License term, obtain all necessary approvals for such a system. For that reason the License requires Con Edison to proceed with speed and direction regardless of its initial opposition.

In this context, due diligence means that Con Edison, at the barest minimum, must present in a timely manner credible and cogent factual support for its applications for necessary government approvals; adopt legitimate legal positions in

support of its applications; and not mislead the governmental unit into error, nor sit back and allow the unit to fall into error. The record in this case shows that Con Edison did not meet this standard.

Con Edison's failures were twofold in character. First, a fair reading of the record demonstrates that Con Edison misled the Village by not bringing before it the compelling factual reasons for closed-cycle cooling. To the contrary, through its equivocal presentation, Con Edison indicated that its application was only pro forma. Second, the record shows that Con Edison allowed the Village to fall into legal error when it failed to object to the Village's second-guessing of the NRC's factual conclusions and License term and when it failed to affirmatively assert both the federal preemption and state law doctrines which require issuance of the variance.

On May 6, 1974 the NRC issued the relevant License Amendment which requires termination of once-through cooling by May 1, 1979. The basis for the NRC's action was evidence that the existing mode of operation of the Indian Point 2 plant with once-through cooling posed an environmental risk to the fishery resources of the Hudson River.

In compliance with the License, Con Edison determined, after study, that the preferred alternative closed-cycle cooling system for Indian Point 2 is a natural draft wet cooling tower.

This system involves the construction of a cooling tower 565 feet in height. The current Village of Buchanan zoning ordinance, however, places a height limitation at the Indian Point site of 40 feet although the existing power plant structures reach 219 feet and a stack for one unit reaches 375 feet. All of these structures predate the adoption of the 40 foot height limitation. (A27*).

Con Edison applied for a building permit from the Village of Buchanan on February 21, 1975. The building inspector denied the permit, asserting that the height of the structure exceeded the allowable height for the district and that the visible plume and saline drift violated sections 54-2 of the Village Code.** (A35). Con Edison appealed the building inspector's decision to the Village Zoning Board of Appeals, and a hearing was held on May 6, 1975.

Con Edison's presentation at the hearing was reluctant. Con Edison's presentation contained neither a discussion of

---

*Citation to numerals preceded by "A" refers to the record on appeal in Consolidated Edison Co. v. Hoffman, a copy of which is being supplied to the Appeal Board.

**The assertion of height violation appears to be in error because the Code specifically exempts "utility towers" from height limitations. Buchanan Zoning Code §54-24(A). The New York State Supreme Court expressly noted this fact (A12). Con Edison has, however, uniformly failed to argue the point, opting instead to claim a variance based on factual need, a more demanding standard. Obviously, if Con Edison enjoyed the legal right to construct under the code itself there would be no need for a factual showing at all.

environmental harms which had persuaded the NRC to required closed-cycle cooling in the first place, nor a relevant discussion of the federal and state law compelling the granting of the variance. Instead, the presentation stressed what Con Edison termed a "two track" approach. Con Edison would apply for the zoning variance on one track, while proceeding with its ecological studies and reapplication to the NRC on the other track. (A113). Con Edison's explicit adoption of the "two track" presentation, of course, signalled the Village that the application was pro forma. It invited the Village to treat the application as the less-favored, hypothetical track.

The bulk of the remaining Con Edison presentation stressed how the plant operated, the size of the tower, and the alleged disadvantages of cooling towers (salt drift and vapor plume) despite the fact that both the company's and NRC's studies revealed that the adverse affects were minimal. (A115-22, 130, 208-28).

Con Edison failed to give the Village any reason why it should grant the variance other than its "two track" metaphor, i.e. the variance was needed only as a precaution. Con Edison's presentation, of course, included disclaimers that it "could give no assurance" that its future request to the NRC would be granted. (A113). But the overall presentation revealed that the dominant intention was to make as pro forma an application as could be made.

The next speakers were all from HRFA, who spoke in favor of the variance. (A125-40). Only when HRFA spoke was there any discussion of the underlying facts of damage to the fishery. This of course made the proceeding appear adversarial because only HRFA was in favor of the application on the merits. The failure of Con Edison to explain or support the decision was later picked up by the Village in its decision when it noted that Con Edison "sharply criticized" HRFA's proof of fishkills (A43).

