1/13/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 OF
HUDSON RIVER FISHERMEN'S ASSOCIATION

The Hudson River Fishermen's Association ("HRFA") submits this reply to the comments submitted by the other parties in response to the Memorandum and Order of the Nuclear Regulatory Commission ("NRC" or "Commission").

For purpose of clarity, HRFA's response is divided into its responses to the comments of Consolidated Edison and PASNY, to those of the NRC Staff, and finally to those of EPA.

Reply to Comments of
Con Edison and PASNY

Both Con Edison and PASNY argue that Section 511 of the FWPCA deprives the NRC of jurisdiction over the regulation of water quality impacts and therefore the NRC license conditions requiring termination of once-through cooling at Indian Point 2 and 3 should be vacated or modified to state that the cooling system will be the same as that which is required by EPA. These

arguments must be rejected for the following reasons.

The Issue Should be Treated as Res Judicata

The very same question of the effect of Section 511(c)(2) of the FWPCA on the NRC's authority under NEPA to impose such a condition on the Indian Point 2 license was fully litigated five years ago in the licensing proceeding for Indian Point 2. The issue should therefore be treated as res judicata.

At a pre-hearing conference held on November 22, 1972, the Atomic Safety and Licensing Board requested that the parties to the Indian Point 2 licensing proceeding address the effect of Section 511(c)(2) of the FWPCA on the Indian Point 2 proceeding. Briefs were filed on behalf of HRFA and Con Edison in December, 1972. In its brief, HRFA argued that the NRC's responsibilities under NEPA with respect to Indian Point 2 were unaffected by the passage of the FWPCA; that the issue before the then AEC related principally to the effects of water intake, not discharge, and that the controls proposed were not in the nature of effluent limitations; that even if effluent limitations were involved, Section 511(c)(2) did not deprive the NRC of its NEPA jurisdiction where the effluent limitations had not yet been established by EPA. (Environmental Defense Fund and Hudson River Fishermen's Association's Memorandum with Respect to Section 511(c)(2) of the Federal Water Pollution Control Act Amendments of 1972, December 20, 1972).

Con Edison contended, much as it does here, that Section

511(c)(2) deprived the AEC of jurisdiction under NEPA to regulate water quality matters in connection with its licensing proceedings; however, it argued that the licensing hearings proceed on the basis of a full evaluation by the Licensing Board of all environmental considerations pending further consideration by the Commission of the effect of the FWPCA. (Applicant's Memorandum on the Federal Water Pollution Control Act Amendments of 1972, December 8, 1972).

The Regulatory Staff did not file its brief on this issue until June, 1973. In the interim, the AEC's "Interim Policy on Implementation of Section 511 of the FWPCA" (38 F.R. 2679) and the "Memorandum of Understanding" between EPA and the AEC (38 F.R. 2713) had been issued. The Staff argued from these that in order to avoid any hiatus in federal responsibility and authority respecting environmental matters embraced by both NEPA and FWPCA, the Atomic Energy Commission must continue to exercise its NEPA authority and responsibility in the period before implementing actions are taken by EPA. Because no standards had been adopted by EPA, the Staff took the position that its proposed license condition requiring Con Edison to install and operate a closed-cycle cooling system after January 1, 1978 remained unaffected by the FWPCA provisions. (Regulatory Staff Memorandum on the Effect of the Federal Water Pollution Control Act Amendments of 1972 on the Indian Point 2 Proceeding, June 11, 1973).

The Licensing Board issued its Initial Decision on September

25, 1973. It adopted the Staff and intervenor proposals to condition plant operation on cessation of once-through cooling by May 1, 1978. This action was taken pursuant to NEPA.*/ Thus, the Licensing Board rejected the argument that it had been deprived by the FWPCA of its authority to regulate water quality impacts. Con Edison had full opportunity to challenge this result, but it never did so, even though the utility undertook an extensive appeal of the Licensing Board's decision. Again, in its decision, the Appeal Board applied NEPA, unconstrained by Section 511.**/ Con Edison did not appeal that decision and the Appeal Board's decision became a final agency decision.

In light of the above, Con Edison should be precluded now from arguing that the NRC must vacate or modify its license requirements in order to defer to EPA. This issue was argued and decided five years ago. Con Edison could have appealed the issue at that time and chose not to. This issue should be treated as res judicata.

The same argument is applicable to Indian Point 3. Con Edison was the original applicant for the license for Indian Point 3, prior to its sale of the plant to PASNY. Con Edison signed

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*/Consolidated Edison Company of New York (Indian Point Station, Unit No. 2), LBP-73-33, RAI-73-9 751 (September 25, 1973).

