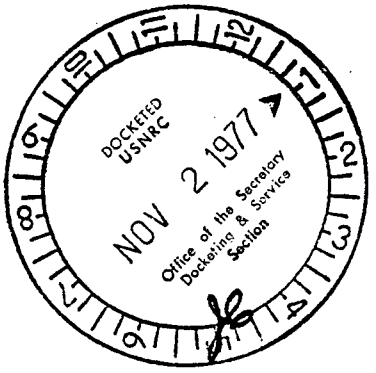
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

10/31/77

BEFORE THE COMMISSION



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)

REPLY BRIEF OF THE HUDSON RIVER FISHERMEN'S ASSOCIATION

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The Hudson River Fishermen's Association ("HRFA") submits this reply brief pursuant to the Order of the Nuclear Regulatory Commission ("Commission") dated September 12, 1977, providing for the filing of reply briefs in the above-captioned case on or before October 30, 1977.

1. INTRODUCTION

Each of the parties to this proceeding has already filed a brief addressing the issues articulated by the Commission in its August 26, 1977 Order granting the Staff's petition for review of ALAB-399. While the legal reasoning differs, the parties are in basic agreement on the two most important issues in the case: that the Village of Buchanan may not block construction of the cooling tower at Indian Point 2; and that the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq., does not preempt State regulation of environmental matters, but that

an NRC license term implementing NEPA overrides directly conflicting state action. The existence of disagreement among the parties on the questions of whether the Village's approval is a required approval under the license and what effect the May 1, 1982 date for termination of once-through cooling has on this proceeding, does not alter the fact of this basic consensus.

The major difference in positions of the parties which does exist relates to whether or not the Commission should proceed to decide the issues before it. While admitting that the applicable federal and state law on the issues in the case is clear, Con Edison takes the position that the Commission should defer its consideration of the case until the New York State Court of Appeals has ruled on the Village of Buchanan zoning appeal. In contrast, the Staff and HRFA argue that the interpretation of an NRC license and the application of principles of federal law are at issue and, therefore, the Commission should proceed with its decision. As the Staff has pointed out in its initial brief, deferral to the decision of the state courts, the timing of which is uncertain, could undermine the 1982 date established by the NRC for elimination of once-through cooling.

The case before the Commission is a simple one presenting a limited set of facts. There is no suggestion in this case that the NRC has compelled a state to site and operate a nuclear power plant over the state's objection nor is there any suggestion that Congress in passing NEPA restricted the state's traditional

police powers. The suggestions to the contrary have infused this case with an undeserved importance and have caused the Staff and the amicus New York State Energy Office to make arguments in their briefs concerning facts and legal doctrines not before the Commission. The Commission should take the case as it is presented, namely a narrow case involving the appropriate interpretation of an NRC licence term and the application of familiar principles of federal law. The basic agreement of the parties on the substantive conclusion reached by the Appeal Board in ALAB-399 is indicative of the straightforward nature of the issues involved.

2. CON EDISON IS IN ERROR WHEN IT ARGUES THAT THE COMMISSION SHOULD AWAIT THE DECISION OF THE STATE COURT OF APPEALS

The heart of Con Edison's argument to the Commission is that until the New York State Court of Appeals finally rules, the Commission may not base its interpretation of the NRC license on a doctrine of state law.*/ Con Edison also argues that since the issue of federal preemption is before the state court, it is premature for the Commission to rule on this issue either. Con Edison's argument is wrong for two reasons. First, the question of what governmental approvals are required under the NRC license is a federal question for the NRC to resolve, and the NRC is the appropriate federal body to decide such questions. Secondly, deferral to the state courts would threaten the 1982 date for termination of once-through cooling and would violate the Commission's overriding responsibliities under NEPA.

The Commission is not bound by the state courts' interpretation of an NRC license. Even Con Edison admits this.**/ It is for the Commission to interpret the license it has issued and decide what is meant by the provision that Con Edison obtain all governmental approvals required for construction of the cooling tower. The question of what approvals are required under the license is not even before the state courts.***/

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*/Con Edison Brief, p. 6.