The next speaker was the attorney retained by the Village of Buchanan. He quickly picked up on Con Edison's presentation. The attorney for the Village testified it was his opinion that the NRC license requirement was not final, but only conditional (A142-143). Such advice was plainly wrong. Nevertheless, he continued that the issue was still a matter of study and that it would be appropriate for the Zoning Board to examine afresh whether closed-cycle cooling was in fact preferred over once-through cooling. The attorney declared that the Board had done the proper thing in hiring its own expert to examine the issues and to enlighten the Board on whether Con Edison was likely to prevail in overturning the license requirement. (A142-144).

Then Dr. William Shuster, the Village's retained expert, offered his undocumented opinion that, on balance, once-through cooling was preferable for Indian Point to closed-cycle cooling. (A146). With respect to the problem of impingement and entrainment of organisms, Professor Shuster testified without explanation

that "innovative approaches can solve, or at least markedly reduce the problem." (A147). This opinion was, again, totally contradictory to the existing License requirement.

Con Edison sat silently throughout this presentation. It did not correct or object to false characterization of the License or to the acceptance by the Board of the expert's opinion to the effect that the NRC would reverse itself. In contrast, Con Edison quickly rose to object to HRFA's statement of the number of fish impinged at Indian Point (A158-59) and to the mention of Atlantic sturgeon (A140). But it failed to object to the patently erroneous interpretation of the License and the obvious irrelevance of Dr. Shuster's prediction that the NRC would change its mind.

These failures to diligently present its case emerged as determinative when the Village's opinion came down. On June 19, 1775, the Zoning Board of Appeals denied the variance. The Board ruled that Con Edison had not shown practical difficulties because, as the Board interpreted the License, the requirement for termination of once-through cooling lapsed if a governmental unit such as the Village of Buchanan did not approve the preferred closed-cycle cooling system (A49). According to the Board, the License only demanded a "good faith" and "pro forma" application by Con Edison. The Board viewed itself as entirely free to accept or reject the License requirement, and placed great reliance upon Dr. Shuster's testimony that the superiority of

closed-cycle cooling over once-through cooling was an open factual question. (A46-47). The Board, following the legal advice it received at the hearing, concluded that there was neither a factual nor legal compulsion for it to grant the variance. (A48-49).

The Village Board picked up Con Edison's assertion that the application was precautionary only and used that as the primary theory for denying the variance:

> "Con Edison's position at the public hearing was that it intended to press forward with its ecological study in an effort to demonstrate the validity and reasonableness, all things considered, of its once-through system, but that it might be caught between conflicting governmental commands if this Board refused to vary the height limitations and use restrictions of the ordinance, at least to the extent of enabling it to have a building permit presently on hand. It therefore presented the facts as to the Federal regulatory proceedings to date, showed the details of its projected closed-cycle system, and briefly discussed its choice of a natural draft system as ecologically preferable to other closed-cycle systems.
>
> * * *
>
> "On all the facts brought out at the hearing and the materials submitted to the Board, it appears that Con Edison is presently in full compliance with all requirements of the Zoning Ordinance. In the operation of Unit No. 2 at Indian Point with its once-through cooling system, it is in full compliance, as far as can be determined here, with the requirements of the Federal agency having jurisdiction. It has further carried out the requirements of its license as to making and submitting its evaluation of a preferred system of closed-cycle cooling to the Nuclear Regulatory Commission (License No. DPR-26, Amendment No. 6, Par. 2.E(2), May 6, 1974) and has satisfied the requirements of Par. 2.E(1)(b) of the license by acting diligently and in good faith in prosecuting the present application for a building permit and variances.

"On the present Con Edison application, we do not find practical difficulties in enforcing the ordinance according to its terms because the application is contingent, i.e. for the purported erection of a structure which may or may not ever be erected, depending on future events, and pro forma, i.e. made because an agency having jurisdiction over Con Edison has directed it to make the application, but involving no present intent, commitment or direction to begin excavation, construction or any other activity on the premises for which a building permit would be required by the Village of Buchanan.

