Natural Resources Defense Council, Inc.

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November 4, 1976

Director of Nuclear Reactor Regulation
Attn: Director, Division of Site Safety and
Environmental Analysis
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Indian Point Unit No. 2
Docket No. 50-247
Proceeding for Extension
of Operation with Once-
Through Cooling

Dear Sir:

The Hudson River Fishermen's Association respectfully submits its additional comments on the Draft Environmental Statement for Extension of Operation with Once-Through Cooling for Indian Point Unit No. 2. These comments are addressed to the question of the authority of the NRC and EPA with respect to the requirement of closed-cycle cooling at Indian Point No. 2.

This key issue has been raised in connection with the two-year extension proceeding in the following way. In the Draft Environmental Statement (DES), the NRC staff found that the sole justification for a two-year extension of interim operation, as opposed to a one-year extension, is to provide time for EPA to make a final decision on closed-cycle cooling at Indian Point 2. In HRFA's comments on the DES dated August 27, 1976, we stated our opposition to this conclusion and the staff's rationale on three grounds: (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 closed-cycle cooling by May 1, 1979; (3) under the DES rationale, extension of interim operation could be open-ended since it may be several years before EPA completes its proceedings.

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EPA's comments on the recommendation of the NRC staff has important bearing on the issue. EPA has stated that:

> "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."
>
> EPA comments on DES dated September 2, 1976

EPA opposes the granting of Con Edison's application for the proposed license amendment.*

In view of the importance of the question and in view of the comments by EPA and others, HRFA wishes to expand its earlier comments regarding the relationship of NRC and EPA responsibilities in this case. In this connection, we point out that the Second Memorandum of Understanding and Policy Statement Regarding Implementation of Certain NRC and EPA Responsibilities fails to resolve the question.**

The following discussion directly addresses the question of the effect that Section 511 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) has on the NRC's present requirement of closed-cycle cooling at Indian Point 2 by 1979.

Facts

The Nuclear Regulatory Commission, acting pursuant to its mandate under the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., and the Atomic Energy Act, 42 U.S.C. §§2011 et seq., and after extensive proceedings involving thousands of pages of expert testimony ordered that the existing Indian Point Unit No. 2 generating station could not

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*Other federal and state agencies having jurisdiction over fish and wildlife matters have also taken the position in their comments that the DES is inadequate to justify a two-year extension of interim operation.

**The Natural Resources Defense Council in its comments on the Second Memorandum dated January 20, 1976 asked for clarification on the issue, but this clarification has not been forthcoming.

operate after May 1, 1979 with a once-through cooling system. NRC Facility Operating License No. DPR-26, Amendment No. 6, issued on May 6, 1974. This requirement was imposed because of the finding that severe long-term reductions in the Hudson River fishery would result from entrainment and impingement of fish in the once-through cooling system of Indian Point 2.

The NRC's requirement of closed-cycle cooling is final. Unless some form of closed-cycle cooling is installed by May 1, 1979, Con Edison will have to halt operation at Indian Point Unit No. 2 altogether. As with any other final requirement of a license, the requirement can be changed only by a license amendment. The contemplated or actual filing of an application for such an amendment in no way makes the requirement less final or binding. Paragraph 2.E(1)(c) of the license. The controversy between once-through and closed-cycle is ended, so far as the NRC is concerned, unless a wholly new proceeding is commenced and reaches a contrary conclusion based upon new data. In re Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit 3), Docket 50-286, Memorandum and Order, CLI-75-14 (December 2, 1975).

After the NRC had extensively considered and made its decision on the need for closed-cycle cooling at Indian Point 2, the United States Environmental Protection Agency (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.* No date has as yet been specified for

*40 CFR 125.35(d)(2) provides: "If a request for an adjudicatory hearing is granted pursuant to §125.36(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."

commencement of the hearing. Not until EPA acts on the adjudicatory hearing requests, will EPA have made a final decision regarding closed-cycle cooling at Indian Point 2.