**/Brief, p. 12.

***/The question before the New York State Court of Appeals is the scope of the Village's authority with respect to the cooling tower.

Even if the NRC intended to rely on principles of state law to determine what approvals are required, the extent of that reliance is a federal question.*/ It therefore is up to the Commission, not the state courts, to decide what approvals are required.

Con Edison's other argument, that since the state court is considering the federal preemption issue it would be premature for the Commission to rule, is also illogical. The Commission istelf is the in the best position to determine the effect under federal law of a federal license requirement established in fulfillment of federal statutory goals.

Finally, as the Staff has argued in its initial brief,**/ deferral to the New York State Court of Appeals for decision on the state and federal law issues could threaten the integrity of the May 1, 1982 date for termination of once-through cooling. The Commission has determined, pursuant to NEPA, that a public interstate resource, namely the Hudson River fishery, needs to be protected from the adverse impacts of operation of Indian Point 2 with its present once-through cooling system. Accordingly, it

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*/ cf. Commission v. Tower, 327 U.S. 280 (1946)(federal tax court is not bound by state law on question of whether partnership existed for federal tax purposes); Jerome v. U.S., 318 U.S. 101 (1943)(applicability of a federal act is not dependent on state law, particularly if federal program would be impaired if state law controlled); United States v. Nardello, 393 U.S. 286 (1969) (limitation on reliance on state law to determine content of federal statute).

**/ Brief, p. 46.

has set a May 1, 1982 date for termination of that type of cooling system. The Commission may not undercut that date and its NEPA responsibilities by deferring its decision in this case to the ruling of the New York State Court of Appeals.*/

Similarly, the licensee's argument that the date for termination is a "flexible" date, to be moved about for Con Edison's convenience is nonsense. The timing for termination of once-through cooling at Indian Point 2 is and always has been a critical issue under NEPA. The termination date has been set only after extensive examination, in Environmental Impact Statements and lengthy adjudicatory hearings, into the question of adverse environmental impacts to the fishery flowing from operation of the plant with a once-through cooling system during an interim period. Yet Con Edison would have the license interpreted to allow this termination date to be at the mercy of state or local government decisions.**/ Such an interpretation would violate NEPA and is therefore impermissible.

The NRC may not delegate to the State of New York or any agency thereof, 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 that NEPA's goals

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*/There is presently no date set for oral argument before the state court. Predictions as to the date of decision are totally guesswork.

**/Brief, p. 18-21.

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 by Con Edison--deferral to a state or local 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 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.

As we said before, Paragraph 2.E.(1)(b) 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, and was not intended nor may it be used as a sword in the hands of the Village of Buchanan.

Thus the licensee's suggestion that the date for cessation is flexible and may be deferred for Village action is meritless because that suggestion runs counter to the basic tenets of NEPA under which this Commission must operate.

3. THE BULK OF THE STAFF'S BRIEF CONSISTS OF A LARGELY IRRELEVANT DISCUSSION OF FEDERAL PREEMPTION; THE RELEVANT ISSUE IS WHAT OCCURS WHERE AS HERE THERE IS A DIRECT CONFLICT BETWEEN FEDERAL ACTION AND LOCAL ACTION

The conclusions reached by the NRC Staff in its brief are very similar to HRFA's. The Staff agrees with HRFA that the Village (or any state agency) could not authorize Indian Point 2 to operate with less environmental safeguards than the NRC has determined to be necessary.* The Staff furthermore agrees with HRFA that at rock bottom, the basis for such a legal conclusion is that a direct conflict between the NRC license and an opposing action must be resolved under "familiar supremacy clause principles."**

Furthermore, HRFA and the Staff agree that there is no express federal preemption contained in NEPA. HRFA also agrees with the position espoused by amicus New York State Energy Office that the NRC could not require continued operation of Indian Point 2; however, that is not HRFA's understanding of what the license nor the Appeal Board has directed. The license of course is clear that the alternative is either upgrading the plant or cessation of operation. HRFA also agrees that should the state, for reasons within its jurisdiction, decide not to authorize the upgrading but rather require discontinuation of plant operation, there would be no question of federal

*/Brief, pp. 36-37.