"In the view of this Board, there is nothing before it which indicates any legal or factual compulsion upon the Board to accept a tower standing 525 feet higher that the legal maximum as a necessary evil, on a theory of superior governmental requirement or a theory of practical difficulties to the applicant. Indeed, no practical difficulty to Con Edison is apparent upon the very denial of its application: its license is in effect, it has made the application directed, and the refusal to grant the "governmental approval" is entirely attributable to this municipal agency, not to any deficiency on Con Edison's part.

"A very different situation might be presented some two years hence, or earlier if Con Edison's $15,000,000 ecological study were completed and any application based on it were finally determined by the Nuclear Regulatory Commission before January 1, 1977. On the other hand, no proposal for a closed-cycle system or for variances may ever be presented again. The situation which may or may not occur is not before the Board on the present application and there appears to be no basis for anything more than speculation as to whether a closed-cycle system will or will not be required in 1977, in the absence of any inkling as to what facts will be revealed by the present and ongoing study."

(A45, 47-49)

Thereafter, Con Edison filed a petition appealing the Village's decision to the New York Supreme Court. But not until it briefed that case did Con Edison take the position that the Village had no authority to regulate, and that it had in fact

been preempted by the NRC's License. Con Edison's lateness in raising the argument was such that the Village's main claims on appeal were that the court could not consider preemption because Con Edison had belatedly raised "for the first time the question of the illegal or unconstitutional application of the zoning ordinance to its property" at the court stage. (Brief of Respondents-Appellants to the New York Supreme Court, Appellate Division, at p. 35, July 22, 1976).

The record thus supports a finding that Con Edison did not proceed with due diligence. Con Edison was a reluctant applicant. It failed to make clear that the NRC License term requiring cessation of once-through cooling was final absent a license amendment. It emphasized the alleged harms of the tower and its future hopes of reversal, rather than the harm to the fishery from the present system. It failed to object to the incorrect interpretation of the License by the Village attorney and its failed to object to the Village expert's irrelevant and speculative predictions. It failed to argue federal preemption or the state law doctrines requiring issuance of the variance. One might by comparison match Con Edison's performance at Buchanan with its performance when it diligently desires a result. It has produced in hearings before the NRC, for example, cadres of supporting scientists, volumes of studies, and exhaustive legal briefs. It has paid careful attention to the record. It promptly objected to adverse legal positions and

irrelevant factual evidence. Due diligence would require that a reasonable measure of such intensity of advocacy be brought to bear to comply with the License. Instead, Con Edison did little more than make, as the Village stated, a "pro forma" application. (A48).

Because of its own inadequate performance Con Edison found itself entangled in delaying litigation, and now seeks to benefit from that delay. The public who have been following this case and who are familiar with this record know that Con Edison's conduct did not constitute the type of diligent prosecution of legal rights one would expect under the license requirement.

If this Board finds that such conduct in fact meets the standard of "due diligence," then such a finding will be a signal to the applicant and the public that due diligence requirements to perform license terms have very little force. The credibility of the NRC in the environmental community will be severely damaged. More important the NRC will lose the respect of the government agencies whose cooperation the NRC needs as well as losing the respect of the industry it must regulate. If Con Edison receives this Appeal Board's stamp of approval here, then the industry will know that future tough requirements by NRC need not be taken seriously.

III

THE NRC, IN THE EXERCISE OF ITS POWERS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, HAS CONCLUDED THAT THE INDIAN POINT 2 PLANT MUST BE UPGRADED TO MORE FULLY PROTECT THE ENVIRONMENT. THAT DECISION EFFECTIVELY SETS A MINIMUM REQUIREMENT FOR PROTECTION OF THE ENVIRONMENT WHICH THE VILLAGE OF BUCHANAN MAY NOT CIRCUMVENT.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq. is a substantive federal law. That law has been applied by the NRC in this case to require a change in cooling mode at Indian Point 2 in order to protect the environment. License Condition 2.E.(1). As a result, the state or any agency thereof is precluded from regulating in a manner which is not consistent with the federally imposed requirement.

