

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY) Docket No. 50-247
) (Extension of Interim
OF NEW YORK, INC.) Operation Period)
)
(Indian Point Station,)
)
Unit No. 2))

HUDSON RIVER FISHERMEN'S ASSOCIATION
MEMORANDUM IN SUPPORT OF
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Sarah Chasis
(Natural Resources Defense
Council)
15 West 44th Street
New York, New York 10036
(212)869-0150
Attorney for Hudson River
Fishermen's Association, Inc.

April 14, 1977

hearing jacket

8111120257 770414
PDR ADOCK 05000247
G PDR

TABLE OF CONTENTS

	<u>Page</u>
<u>ARGUMENT</u>	1
I. The Burden that Con Edison must meet to Obtain the Requested Extension is a Showing by a Preponderance of the Credible Evidence that there is new Data not Previously Available which Compels a Different Conclusion as to the Appropriate Cessation Date for Once-Through Cooling at Indian Point 2 and that the Benefits Accruing from the Requested Extension Outweigh the Costs.....	1
II. Con Edison has not Met its Burden of Showing that it has new Evidence Compelling a Different Result on the Termination Date and that the Benefits of the Proposed Action Exceed the Costs	7
III. The Relationship of the NRC's Proceeding to the Environmental Protection Agency	12
IV. Reference to the Indian Point 3 FES is Entirely Proper	16
<u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

CASES	Page
Civil Aeronautics Board v. Delta Airlines, Inc. 367 U.S. 316 (1961)	6
Consolidated Edison Co. of New York, Inc. (Indian Point Unit No. 2), LBP-73-3 (Sept. 23, 1973) reported at RAI-73-9 751 <u>et seq.</u>	2, 3
Consolidated Edison Co. of New York, Inc. (Indian Point Unit No. 2), ALAB-188 (April 4, 1974) reported at RAI-74-4 323-409	4
Consolidated Edison Co. of New York, Inc. (Indian Point Unit Nuclear Generating Station, No. 3), Docket No. 50-286 (December 2, 1975) reported at NRCI-75/12 835 <u>et seq.</u>	4
I.C.C. v. Jersey City, 322 U.S. 503 (1944)	6
Safir v. Gibson, 432 F.2d 137 (2d Cir. 1970)	6
U.S. v. Utah Construction & Mining Co., 384 U.S. 394 (1966)	6
 STATUTES	
Atomic Energy Act, 42 U.S.C. §§ 2011 <u>et seq.</u>	1
Federal Water Pollution Control Act Amendments of 1972:	
33 U.S.C. §§ 1251 <u>et seq.</u>	13
33 U.S.C. § 1251(f)	14
33 U.S.C. § 1326	13, 14
33 U.S.C. § 1371	14, 15
National Environmental Policy Act, 42 U.S.C. §§ 4321 <u>et seq.</u>	<u>passim</u>
 REGULATIONS	
40 C.F.R. § 125.35(d) (2)	14

MISCELLANEOUS	Page
Davis, 1970 Supplement, § 18.02	6
2 Davis, Administrative Law Treatise (1958), §§ 18.02, 18.12	6
Draft Environmental Statement for Facility License Amendment for Extension of Operation with Once-Through Cooling for Indian Point Unit No. 2, NUREG-0800 (July 1976)	12
Final Environmental Statement for Facility License Amendment for Extension of Operation with Once-Through Cooling -- Indian Point Unit No. 2, NUREG-0130 (Nov. 1976).	8, 9
Final Environmental Statement Related to Operation of Indian Point Nuclear Generating Plant Unit No. 3, NUREG-75/002 (Feb. 1975)	<u>passim</u>

ARGUMENT

I.

THE BURDEN THAT CON EDISON MUST MEET TO OBTAIN THE REQUESTED EXTENSION IS A SHOWING BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT THERE IS NEW DATA NOT PREVIOUSLY AVAILABLE WHICH COMPELS A DIFFERENT CONCLUSION AS TO THE APPROPRIATE CESSATION DATE FOR ONCE-THROUGH COOLING AT INDIAN POINT 2 AND THAT THE BENEFITS ACCRUING FROM THE REQUESTED EXTENSION OUTWEIGH THE COSTS.