Discussion

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, upon which the NRC appears to rely in recommending deferral to EPA of the final decision on closed-cycle cooling at Indian Point 2, 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:

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

The same section also provides: "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States not inconsistent with this chapter..." §511(a)(1), 33 U.S.C. §1371(a)(1).

To attempt to utilize Section 511 to justify deferring to EPA the "final decision" on closed-cycle cooling at Indian Point 2 would be to frustrate the very purpose of the Act. The NRC has already been through years of hearings on this very question, has developed an exhaustive record and has reached a final decision prior to EPA's ever entering the field. Needless duplication and delay would result if all of that were put aside in order to allow EPA to make its final determination.

The clear intent of Section 511(c)(2) is to deal with prospective licensing decisions of federal agencies, called upon to act after EPA has made determinations related to the plant sought to be licensed. These agencies are precluded from independently reviewing effluent limitations or other requirements "established" by EPA and from imposing effluent limitations other than those established by EPA. The intent here is to vest in EPA, the agency with special expertise in environmental protection, final authority over water quality related issues and to prevent other agencies from second-guessing EPA on such issues, thus avoiding wasteful duplication of effort.* Where an agency has already acted, however, the intent of Section 511(c)(2) is best served by allowing that agency's decision to stand.

The legislative history of the FWPCA makes clear that the pre-emption intended by 511(c)(2) is of agency imposition in future licensing proceedings of water quality conditions different from those already prescribed by EPA. See e.g., Senate consideration of the Report of the Conference Committee in Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972, (1973) at 196-199. For example, this floor debate points to the fact that the NRC's decision to require closed-cycle cooling at Indian Point 2, a specific topic of discussion, was not seen as affected by passage of the FWPCA. Id.

Because the NRC has already imposed a closed-cycle cooling requirement at Indian Point 2, it is not reviewing effluent limitations or other requirements established by

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* Federal agencies' obligation under NEPA to conduct an overall balancing of environmental costs and benefits, however, would remain unaffected.

EPA nor is it imposing effluent limitations other than those required by EPA. Thus, even were EPA to decide at some subsequent date that closed-cycle cooling was not required at Indian Point, the NRC's license requirement would be unaffected and would stand as is.

For these reasons, HRFA believes that it would be clearly erroneous to alter the NRC's existing license requirement for reasons of allowing EPA to make the final decision on closed-cycle cooling at Indian Point. Such action would directly conflict with the intent of Congress.

Two additional points remain. EPA's authority to require closed-cycle cooling to minimize adverse harm from entrainment and impingement of fish under 316(b) of the FWPCA is under direct attack by the electric utilities, including Con Edison, in the United States Court of Appeals for the Fourth Circuit. Appalachian Power Co. et al. v. Train. Thus it is not at all certain that EPA will be deciding the issue of closed-cycle cooling at Indian Point 2.

Second, to the extent that EPA has entered this field, it has established a permit condition requiring Con Edison to cease once-through cooling at Indian Point 2 by May 1, 1979. Although this requirement is not yet final, it may be "established" for purposes of staking out EPA's jurisdiction. If this is so then Section 511(c)(2)(A) prevents the NRC from reviewing that requirement.

Conclusion

The rationale presented in the Draft Statement for granting the second year of the two-year extension requested by Con Edison must be rejected. NRC's decision on closed-cycle cooling at Indian Point 2 was reached after full review under NEPA and prior to any action by EPA. The NRC decision stands and is not legally affected by subsequent EPA action. This would be true even if EPA should decide that closed-cycle cooling is not required. Deferral to EPA is also a mistake since that agency's authority to require closed-cycle cooling under 316(b) is in question. Finally, the granting of the two-year extension would conflict with the EPA requirement, established after the NRC's issuance of the license, requiring cessation of once-through cooling at Indian Point 2 by May 1, 1979.