A. The Statutory Basis for Federal Regulation.

The License term requiring cessation of operation with once-through cooling at Indian Point 2 by May 1, 1980 and conditioning operation thereafter on utilization of a natural draft wet cooling tower as the preferred alternative closed-cycle cooling system is based upon the NRC's exercise of its authority under the Atomic Energy Act, as amended, 42 U.S.C. §§2011 et seq.--which empowers the NRC to regulate construction and operation of nuclear power plants--and the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., which requires all agencies of the federal government to administer the laws they implement in accordance with the policies of environmental protection set out in

the Act

Pursuant to NEPA, federal agencies now possess the authority to incorporate environmental concerns into agency decisions. As one of the most authoritative commentators on NEPA has noted*, the statute creates substantive powers:

> ...Specifically, §101(a) instructs the federal government to protect and restore the environment in accordance with a general national policy, declared by the Act, that the government shall endeavor "to create and maintain conditions under which man and nature can exist in productive harmony." The national environmental policy is spelled out in §101(b) in six specific environmental mandates to the federal government. These give content to NEPA's substantive policy and ensure that NEPA's lengthy opening passages are more than a mere hortatory preamble. [Ftn. omitted] Further, in §102(1) Congress stated that "to the fullest extent possible...the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." In §102(2), in responding to fears that the new policy might become an empty utterance unless the statute included a means of ensuring that federal agencies would implement the policy, Congress addressed itself to the task of designing a system that could translate NEPA's goals into action. This system was also subject to compliance "to the fullest extent possible." Section 102(2)(C) was one of eight "action-forcing" provisions set up to ensure that the federal government bore these general goals and directives in mind in making specific decisions. As a Senate report put it:
>
> > 'If goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain "action-forcing" provisions and procedures which are designed to assure that all Federal agencies plan and work towards meeting the challenge of a better environment.'
> > [S. Rep. No. 91-296, 91st Cong., 1st Sess. 3,9,10,14 (July 9, 1969)]

---

*Frederick R. Anderson, NEPA in the Courts 2 (1973)

The Eighth Circuit in the Gillham Dam case fully articulated the view that NEPA imposes judicially reviewable substantive requirement. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 297 (8th Cit. 1972).

> The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision making. Section 101(b) of the Act states that agencies have an obligation "to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources" to preserve and enhance the environment. To this end, §101 sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment...

In the more recent case of EDF v. Matthews, 8 ERC 1877, 1878 (D.C.D.C. 1976) the court, citing the decision in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), concluded that NEPA provides the Food and Drug Administration with authority supplementary to that agency's organic acts:

> NEPA was enacted in 1969 as a mandate to the agencies of the Federal Government to take environmental considerations into account in their planning and decision making "to the fullest extent possible." 42 U.S.C. §4332. In one of the leading cases bearing specifically on the reach of NEPA, our appellate court stated:
>
> > [Every federal agency] is not only permitted but compelled to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates. Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1112 (1971).

> NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties. 449 F.2d at 1115, fn 12.

The NRC in this case applied NEPA in a substantive manner in conditioning authorization of operation at Indian Point 2 on the cessation of once-through cooling by May 1, 1979. That being the case, the next relevant question is the nature and extent of the federal regulation.

B. The Nature and Extent of Federal Regulation Under NEPA.

The NRC has conditioned the operating license for Indian Point 2 on the plant's cessation of operation with its present once-through cooling system by May 1, 1979 and on operation thereafter with the preferred closed-cycle cooling system, which has been determined to be a natural draft wet cooling tower. License Condition 2.E.(1). Throughout the NRC proceedings which preceded issuance of the operating license, the timing of cessation of once-through cooling was a critical NEPA issue. The termination date was hotly contested throughout and the May 1, 1979 date was finally imposed only after a careful cost-benefit balance carried out pursuant to the requirements of NEPA.

Con Edison itself has recognized that the termination date is an essential part of the NRC's decision under NEPA:

> "The Commission's conclusion that operation with the present once-through cooling system must terminate on May 1, 1979 constitutes a federal policy

> decision based on a federal interest in protecting an interstate resource." (emphasis supplied)
>
> (Con Edison's Memorandum of Law to the Supreme Court of New York, p. 42)*

We agree.