**/Brief, p. 37.

override because both state and federal policies could be implemented without producing a conflict.

While the basic conclusions reached by the Staff and HRFA are the same, there are erroneous and misleading elements in the Staff's analysis, particularly in its characterization of NEPA. Because the Staff's arguments on these points are inconsistent with the issues actually presented, they should be disregarded.

The Staff spends the bulk of its brief arguing that NEPA does not preempt state regulation of environmental effects. The Staff refuses to directly face the admittedly separate question of federal override where there is a direct conflict between federal action and state action.

The United States Supreme Court has characterized the test for override as a determination of whether the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," using the formulation from Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This test was used both in DeCanas v. Bica, 424 U.S. 351, 363 (1976) and in Jones v. Rath Packing Co., 97 Sup. Ct. 1305, 1309 (1977). The Supreme Court has consistently used this test by construing the two statutes and then deciding whether they conflict. See, Perez v. Campbell, 402 U.S. 637 (1971). Questions of the pervasive nature of the federal scheme or

the states' traditional role in an area are irrelevant to a determination of whether there is an actual conflict. Thus, while the Staff's discussion of the absence of a regulatory scheme and the lack of need for uniformity is appropriate in an analysis of preemption, it does not influence a determination of whether the local regulation conflicts with federal law.

A situation of direct conflict is precisely what presently exists. The Village of Buchanan attempted to delay the NRC's decision with respect to the time for installation of closed-cycle cooling and to countermand the NRC's decision that a cooling tower is the preferred method of cooling. It is because these are the facts of this case that the New York courts and the Appeal Board reached the conclusions that they did.

The Staff's characterization of NEPA as a procedural statute lacking in substantive standards is confusing and wrong. NEPA directly affects the substantive decisions of federal agencies because it supplements the authority of all federal agencies and requires that they not only consider environmental matters but take them into account in their actions. (See HRFA's Initial Brief, pp. 14-16 for discussion of this point.) Senator Jackson described the statute as constituting "A statutory enlargement of the responsibilities and concerns of all instrumentalities of the Federal Government."* The requirement of an environmental impact statement

*/115 Cong. Rec. 19009 (1969).

is the "action-forcing mechanism" to assure that environmental protection is incorporated into federal agency decision-making.

The fact is that NEPA has been applied in this case by the NRC, after extensive EIS analysis and years of adjudicatory hearings, to condition the federal license issued for plant operation on cessation of once-through cooling by a date certain. This decision, embodied in the NRC license, has the weight of federal law and it is against this decision, not NEPA in the abstract, that the presence of a conflict must be measured.

Finally, the Staff's newest afterthought--that to avoid a direct conflict with the Village the Commission should consider whether the Indian Point 2 license should be modified**--constitutes an abrogation, rather than an affirmation, of the Commission's responsibilities under NEPA. The NRC has imposed the license conditions pursuant to its NEPA responsibilities. The condition is final, absent a license amendment to the contrary. This requirement, determined as necessary to protect the environment, should not and may not be abandoned, delayed, or modified because of action by the Village of Buchanan which has repeatedly indicated its intent to obstruct construction of the cooling tower.

**/Brief, p. 37.

CONCLUSION

For the foregoing reasons, HRFA respectfully requests the Commission to proceed to decision in this case and to find that the Village of Buchanan's approval is no longer a required governmental approval under the license.

Respectfully submitted,

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(Indian Point Station, Unit No. 2)	)	

I hereby certify that I have this 31st day of October, 1977, served the foregoing document entitled "Reply Brief of Hudson River Fishermen's Association" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

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