After extensive proceedings, the U.S. Nuclear Regulatory Commission, acting pursuant to its mandate under the National Environmental Policy Act and the Atomic Energy Act, 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 Operation License No. DPR-26, Amendment No. 6, issued on May 6, 1974.

The basis for the license amendment was the extensive record supporting the conclusion that the present once-through cooling mode of operation at Indian Point 2 poses an unacceptable environmental risk to the aquatic life of the Hudson River, in particular the striped bass fishery.

Throughout the licensing proceeding for Indian Point 2, Con Edison repeatedly argued for a 1981 date for cessation of once-through cooling the grounds that such a date would give the utility an opportunity to complete its research program. This position was thrice rejected by the NRC.

In its proposed findings of fact to the Licensing Board, Con Edison requested that 1981 be set as the date for cessation of operation with once-through cooling. The Licensing Board denied this request and set May 1, 1978 as the date. In so doing, the Licensing Board found the following with respect to the Applicant's research program.

After careful consideration of the voluminous testimony on the research program, the Board reaches essentially the same conclusion as the Staff and the Intervenors. The Board is impressed by the careful planning, the magnitude of the effort, and the high level of competence of personnel engaged in the program. Much valuable information should come from the work. Applicant has, however, made no convincing showing that the data now available provide an adequate base for meaningful comparison with future data. Although some knowledge exists of the causes of natural fluctuations in year class sizes of the fish, no evidence suggests that quantitative relationships can be evolved in a short time. In addition to the high but unexplained natural variability, uncertainties will arise from the startup of other power plants on the river. In consideration of all the evidence, the Board concludes that the natural variations in the populations and phenomena being observed are so great as to make it unlikely that the Applicant can provide in a period as short as five years a statistically valid demonstration that the adverse impact of Unit 2 operations on the river ecology is acceptably small.

* * *

The Board agrees with the Applicant that there is unlikely to be a serious permanent effect on the fishery by a delay of a year or two in starting construction of a closed-cycle cooling system. However, the Board also agrees

with the Staff, HRFA, and the State of New York that operation of Unit No. 2 with a closed-cycle cooling system can have a seriously adverse effect on the fishery, and that Applicant's research program is unlikely to resolve the important questions in that extra year or two. The Board finds, therefore, that the research program does not presently provide sufficient reason to delay construction of a closed-cycle cooling system for Unit 2.

* * *

The Applicant has not, however, provided reliable, probative and substantial evidence to constitute a convincing case that its research program will resolve the question of the impact of entrainment at Unit Nos. 1 and 2 on the fisheries. Therefore, the Board concludes that the Applicant should proceed expeditiously with construction of a closed-cycle cooling system and that operation with the present system should be terminated by May 1, 1978.¹

On its appeal from the Licensing Board's decision, the Company again requested that it be permitted to complete its research program before commencing construction of the closed-cycle system and that a 1981 date be set for termination. The Appeal Board modified some of the critical findings of the Licensing Board, but found that even under facts more favorable to Con Edison, once-through cooling must cease by May 1, 1979, a date which does not allow for completion of

¹ Consolidated Edison Co. of New York, Inc. (Indian Point Unit No. 2), LBP-73-33 (September 25, 1973) reprinted at RAI-73-9751, 778-81, 783.

the research program prior to initiation of construction of a closed-cycle cooling system.² Con Edison again sought to have this date modified in its petition for rehearing of the Appeal Board's decision. This was denied. Thus, the relief sought by Con Edison in its present application has been fully litigated before.

The license condition under which the extension application has been brought in no way entitles Con Edison to an extension of the termination date by the mere submission of new data to the Commission. All that condition 2(E)(1)(c) states is that:

If the Applicant believes that the empirical data collected during this interim operation justifies an extension of the interim operation period or such other relief as may be appropriate, it may make timely application to the Atomic Energy Commission.