The NRC may not delegate to the State of New York or any agency thereof including the Village of Buchanan, control over the date for cessation of once-through cooling. It is the NRC which is bound by the mandates of NEPA and it is the federal agency which must assure the NEPA's goals are implemented and safeguarded. These responsibilities may not be delegated to state or local authorities which are not bound by NEPA.

Delegation of decision making was precisely the issue in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). There the AEC by regulation deferred to state water quality decisions. Here a similar deferral is suggested--deferral to a village zoning authority as to when NRC decisions are to be carried out. The answer given in Calvert Cliffs' disposes of the contention:

> Arguing before this court, the Commission has made much of the special environmental expertise of the agencies which set environmental standards. NEPA did not overlook this consideration. Indeed, the Act is quite explicit in describing the attention which is to be given to the views and

---

*Copies of the Con Edison Briefs in the State court case were requested by this Board and are being provided by Licensee. HRFA believes that it is only appropriate for the Board to accept HRFA's briefs in the State courts since Con Edison's are being accepted. We are therefore supplying at this time copies of these briefs to the Board and to the other parties which are not already in receipt of copies.

standards of other agencies. Section 102(2)(C) provides:

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public.
>
> * * *
>
> Thus the Congress was surely cognizant of federal, state and local agencies "authorized to develop and enforce environmental standards." But it provided, in Section 102(2)(C), only for full consultation. It most certainly did not authorize a total abdication to those agencies. Nor did it grant a license to disregard the main body of NEPA obligations. (Emphasis Supplied)

Even delegation of the preparation of the environmental impact statement required by Section 102(2)(C) of NEPA is impermissible, except to state agencies (not local agencies) under carefully limited circumstances. See Section 102(2)(D). See also, Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972). In no event may the burden of representing the public interest in the environment and the decision under NEPA be delegated by the responsible federal agency to a state or agency thereof.

Paragraph 2.E.(1) of the license represents an attempt to accomodate potential short term problems associated with obtaining

governmental approvals to the necessity of setting a fixed date for installation of a closed-cycle system. Paragraph 2.E.(1)(b) is thus a shield to protect Con Edison from momentary delays occasioned by good faith governmental procedures. It was not intended nor may it be used as a sword in the hands of the Village of Buchanan by construing this term to permit an indefinite extension because of the Village's continued refusal to accept its own circumscribed authority in this case.

The Village, and now Con Edison, seek the contrary result. Under their position the Village can indefinitely postpone performance. The Village's statement is unequivocal on this point:

> "Indeed, no practical difficulty to Con Edison is apparent upon the very denial of its application; its license is in effect, it has made the application directed, and the refusal to grant the 'governmental approval' is entirely attributable to this municipal agency, not to any deficiency on Con Edison's part." (A 266).

In other words, the Village reads the License as delegating timing to it, and it therefore states that it is empowered to reverse the NRC's License. There is no significant difference between the Village's unlawful arrogation of power and Con Edison's claim that the License term should be deferred solely on the basis of that continued arrogation.

Having found that the federal regulation under NEPA controls the timing of cessation of once-through cooling, we now turn to the issue of the extent of federal regulation of the <u>type</u> of closed-cycle cooling required.

Con Edison applied for a license amendment to designate a natural draft wet cooling tower as the preferred alternative closed-cycle cooling system at Indian Point 2. In support thereof, Con Edison submitted a report entitled "Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point Unit No. 2" (December 1, 1974). (Applicant's Exhibit No. 1 in this proceeding; Tr. 243-4). This Report discusses alternative closed-cycle cooling systems and recommends the natural draft wet cooling tower because of the environmental and economic advantages it possesses over the other types.

This report was not based on an analysis of abstract systems, but estimates of impacts from a natural draft wet cooling tower of a given height (approximately 560 feet), a given diameter (460 feet) and a specific location on the plant site. (See Section 3.2 System Description). Detailed maps were included describing the proposed location. In addition, meteorological data and other data relating to concerns about vapor emissions and salt deposition from the tower were presented based on the assumed height of the tower. See p. 6-7.

