UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

HUDSON RIVER FISHERMEN'S ASSOCIATION BRIEF IN OPPOSITION TO STAFF AND LICENSEE EXCEPTIONS

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On November 23, 1977, the Atomic Safety and Licensing Board (the "Licensing Board") issued an Order Granting Motion For Determination That All Governmental Approvals Have Been Received. On December 5, 1977, the NRC Staff filed an exception to the Order with the Atomic Safety and Licensing Appeal Board (the "Appeal Board"), as well as a motion to dispense with briefing and refrain from ruling on the exception until the Commission had issued a decision in its review of ALAB-399. On December 5, 1977, the licensee Consolidated Edison Company of New York, Inc. ("Con Edison") also filed exceptions to the Order and submitted a brief in support of these exceptions on December 20, 1977. On December 9, 1977, the Appeal Board issued an Order which denied the NRC Staff motion to refrain from ruling until the Commission issued its decision in review of ALAB-399 and which established a schedule for the filing of briefs in support

of and opposition to the Staff and licensee exceptions.

The Hudson River Fishermen's Association ("HRFA") files this brief in opposition to the NRC Staff and licensee exceptions. Most of the issues raised by the exceptions have already been fully briefed by HRFA during the course of these proceedings. HRFA will therefore attempt to limit its argument accordingly.

I

THE LICENSING BOARD CORRECTLY CONCLUDED THAT THE VILLAGE OF BUCHANAN ZONING BOARD'S APPROVAL WAS NO LONGER A REQUIRED GOVERNMENTAL APPROVAL

The Licensing Board was correct in holding that, through application of the principle of federal preemption to the Buchanan Zoning Board's inaction, the Zoning Board's approval was no longer a required governmental approval under Paragraph 2.E.(1)(b) of the Indian Point 2 operating license. The Staff exception should therefore be denied.

The NRC has determined, pursuant to its responsibilities under the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., and the Atomic Energy Act, 42 U.S.C. §§2011 et seq., that the present once-through cooling system at Indian Point 2 threatens the vitality of the Hudson River fishery and that the plant, if it is to continue to operate, must be upgraded to more fully protect the river. NRC Facility Operating License No. DPR-26, Amendment No. 6. That decision effectively sets a

minimum requirement for protection of the environment which the Village of Buchanan may not circumvent and still have the plant operate. The Village may not, as it has attempted to do, set standards less strict than those set by the NRC. Such attempts are precluded by the doctrine of supremacy of federal law. This doctrine and its application to this case are discussed at length in HRFA's brief to the Commission in its review of ALAB-399.*/

The Village of Buchanan has adamantly adhered to its position of total opposition to the construction of a cooling tower at Indian Point 2. Rather than utilize the powers it does possess under applicable state and federal law, it has deliberately chosen not to exercise those powers. In the year since the ruling of the Appellate Division of the Supreme Court of the State of New York and in the seven months since the Appeal Board decision in ALAB-399, the Village of Buchanan has failed to issue the requested variance with appropriate local and incidental regulation. Instead, it opposes construction of the cooling tower entirely.**/

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*/HRFA Brief at 13-28 (October 14, 1977).

**/Mr. Carl R. D'Alvia, Village Attorney for the Village of Buchanan, stated in an October 15, 1977 letter to Chairman Jensch that "[t]he local and incidental regulations mean very little to the Village of Buchanan..." The Village of Buchanan has repeatedly stated its absolute opposition to a cooling tower at Indian Point 2. See, e.g., Final Impact Statement Related to Selection of the Preferred Closed-Cycle Cooling System at Indian Point Unit No. 2, NUREG-0042, August 1976, pp. B-51 to B-58.

There is a direct conflict between the requirements imposed by the NRC license, established pursuant to federal law, and the action of the Village of Buchanan. In view of this conflict, and in view of the full opportunity given the Village to exercise its authority in a manner consistent with the federal requirements, the Licensing Board correctly concluded that the Village's approval was no longer a governmental approval required to proceed with construction of the cooling tower, within the meaning of Paragraph 2.E.(1)(b) of the license. The NRC Staff exception should therefore be denied.

II

THE ORDER OF THE LICENSING BOARD IS CONSISTENT WITH ALAB-399

The Appeal Board held in ALAB-399 that the Village of Buchanan Zoning Board may not block construction of the cooling tower at Indian Point 2.*/ The Board gave the Village the opportunity to exercise its authority, consistent with the Appeal Board

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*/ The Board stated that "[t]he Zoning Board's attempt to prevent construction of a cooling tower is pre-empted under all of these tests." ALAB-399 at 26-27. The Appeal Board also stated that "[i]f the Zoning Board uses this declaration of its powers [to regulate local and incidental conditions in a manner consistent with the construction of the cooling tower] under state law in such a way as substantially to obstruct or to delay the license conditions imposed upon Con Edison by this Commission pursuant to NEPA, then its 'regulation' would be pre-empted by federal law." ALAB-399 at 27.

holding. This was the stated purpose of the 45-day period. The Village of Buchanan Zoning Board failed to act during the 45-day period or anytime thereafter. Instead, it made clear its intent to continue to block construction of the cooling tower.

There is a real conflict between the present requirements of the NRC license and the Village's refusal to grant a zoning variance. In view of this direct conflict, the Licensing Board's finding that the Village's approval was no longer necessary was correct and fully consistent with the holding of ALAB-399 concerning federal preemption.

