MEMORANDUM OF LAW IN SUPPORT OF
THE POSITION OF HRFA AND EDF

HRFA and EDF have contended that the operation of Indian Point 2 with the present cooling system will have a significant and unacceptable impact on the biota of the Hudson. This effect will be caused by the impingement of fish at the intake screens to the plant and by the entrainment of biotic organisms with the cooling water.

HRFA and EDF contend that impingement and entrainment will also take place at Bowline Point and Roseton and that those plants will also have a significant impact on the biota of the Hudson. The location of the plants within the Hudson spawning and nursery grounds and the size of the plants,with their attendant requirements for the use of vast quantities of Hudson water which will be withdrawn from the Estuary and significantly heated,both support this contention. These contentions are parallel to the contentions made on the operation of Indian Point 2.

Con Edison has requested a license to operate the Indian Point 2 plant for a period of forty years and an interim license for an indeterminate period. It is, of course, clearly foreseeable that some or all of the Bowline Point and Roseton plants will operate during any period for which Indian Point 2 is licensed. Thus Indian Point 2 will operate in an environment on which Bowline Point and Roseton will have a significant effect. Bowline Point and Roseton are not scheduled to undergo a N.E.P.A. review. Thus they cannot be viewed as producing future increments of environmental impact which will be reviewed before

they are allowed to begin operation. In these circumstances the impact of Indian Point 2 must be weighed in light of the knowledge that within a few years the total impact of the Bowline Point, Roseton and Indian Point 2 cooling systems will be thrust on the Hudson and its biotic life. This Licensing Board must reach a decision as to whether the present cooling system planned for Indian Point 2 is acceptable not only in May or June of 1972, but also in late summer 1972 when Bowline Unit 1 is operating and two years from now when all the units at Bowline Point and Roseton are withdrawing their vast quantities of water from the Hudson and discharging their heated load to the River with the attendant effects of impingement and entrainment.

Not to consider the clearly foreseeable effects of Bowline Point and Roseton is tantamount to not considering winter operations on the ground that the license was applied for in the spring. The only rational procedure in analyzing the impact of this facitliy is to take into account the foreseeable future events which are not themselves subject to a similar review under NEPA.

The law follows this rational line and instructs Federal agencies to take a wide and comprehensive view of their duties under the National Environmental Policy Act, 42 U.S.C. §4321, et seq. In Section 102 of NEPA, federal agencies are directed that "to the fullest extent possible" the policies of NEPA are to be carried out in all of the agency's activities, including, but not limited to, the preparation of environmental impact

statements.

The term "to the fullest extent possible" has been the subject of both Congressional and judicial interpretation. The Senate and House conference, which wrote the phrase into NEPA stated:

> The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [Section 102(2)] unless the existing law applicable to such agency's operations does not make compliance possible.... Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means to avoiding compliance with the directives set out in Section 102. Rather, the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall seek to construe its existing statutory authorizations in a manner designed to avoid compliance. 115 Cong. Rec. 40417-40418.

In Ely v. Velde, __F.2d__, 3 ERC 1280, 1285 (4th Cir. 1971), the Court of Appeals for the Fourth Circuit held that the phrase is "an injunction to all federal agencies to exert utmost efforts to apply NEPA to their operations. In short, the phrase 'to the fullest extent possible' reinforces rather than dilutes the strength of the prescribed obligations."

In Calvert Cliffs' Coordinating Committee v. AEC, __F.2d__, 2 ERC 1779 (D.C. Cir 1971), the Court of Appeals for the District of Columbia carefully considered the phrase, "to the fullest extent possible" and concluded that Section 102 must be complied with (2 ERC at 1782): "unless there is a clear conflict of statutory authority" and further explicitly instructed the Atomic Energy Commission that "the requirement of environmental consideration 'to the fullest extent possible' sets a high

standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." (Ibid.) In the revised Appendix D to 10 CFR Part 50 the Commission has set out to apply the instructions of the Court in Calvert Cliffs.

There can be little question that if the environmental effects of the operation of Indian Point 2 are considered "to the fullest extent possible" that consideration will include analysis of the impact which may be foreseen and calculated over the next few years when Indian Point 2 will be operating on the same stretch of river with Bowline Point and Roseton which are not scheduled to undergo NEPA review.

The Staff obviously recognizes this point when it includes in the draft statement on Indian Point 2 an analysis of the plants' physical relation to the Indian Point site (DES, II-7), their contribution to the heat load on the Hudson (DES, III-7 et seq.) and their importance to the future power supply in the area (e.g. DES, XI-5). The only logical step to take is to consider the impact of Bowline Point and Roseton on the fish and aquatic life of the Hudson as well.

In addition, putting off consideration of Bowline Point and Roseton to any later date will only fragment consideration of a single problem into a multitude of small pieces. Such fragmentation does not make sense in scientific terms or in terms of administrative efficiency.

Common sense, the language of NEPA, the legislative history of the Act and the judicial decisions under the Act all require that the NEPA review on the application for an operating license

for Indian Point 2 take into consideration the environmental impact of foreseeable actions which are not themselves subject to NEPA review. Nothing less can implement the Act's requirement that its policies and procedures be followed "to the fullest extent possible."

CONCLUSION

Intervenors, HRFA and EDF request that the Board rule that the impact of the operation of the Bowline Point plant and the Roseton plant must be analyzed and considered in the NEPA review of Indian Point 2 and that evidence relevant to those plants will be admitted by this Board during the review of the Indian Point 2 application.

Respectfully submitted,

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