As the Licensing Board properly stated in its decision:

> "The recommendation [of Licensee's Report] was based upon considerations, among others, of the physical location of the proposed cooling towers, site preparation and excavation system components and piping needed, as well as all other equipment requirements." (Slip op. at 3) (emphasis supplied)

The Final Environmental Statement prepared by the NRC Staff

analyzed the environmental and economic impacts of a natural draft wet tower of the height, base and location proposed by the Applicant. (See discussion in FES Sections 3, 5, 6).

Thus the recommendation of both Licensee and Staff was based on a NEPA review of a natural draft wet cooling tower of a particular height, structure and location. And the particular natural draft wet cooling tower which was recommended was the one approved and accepted by the Licensing Board:

> "...the proposed amendment sought by Consolidated Edison Company of New York, Inc. is approved and accepted and it is determined that the preferred type of closed-cycle cooling system for installation at Indian Point Unit No. 2 is the closed-cycle natural draft, wet cooling tower system recommended by the Licensee in its request for an amendment filed on December 2, 1974."
>
> Slip op. at 14.

C. Powers Remaining to a State or Agency Thereof

As discussed in the memorandum of law of Con Edison submitted to the Supreme Court of the State of New York (pp. 37-42) and as set out in HRFA's first brief to this Board, a State or locality may not exercise its power so as to conflict with or frustrate a policy of the federal government or a condition imposed pursuant to federal regulation. Such state or local regulation is prohibited by the Supremacy Clause of the United States Constitution upon which the doctrine of federal preemption is based:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
>
> Article VI.

There is federal preemption of state regulation or municipal zoning power where it is impossible to comply with both the federal and state or local regulatory schemes. FPC v. Conservation Commission of the State of Okla., 362 F.Supp. 522 (W.D. Okla. 1973), aff'd., 451 U.S. 961 (1974); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). In Florida Lime Growers, the United States Supreme Court concluded that:

> "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility..." 373 U.S. at 142-143.

The minimum standards imposed by the federal government, pursuant to its regulatory power, therefore, must be met and cannot be lowered by a state or agency thereof.

Where as here the NRC, pursuant to its responsibilities under NEPA, has determined that operation of Indian Point 2 with a once-through cooling system must cease by 1979 (now 1980) in order to protect a public interstate resource and that a natural draft wet cooling tower is to be utilized in its stead if the plant is to continue operation after that date, the powers of a state or municipality to interfere with the federal regulation are circumscribed: Construction of the tower may not be prevented nor the date for termination of operation with the once-through cooling system delayed since to do so would be inconsistent with the federally imposed license requirement.

This would not mean that the state could not opt to shut

the plant down after May 1, 1980 in lieu of allowing it to operate without the cooling tower. Such regulation would be permissible because it would not be inconsistent with the federal regulation. However, as we argued in our initial brief to this Board, the Village of Buchanan would be precluded from utilizing its power to bring about such a result because of state law, not federal law. The point is simply that if the state is going to permit the plant to operate, then it must not regulate inconsistent with the mode of operation determined by the NRC under federal law.

Actions taken by the Village of Buchanan may not frustrate or conflict with the federally imposed requirements. The fact that the Village failed to impose conditions which were consistent with the federal regulation when it had an opportunity and instead attempted to block construction entirely--and continues to do so--may not frustrate compliance with the federal requirements or else the doctrine of federal preemption will be frustrated. Yet this would be the precise result were this Board to extend the termination date because Con Edison has not yet obtained variances from the Village of Buchanan. The NRC may not reverse itself merely by deferring to the Village--either because the Village refuses to issue the requested variances or because the Village seeks to keep its futile litigation alive.

D. Local Regulation of Ancillary Matters

To say that the Village may not regulate inconsistent with construction of the tower and the requirement for termination of

once-through cooling is not to say the Village is without power. It may regulate ancillary matters relative to construction of the cooling tower. However, its decisions on those ancillary matters may not hold up the whole construction program.

There need be no solicitude for the Village which has had full opportunity to act within the scope of its authority and has rejected those opportunities.* Indeed the principle enunciated by the court in Nader v. NRC, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975) with respect to those who fail to join in hearings and then later litigate is applicable to the Village's performance here.