**/Consolidated Edison Company of New York (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323 (1974).

a Stipulation (binding not only on Con Edison, but also on any successor-in-interest to Con Edison), approved by the Commission, which sets a termination date for once-through cooling at Indian Point 3.*/ That Stipulation, as well as the Commission's approval of the Stipulation, were based on an understanding that NEPA applied and authorized the Commission to impose such a requirement on the operating license. For Con Edison and PASNY to now argue, three years after the license was issued, that the condition should be vacated or modified because of EPA's Section 511 is outrageous. The FWPCA existed at the time the Stipulation was signed and approved. (January 13, 1975). Con Edison and PASNY specifically agreed to the inclusion of such a term. No objection based on Section 511 was raised at the time. They should be found to have waived their rights to object to the license condition on these grounds.

For the foregoing reasons, HRFA submits that the issue of the NRC's jurisdiction to regulate the water quality impacts of both Indian Point 2 and 3 should be treated as res judicata.

A Deferral to EPA Violates the Primary Purpose of the FWPCA and NEPA

A second reason that the utilities' arguments must be rejected is that the result they seek, namely the complete withdrawal of the NRC at this time from the regulation of water quality

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*/Paragraph 2 of the Stipulation. See Consolidated Edison Company of New York (Indian Point Station, Unit No. 3), 2 NRC 835, Appendix A (1975).

impacts, is directly contrary to the primary purpose of both the FWPCA and NEPA which is to provide effective environmental protection of our nation's natural resources. It is inconceivable that Congress, which declared the objective of the FWPCA to be to (Section 101(a)):

> "...restore and maintain the chemical, physical, and biological integrity of the nation's waters..."

intended that any provision of the Act should be read to require an hiatus in the regulation of water quality impacts. Yet this is precisely what the utilities are seeking by removal or deferral of limitations on the operation of Indian Point 2 and 3 when EPA has not yet acted. In addition, Section 107(f) makes clear, one purpose of the FWPCA is to eliminate duplication of effort by federal agencies. Section 511(c)(2) was proposed in implementation of that directive. (Legis. Hist. at 825). Until EPA has established limitations, the imposition of limitations by the NRC is not only not duplicative--it is essential.

The NRC License Conditions are Not "Effluent Limitations"

The Utilities conveniently ignore the plain language of Section 511(c)(2)(B) which prohibits agencies such as the NRC from imposing under NEPA effluent limitations different from those established by EPA.*/ The term "effluent limitation" is defined in Section 502(11) as follows:

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*/Section 511(c)(2)(A) is broader. It refers to "effluent limitations and other requirements"; however, this subsection deals with limitations on NRC review of an already established EPA effluent limitation or other requirement, a situation not presented by this case.

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constitutents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

It is clear that "effluent limitations" refer to restrictions (including schedules of compliance) on discharges. See also Section 301(a) defining the prohibition on effluents in terms of discharges.

This point has been made specifically with respect to the limitations EPA is authorized to impose on cooling water intake structures, pursuant to Section 316(b). The United States Court of Appeals for the Fourth Circuit has specifically held that Section 316(b) regulations are not "effluent limitations" in a case to which Con Edison was a party (Virginia Electric and Power Company v. Costle, 566 F.2d 446, 449 (4th Cir. 1977)):

> "...It is obvious that they [§316(b) regulations] are not, for the statute defines 'effluent limitation' as 'any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constitutents which are discharged from point sources into navigable waters...' §502(11). [ftn. omitted]. The regulations involved here are concerned with structures used to withdraw water for cooling purposes, not with the discharge of pollutants into water."

Thus, the type of limitations EPA will be placing on Indian Point

2 and 3 at the conclusion of its present proceedings are not "effluent limitations."*/ Nor are the NRC license conditions. The NRC license conditions on Indian Point 2 and 3 are not effluent limitations either in form or purpose. They are limitations on the cooling water intake of the plants, not the discharges. They were put in place because of the entrainment and impingement of fish and other living organisms accompanying the withdrawal of cooling water, not because of thermal pollution.

Therefore, the strictures of Section 511(c)(2)(B) do not apply and the NRC is not required by the FWPCA to defer to EPA, either now or in the future.

The utilities' reliance on floor debates to bolster their interpretation of Section 511 is misplaced. As discussed in HRFA's opening brief, the colloquy among a few Senators is replete with factual errors and misunderstandings concerning the basis for the AEC's action at Indian Point 2. The Senators clearly thought thermal pollution and effluent limitations were involved. Second, where as here, the statutory language of Section 511(c)(2) is clear, there is no need to look to legislative history. United States v. Oregon, 366 U.S. 643, 648 (1961); Packard Motor Car Co.

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*/The present ongoing EPA hearings are proceeding under Section 316(b) to determine the appropriate limitations on cooling water intake structures at Indian Point 2 and 3. The decision reached by EPA at the end of this lengthy hearing will not be in the nature of an "effluent limitation," as pointed out above. Thus, the provision of Section 511(c)(2)(B) will not apply.

v. NLRB, 330 U.S. 485, 492 (1947).