The fact that the Village's refusal to issue the zoning variance has not yet delayed construction of the cooling tower should not stand in the way of such a finding of preemption.*/

As things now stand, Con Edison cannot satisfy both the NRC license requirement and the Village's regulation. There is a direct conflict in what is permitted by the two levels of government. As discussed in HRFA's earlier briefs to this Board and to the Commission, where such a direct conflict exists, the local regulation must fall to the federal requirements imposed pursuant to federal law.

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*/ In June, 1977, the Licensing Board granted an extension of interim operation with once-through cooling until May 1, 1982. Under the schedule for construction of the cooling tower set out in ALAB-188, all necessary governmental approvals need not be received until December, 1978 to meet the May, 1982 date.

It is neither necessary nor appropriate to wait until the Village has in fact delayed construction of the cooling tower to find that federal preemption applies. Such a result is preposterous and would undermine the very federal regulation and federal objectives that the federal preemption doctrine seeks to protect. Yet this result is precisely what Con Edison seeks by its Exceptions 1 and 4. Con Edison argues that the only basis for a preemption finding is where the Village's inaction has actually prevented Con Edison from carrying out activities necessary to construction of the cooling tower. To have to await such a moment is truly perverse and defeats the policy behind the federal preemption doctrine. (See Con Edison Brief in Support of Exceptions at 3).

Where the Village has taken an action which contravenes a federal requirement, and where it has had full opportunity to impose conditions harmonious with the federal requirement and yet has failed to do so, a finding of federal preemption is appropriate.

Con Edison itself, in its briefs to the state courts, has argued that the Village may not deny the variance for the cooling tower because of federal preemption principles. It has not argued there that the Village had to actually cause delay in the construction of the cooling tower for the doctrine of federal preemption to apply.

For the foregoing reasons, Con Edison's Exceptions 1 and 4 should be denied.

III

THE LICENSING BOARD DID NOT ABUSE ITS DISCRETION BY FAILING TO AWAIT THE DECISION OF EITHER THE NEW YORK STATE COURT OF APPEALS OR THE COMMISSION

The Licensing Board did not improvidently issue the order granting HRFA's motion for a determination that all governmental approvals had been received. It would have been improper for the Licensing Board to defer the granting of HRFA's motion until the New York State Court of Appeals issued its decision. Furthermore, it was appropriate for the Licensing Board to proceed, despite pending Commission review of ALAB-399, in view of the fact that no stay of ALAB-399 had been issued.

In its Exception 3, Con Edison attempts to reargue a position already rejected by this Board in ALAB-399. In ALAB-399, the Board held that to await the final resolution by the New York State Court of Appeals was not only inappropriate, in light of the already long delay, but pointless since the State Court of Appeals could not give the Zoning Board greater powers than those afforded by the Appellate Division decision and still be consistent with federal law. ALAB-399 at 29.

The Board's decision was correct. The question of what governmental approvals are required under the NRC license is a federal question and the NRC is the appropriate federal body to decide such questions. For a full discussion of this point, HRFA respectfully refers the Board to HRFA's Reply Brief before the Commission (pp. 4-9) filed on October 31, 1977 which discusses

this point at length.

Moreover, as the NRC Staff has pointed out in its brief to the Commission, acceptance of Con Edison's argument in favor of deferral until the Court of Appeals has ruled and the Village has acted, could threaten the integrity of the present May 1, 1982 date for cessation of once-through cooling at Indian Point 2. (Staff Brief of October 14, 1977 at 46). There is no assurance that the Court of Appeals will have issued its decision,*/ any further appeal that might be available to the losing party will have been exhausted, and the Zoning Board will have taken action pursuant to the final order of the courts, in time for the commencement of construction of the cooling tower. All or some of these events might not occur until well after December 1, 1978.

Finally, Con Edison's Exception 3 must be rejected for the simple reason that the NRC may not delegate to New York State, or any agency thereof, control over the cessation date for once-through cooling at Indian Point 2. Yet this would be the effect of acceptance of Con Edison's arguments. The NRC, not the state, is bound by the National Environmental Policy Act. The NRC has the obligation to assure that the conditions it has imposed in the license, pursuant to NEPA, are met.

Con Edison's Exception 2 should also be rejected. It

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*/Con Edison's claim that the Court of Appeals will rule in the first half of 1978 is pure speculation.

was appropriate for the Licensing Board to act, despite the Commission review of ALAB-399, since the effectiveness of ALAB-399 has not been stayed pending Commission review. In fact, HRFA's request for a partial stay of ALAB-399 pending Commission review was specifically rejected by this Board in ALAB-414 and by the Commission in its order of August 26, 1977.

The Staff, pursuant to ALAB-399, has issued a license amendment stating that all required governmental approvals have not been received pending further proceedings with respect to the Village of Buchanan approval, thus giving effect to the Appeal Board decision. In the same way that this finding of ALAB-399 has been implemented, so too should the Appeal Board's directive with respect to the 45-day provision. The Licensing Board therefore was acting entirely properly when it proceeded to issue the Order.

The possibility that the Commission's decision may require some modification, or perhaps even a vacation, of the Licensing Board's Order in no way makes the Licensing Board's decision to issue the Order an abuse of discretion.

CONCLUSION

For the foregoing reasons, the NRC Staff and licensee exceptions should be denied in full.

Respectfully submitted,

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