> "We have long adhered to the view that it is incumbent 'upon an interested person to act affirmatively to protect himself' in administrative proceedings, and that '[s]uch a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated.' As we have admonished, '[t]o permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in this behalf would create an impossible situation.'" [ftns. omitted]

Nor is there any harm to Con Edison from its proceeding with construction. The Village may not regulate the location of the cooling tower since (1) that was part of the proposal approved by the NRC; and (2) the location is not something for which a

---

*It refused to issue the variances with local or incident regulation imposed; it refused to participate in the NRC hearings to determine the preferred type of closed-cycle cooling system.

variance is needed or has been requested and, therefore, is not something which the Village may control. (See Appendix A of HRFA's original Brief to this Board where the three problems posed by the tower in terms of the zoning code are set forth. Location is not included.)

In fact, the whole issue respecting local and incidental conditions is a red herring. Con Edison's proposal to the Village was found to be in compliance with the Village's building code except with respect to the three areas specified in the Building Inspector's letter. And as to these, the Appellate Division has directed the Village to issue the variances. As to all other facets the Village has already certified compliance.

In addition, as Con Edison itself admitted in its Brief to the Licensing Board (October 6, 1976), p. 9:

> "Similarly, experience with limited work authorizations is not relevant. A company receiving a limited work authorization may proceed with site preparation and construction of foundations while a hearing proceeds usually on the safety of the design of component systems. In the Buchanan Zoning case, the Zoning Board is challenging the construction of the cooling tower in its entirety, not merely with respect to an auxiliary matter which would be altered at a later date."

Thus Con Edison recognizes that if the Village's regulatory authority is limited to auxiliary matters, as it must be under federal (and state) law, these matters can be incorporated after site preparation and construction commence and need not be determined beforehand.

Finally, a specific provision provides Con Edison with the appropriate mechanism by which to seek relief from actions of the Village which affect construction:

> After the commencement of the construction of a closed-cycle cooling system, a request for an extension of the interim operation period will be considered by the Atomic Energy Commission on the basis of a showing of good cause by the applicant which also includes a showing that the aquatic biota of the Hudson River will continue to be protected during the period for which the extension is sought.
>
> License Condition 2.E.(1)(d)

CONCLUSION

For the foregoing reasons, as well as those set forth in its initial brief, HRFA respectfully requests the Board to deny in full Con Edison's exceptions.

Respectfully submitted,

Sarah Chasis

Sarah Chasis
Ross Sandler

(Natural Resources Defense Council, Inc.)
15 West 44th Street
New York, New York 10036
(212) 869-0150

Attorneys for Hudson River Fishermen's Association

March 4, 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	Docket No. 50-247
	)	OL No. DPR-26
Consolidated Edison Company of New York, Inc.	)	(Determination of Preferred Alternative Closed-Cycle Cooling System)
(Indian Point Station, Unit No. 2)	)	

I hereby certify that I have this 4th day of March, 1977, served the foregoing document entitled "Hudson River Fishermen's Association Supplemental Brief in Opposition to Applicant's Exceptions" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

Docketing and Service (20) Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Lawrence R. Quarles
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome E. Sharfman, Esq.
Chairman, Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel W. Jensch, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Franklin C. Daiber
College of Marine Studies
University of Delaware
Newark, Delaware 19711

Mr. R. Beecher Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

Howard K. Shapar, Esq.
Executive Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Edward J. Sack, Esq.
Law Department
Consolidated Edison Company
of New York, Inc.
4 Irving Place
New York, New York 10003

Richard C. King, Esq.
New York State Energy Office
Swan Street Building
Core 1, 2nd Floor
Albany, New York 12233

Stephen H. Lewis, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Carl R. D'Alvia, Esq.
Village of Buchanan
Municipal Building
Buchanan, New York 10511

Leonard M. Trosten, Esq.
Leboeuf, Lamb, Leiby &
MacRae
1757 N Street, NW
Washington, D.C. 20036

Langdon Marsh, Esq.
General Counsel
Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233

Sarah Chasis