Critical Facts Distinguish Indian Point from Seabrook

As Con Edison itself admits, the facts before the Commission in the Seabrook case*/ were significantly different from those present at Indian Point 2 and 3. The plant at Seabrook was not in operation. Indian Point 2 and 3 are presently operating with once-through cooling systems found by the NRC to be harmful to the Hudson River fishery. At Seabrook, EPA had established effluent limitations and other requirements at the time the Commission ruled--the issue before the Commission was whether to allow relitigation of an issue already decided by EPA. At Indian Point, a final determination by EPA is several years off, and may never be made if the utilities' arguments regarding EPA's authority prevail. At Seabrook, the issue of once-through versus closed-cycle cooling had not been extensively studied and litigated. At Indian Point it has been.**/ In Seabrook, the question of effects of the plant's thermal discharges and appropriate effluent limitations was a major factor in both EPA's and the NRC's consideration. At Indian Point

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*/Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), CLI-78-1, 7 NRC 1 (1978).

**/As Con Edison points out (p. 4), the NRC has prepared four Environmental Impact Statements on Indian Point 2 and 3, each of which has focused extensively on the entrainment and impingement problems at these plants. Ironically, Con Edison would have all that prior effort and expenditure of resources laid to waste and the license condition vacated in the name of avoiding needless government duplication and effort.

this was not so. Finally, as discussed above, the NRC had already decided, after briefing and argument, that it retained its authority to impose a closed-cycle cooling requirement at Indian Point 2 and 3. No such prior decision had been made in the Seabrook proceeding.

Conclusion

For all the above reasons, as well as those set forth in HRFA's initial brief, the utilities' arguments should be rejected.

Reply to Comments of NRC Staff

The Staff argues that since the closed-cycle cooling requirements in the EPA permits for Indian Point 2 and 3 have been stayed, the NRC is free under NEPA to condition the operating licenses for the two plants. However, the Staff also argues that the NRC is required by law to defer to the EPA's limitations on intake and discharge once NPDES permits are issued by EPA as final agency action.

HRFA fully agrees with the Staff that the NRC retains its NEPA responsibilities. HRFA also agrees that the present EPA proceedings make a sensible forum for resolution of the once-through versus closed-cycle cooling controversy--in lieu of the NRC's conducting a duplicative parallel proceeding involving the same witnesses, parties and issues. However, the Staff is wrong in concluding that it must ultimately defer to EPA. The law does not

require the NRC to defer to the EPA proceedings and to the limitations EPA finally establishes. Nothing in the FWPCA or its legislative history requires, or even suggests, that a final decision reached by another agency under NEPA must be vacated or altered to conform to a subsequently imposed EPA limitation. In fact, such a result would run directly counter to the purpose of Section 511, which is to avoid duplicative proceedings by federal agencies.

Furthermore, as the Staff itself argues, the NRC responsibilities under NEPA are now fully effective since EPA has not finally established any effluent limitations or other requirements. To defer to EPA would undercut the NRC's responsibilities under NEPA. The NRC cannot indefinitely postpone the imposition of what it has already determined is a needed limitation on plant operations. A lengthy proceeding was recently concluded by the NRC giving Con Edison until May 1, 1982 to terminate its use of once-through cooling at Indian Point 2 in order to provide an opportunity for the NRC to review Con Edison's new data, which it claims may alter the requirement for closed-cycle cooling. This 1982 date cannot simply be vacated or modified without violating the Commission's responsibilities.

Finally, HRFA submits that the Staff has, like the utilities, ignored the fact that the constraints of Section 511(c)(2)(B) do not apply except where effluent limitations are involved.

Since effluent limitations are not the limitations at issue, either in the NRC license or the present EPA proceeding, the subsection imposes no constraints.

Reply to Comments of EPA

EPA in its comments concludes that NEPA does not authorize the NRC to impose cooling requirements other than those established under the FWPCA. Generally, HRFA agrees with EPA's position. However, the facts of this case merit a different result. Of these facts, EPA takes no notice. Its comments indicate a complete lack of understanding of Section 511 as applied in the context of the extensive and complex Indian Point 2 and 3 litigation.

Conclusion

As HRFA argued in its initial brief, a fair resolution of the present situation is as follows. The Commission should find that:

1. The NRC retains in full its jurisdiction under NEPA with respect to Indian Point 2 and 3;

2. While the NRC is not bound to defer to EPA, the EPA proceedings provide a convenient forum and constitute a final opportunity for Con Edison or PASNY to demonstrate that closed-cycle cooling is not required at either or both plants;

3. Since the NRC may not, consistent with its NEPA responsibilities, defer indefinitely to the EPA proceeding, a firm date within the next two years should be set for the NRC to make its own decision (in the absence of a final EPA determination), based on the record before EPA, as to whether the utilities' applications to lift the present license requirements should or should not be granted.

HRFA submits that the other alternative available to the NRC at this time is to itself proceed expeditiously to carry out its own review of the applications to remove the present license requirements as was ordered by the Licensing Board in the recent extension proceeding.*/

Respectfully submitted,

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*/Consolidated Edison Company of New York (Indian Point Station, Unit No. 2), LBP-77-39, 5 NRC 1452 (1977).