Very truly yours,

Sarah Chasis

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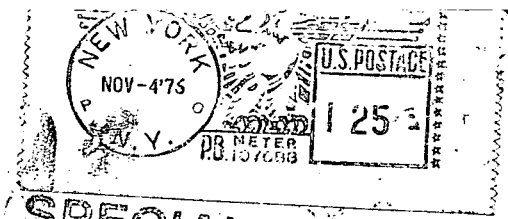

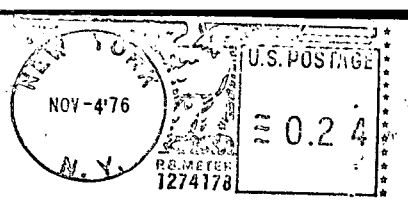

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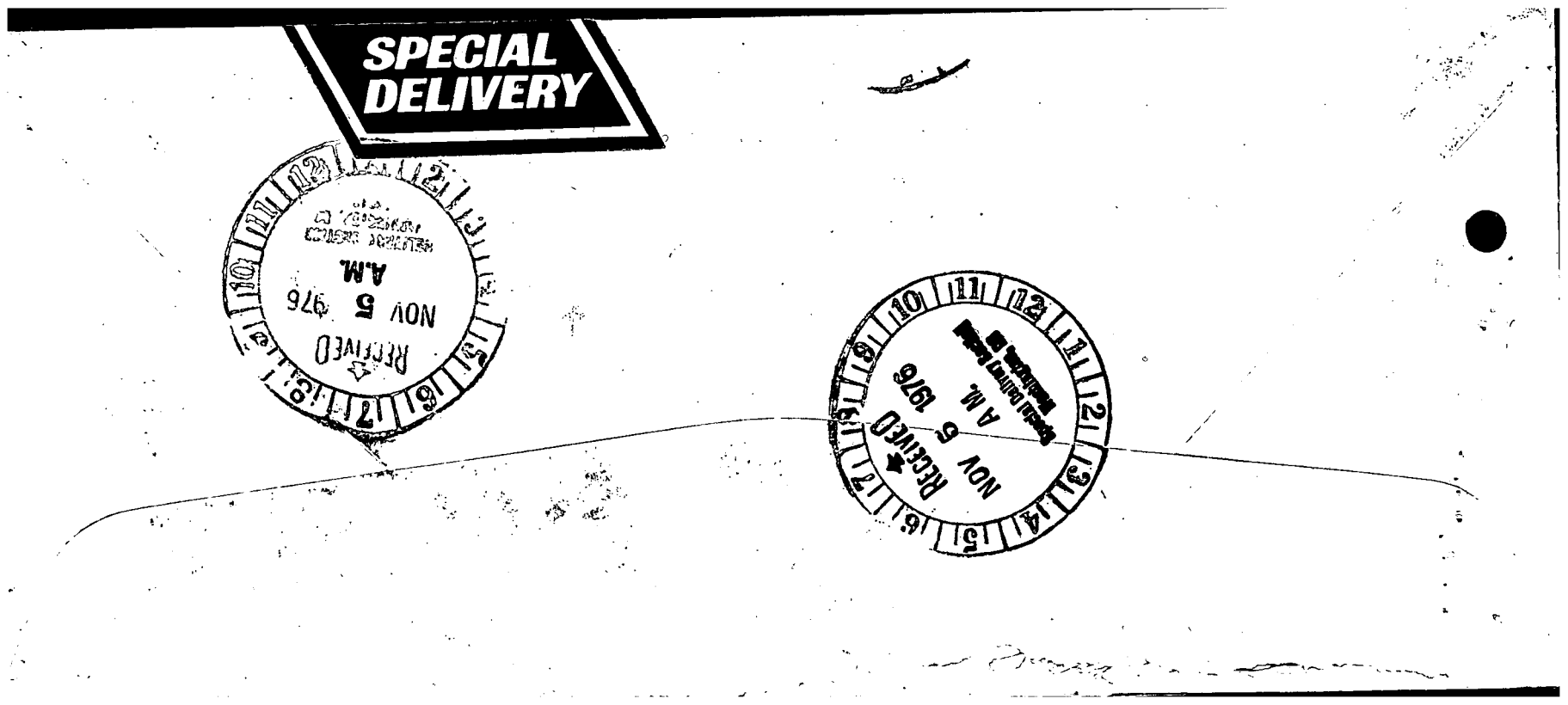
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