HRFA contends that because of the historical context in which this proceeding is brought, in particular because of the fact that in the licensing proceeding the issue of the appropriate termination date was fully litigated, the burden Con Edison must meet in order to obtain the requested

² Consolidated Edison Co. of New York, Inc. (Indian Point Unit No. 2), ALAB-188 (April 4, 1974) reported at RAI-74-4 323-409. The full Commission subsequently found that the criticisms raised by the Appeal Board had been "thoroughly" answered by the FES for Indian Point 3, Consolidated Edison Co. of New York, Inc. (Indian Point Unit Nuclear Generating Station, No. 3) Docket No. 50-286 (Dec. 2, 1975) reported at NRCI-75/12 835,838

relief is more than simply that the benefits of the proposed action exceed its costs. Rather, Con Edison must also demonstrate that there is new evidence which was not available before which compels a different conclusion as to the appropriate cessation date. This means that Con Edison must establish by a preponderance of the credible evidence that, inter alia:

- Pre-operational data provide an adequate base for meaningful comparison to data collected during the interim operation;
- That the natural variations in the populations and phenomena observed do not preclude Con Edison from providing a statistically valid demonstration that the adverse impact of IP 2 operations on the Hudson River ecology is acceptably small.

It is not sufficient for Con Edison to show only that through its program it has collected new and improved data which may possibly lead to a reversal of the earlier decision on once-through cooling. The same argument was made in the licensing proceeding and thrice rejected. A possibility always exists that something new may arise which might show a previous decision erroneous, but this sort of possibility is not what compels agencies or courts to reopen the record of a proceeding to alter a previously imposed requirement.

It is an established principle that when an administrative agency acts in a quasi-judicial capacity

and resolves disputed issues of fact properly before it which all parties had an opportunity to litigate, the doctrine of res judicata will be applied to enforce repose unless new evidence is presented to compel a contrary result.¹ Otherwise litigation would never be ended and there would be constant re-examination and endless vacillation regarding the correctness or fitness of a decision simply because it is a thing of the past.²

The United States Supreme Court in I.C.C. v. Jersey City, 322 U.S. 503 (1944), a case involving the ICC's refusal to reconsider issues raised at an earlier hearing, characterized the claims of the plaintiff as attempts to delay enforcement of an administrative order by requesting that the record be "brought up to date." The court upheld the ICC decision not to reconsider and stated.

If...litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. See also Campus Travel, Inc. v. United States, 224 F. Supp. 146 (1973) (three judge court)

¹ See e.g. United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966); Safir v. Gibson, 432 F.2d 137, 143(2d Cir. 1970)
² Davis, Administrative Law Treatise, §§18.02 18.12(1958)
Davis, 1970 Supplement, §18.02, p. 609.

² Civil Aeronautics Board v. Delta Airlines, Inc. 367 U.S. 316, 321 n.5 (1961)

We do not say that the record may never be reopened on issues in this case, but Con Edison has a burden to overcome in doing so. This burden is greater than the burden it would carry had the issues not been previously litigated and it has failed to meet the burden.

II

CON EDISON HAS NOT MET ITS BURDEN OF SHOWING THAT IT HAS NEW EVIDENCE COMPELLING A DIFFERENT RESULT ON THE TERMINATION DATE AND THAT THE BENEFITS OF THE PROPOSED ACTION EXCEED THE COSTS

Con Edison was unable to prove by a preponderance of the evidence that an extension of the termination date is justified. The evidence showed that the limitations on the research program, as found in the licensing proceeding, still exist.

There was credible evidence presented that the value of the 1974-5 post-operational data, was seriously limited by the variability between this data and the "pre-operational" data. As the Staff's witness testified, a major problem exists which seriously flaws the value of comparative analysis of these sets of data. This unavoidable flaw is due to the fact that data have been collected since the mid-1960's by different researchers, utilizing different techniques and equipment, for different and more limited purposes.¹

¹ Tr. 993-4; IP3 FES V-209.

Furthermore, there is substantial evidence that the two years of post-operational data Con Edison considered so critical can not show the effect of plant operation on the Hudson River fishery because of the natural variations in populations and phenomena which exist.¹ Indeed Staff's expert witness testified that in his judgment even if a 50 percent reduction in the striped bass young-of-the year population occurred it could not be separated out and determined on the basis of the two years of post-operational data.²

These points are critical since it was comparable evidence on these points which originally convinced this Board to deny Con Edison's proposed termination date of 1981.

With respect to the post-operational data itself presented by Con Edison and provided to the Staff in time for an independent analysis to be undertaken, the following statements in the FES are noteworthy:

"The Staff has found no new information in the applicant's Environmental Report for a two-year extension that requires changes in the Staff's young-of-the-year striped bass model as applied to the 1973 data."³

1 Tr. 992; IP3 FES V-205.

2 Tr. 1079; 1021

3 FES at 3-2.

...the applicant's analyses [of compensation] do not remove the Staff's concern for the long-term consequences of protracted and uncontrolled density-independent mortality, such as the cropping imposed by power plants, since the range of cropping rates which could be offset by compensatory responses, and the degree of offset, are not known."¹

"The Staff emphasizes, however, that the 1974 data [on distribution and abundance of young-of-the-year life stages of striped bass and other fish species] do not provide and the 1975 data will not provide the basis for a quantum jump in ability to forecast the impact of plant operation on the Hudson River ecosystem or fish populations.² (emphasis supplied)

Con Edison states that completion of its research program will provide relevant results and will add to a more complete and sound scientific basis for a reasoned decision. This may always be said of additional research. However, the Applicant's research effort is unlikely to conclusively demonstrate that operation of Indian Point² with once-through cooling will not have an unacceptable adverse impact on the Hudson River fisheries. For example, with respect to Indian Point 3, the NRC Staff has made the following comment:

¹ FES at 3-6. Nor will the further studies of Con Edison provide answers to these critical questions. As the evidence shows, Con Edison has not and will not be able to quantify the degree of natural compensation by the end of its study program.

² FES at 3-7.

"the difficulties in obtaining adequate data on major issues in controversy cast serious doubt on the applicant's claim that a final conclusion with respect to the date for closed-cycle cooling at Indian Point Unit No. 3 should await collection of further 'empirical' data." ¹

Two years have passed since the issuance of the IP3 FES and the data and analyses presented by Con Edison in the interim which the Staff has had the time to independently review, have produced nothing to alter the ultimate conclusion. ² We believe, in view of the limits on what the research program has produced and can produce, that Con Edison has not met its burden of establishing that a different result on the issue of the appropriate termination date for once-through cooling is compelled by the new evidence.

Nor has Con Edison succeeded in carrying its other burden, of demonstrating that the benefits of the proposed action exceed the costs. First and foremost, the principle benefit sought by Con Edison -- the opportunity for review and decision by the Staff and Boards of the study results before commencement of construction of the cooling tower -- will not accrue. Such a process can not realistically be completed by May 1, 1978. ³

¹ IP3 FES at V-209.

² Tr. 1007-8; 734; 759; 884-7.

³ Con Edison itself recognizes this and in its Proposed Findings of Fact, recommends an extension pro tanto, i.e. for as long as is necessary for Commission review of the research results. This would be totally unacceptable.

Since the principal benefit sought by Con Edison is not achieved by the proposed action, HRFA believes it is unnecessary to inquire further. We do not believe it would be appropriate to grant an extension on the grounds that one year's worth of expenses would be saved. If this had been the sole reason for Con Edison's request for an extension, the request would have had to have been denied outright. The cost issue has been fully litigated and is res judicata. There is no new "empirical" evidence to justify a reopening on this issue. Since it is the only remaining justification for the requested action, the extension should be denied.

Even weighing the money saved against the cost to the fishery, however, the Staff analysis shows that the benefits do not exceed the costs in terms of the increased risk of irreversible harm to the fishery. We believe that the Staff analysis more fully reflects the costs to the fishery than does Con Edison's cost analysis which values only the loss to the sport fishery, ignoring all other values, and assumes the annual reduction in population from plant operation to be less than 1 percent. Although HRFA takes issue with the Staff analysis because it fails to take account of the cumulative impact of this extension following

on 5 years of operation with once-through cooling, it is still the right order of magnitude. Its basic assumption -- that the value of the fishery protected must be equal to or greater than the cost of the cooling tower for the requirement to have been imposed originally -- is reasonable. In response to Con Edison's arguments, it should be noted that the requirement is final, absent a license amendment of the contrary.

III

THE RELATIONSHIP OF THE NRC'S PROCEEDING TO THE ENVIRONMENTAL PROTECTION AGENCY

The NRC Staff was correct in changing its recommendation from a two year extension to a one year extension only. The original justification for the second year, mainly to give EPA time to make its decision on the closed-cycle cooling requirement for Indian Point 2, was fallacious.

As EPA stated in its comments on the original recommendation made by the NRC Staff:

"Extending the termination date for the purpose of awaiting EPA's decision on Con Edison's request is not only unwarranted but also contradictory to the NPDES permit requirements and in conflict with EPA's decision-making authority."

HRFA supports the NRC Staff's rejection of the original justification for the following reasons. (1) The NRC has its own mandate under the National Environmental Policy

Act, completely separate and distinct from EPA's under the Federal Water Pollution Control Act Amendments of 1972, which the NRC must meet and which it may not avoid by deferral to another agency for decision; (2) by granting the two-year deferral the NRC would undercut rather than defer to EPA's authority since the NPDES permit for Indian Point No.2 requires cessation of once-through cooling by May 1, 1979.

After the NRC had extensively considered and made its decision on the need for closed-cycle cooling at Indian Point 2, and imposed a license requirement to that effect, 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 environmental impact", and upon the "Steam Electric Power Generating Point Source Category Effluent Guidelines and Standards" (Federal Register, October 8, 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 request for an adjudicatory hearing has resulted in a stay of the permit conditions.¹ These hearings are scheduled to commence in July of this year.

The question for discussion is what effect does an action by EPA have on a pre-existing and final decision of the NRC reached under the full authority of NEPA. HRFA believes that subsequent action by EPA does not affect the NRC's prior 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 looked at in view 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:

¹ 40 C.F.R. 125.35(d)(2) provides: "if a request for an adjudicatory hearing is granted pursuant to §121.36(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."

(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. FWPCA §511(c)(2), 33 U.S.C. §1371 (c)(2).

The NRC, however, has already established a closed-cycle cooling requirement for Indian Point 2, prior to action by EPA. Section 511(c) of the Water Act does not require NRC to suspend or alter this requirement in order to permit a subsequent determination by EPA. This would run counter to the intent of Congress. The NRC Staff, therefore, correctly withdrew its recommendation in the DES that the second year of the extension should be granted to permit a determination by EPA.

Finally, to the extent EPA has entered the field, its action supports the denial rather than the granting of the requested extension. The NPDES permit condition after all requires Con Edison to cease once-through cooling at Indian Point by May 1, 1979.

IV.

REFERENCE TO THE INDIAN POINT 3 FES
IS ENTIRELY PROPER

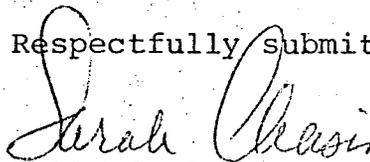
The Indian Point 3 FES was specifically found by the full Commission to be adequate for NEPA purposes and to constitute the "fresh look" required by the ALAB-188 decision. In view of this ruling which Con Edison chose not to appeal, the findings of the ALAB-188 in the Indian Point 2 licensing proceeding are properly judged in terms of the subsequent re-analysis undertaken by the Staff and approved by the Commission.

It is entirely proper for reliance to be placed on this document, particularly in view of the fact that it provides an important backdrop to the position of the Staff in this proceeding. It also contains an analysis of data presented by Con Edison in support of its application. If Con Edison's reports were properly admitted then it was absolutely right for the Licensing Board to take judicial notice of the FES.

CONCLUSION

For the foregoing reasons, the Atomic Safety and Licensing Board should rule that Con Edison has not met its burden of proving that the proposed extension of the interim operation period to May 1, 1981 should be granted or that the benefits of the proposed extension exceed the costs. As a result the application should be denied.

Respectfully submitted,



SARAH CHASIS
(Natural Resources Defense
Council, Inc.)
15 West 44th Street
New York, New York 10036
Attorney for Hudson River
Fishermen's Association, Inc.

Dated: April 14, 1977