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November 1, 1976

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

Re: Indian Point 2 - Docket No. 50-247
DES on Applicant's request for
extension of operation with
once-through cooling

Dear Sir:

After considering the various comments submitted by various parties and agencies concerning the DES on Con Edison's request for a license amendment permitting interim operation of its Indian Point 2 plant with once-through cooling for two more years, and having narrowed the focus of the issues at the pre-hearing conference held on October 27, 1976 concerning the application, the Attorney General of the State of New York has the following additional comments:

I. Compensation

The DES characterizes the applicant's submission on compensation as "the most significant new information to come out of the applicant's research program since issuance of the Indian Point Unit No. 3 FES (3.2.2.3). It should be noted initially that none of the "new" information is "empirical data collected during" interim operation, and thus an extension under Paragraph 2.E(1)(e) of the license cannot be granted based on this "information". Further, this "new" data was available to Con Edison during the original hearings on the operating license, save for one or two insignificant data points.

But putting aside the legal insufficiency of this "most significant" information, the Attorney General must take strong exception to the staff's relatively uncritical acceptance of the applicant's submission on compensation. Although "uncertainties and problems associated with each analysis" were noted, we believe that this submission was so flawed and deceptive as to be without any evidentiary value.

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A few simple examples: (1) the CPUE used in the Ricker-type analysis was derived from data on the yards of licensed gill nets and the number of legal fishing hours for the years in question. Rudimentary checking of commercial fishing habits indicates this approach to be completely unjustified; (2) the left hand side of their Ricker curve appears to be caused entirely by a switch to nylon nets; (3) Fig. VIII-4 in the Multiplant report, comparing growth with abundance, uses absolute growth rather than relative growth. Environmental factors, such as temperature, food and freshwater flow differences prior to June, may have resulted in larger or smaller juveniles in the sampled years, rendering absolute growth rates misleading; (4) Fig VIII-4 CPUA was based on beach seining by three different groups (TI,NYU, Raytheon), using three different net lengths (50,75,100 ft.) and two different seining methods (see V-16 through V-22). Con Edison's claims that gear efficiency and size selectivity were similar under these circumstances is totally unsupported. The relative CPUA differences between 1965-1968 and 1969-1973 (noted by the applicant itself on p.V-26) could be explained entirely by gear efficiency differences.

When one combines these and other deficiencies, the value of Con Edisons work seems negligible. While we realize that the Staff did not attempt an in-depth examination of these issues, in the absence of such critical analysis the FES should refrain from any comment at all as to the significance of the applicant's "new" information on compensation.

II. The Relationship of EPA'S §316 hearing and the NRC'S NEPA responsibilities.

The DES concludes that while the second year of the requested two year extension would not be justified on the basis of any benefits to be derived from data collection or analysis, the second year extension can be justified on the ground that it would provide EPA with time to complete its §316 hearings and reach a final decision on the matter (DES, §§4.1.1, 4.1.5, 6.4.1). Inherent in this justification is the premise that a determination by EPA in favor of the applicant would preclude the NRC from enforcing its license requirement that closed cycle cooling be installed at Indian Point Units 2 and 3.

This conclusion, which does not appear to be supported by any official NRC position as to the limits of its NEPA responsibilities, presumably relies upon the language of § 511(c)(2) of the Federal Water Pollution Control Act Amendments of 1972:

"(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat.852) 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 Act or the adequacy of any certification under section 401 of this Act; 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 Act."

That section, however, does not state that EPA action concerning a disharge preempts the NEPA authority of other federal agencies. Rather, it in effect states that once EPA has acted, other federal agencies may not review those actions or impose different effluent limitations. Inasmuch as the NRC already has imposed a requirement for closed cycle cooling at Indian Point, no review of EPA'S action or imposition of additional effluent limitations will be required by the NRC. Hence, even if EPA were to rule in the applicant's favor, the present NRC license conditions requiring closed cycle cooling would stand. The extra year's delay, therefore, cannot be justified on the ground that a closed cycle system may not be required at Indian Point based solely on an EPA decision in the future.

In effect, the Staff's interpretation of the NRC'S NEPA responsibilities as limited by §511(c)(2) amount to an opinion that EPA alone will decide whether closed cycle cooling will be required at Indian Point. If that is the case, to what end are the Staff, the Commission, and the parties to Docket 50-247 spinning their wheels? Certainly, in the absence of an official NRC determination that presently existing license conditions relating to matters also under EPA'S jurisdiction must be modified in the future to be consistent with EPA'S determinations, the Staff must operate on the premise that EPA'S actions will have no effect on present NRC license conditions.

We therefore believe that the second year of the requested two year extension, which is justified solely by the Staff's legal conclusions, must be deleted from the DES recommendations.

III. Applicant's Description of its Research Program

The Attorney General believes that the DES reflects a Staff decision to give undue weight to quantity over quality, to comprehensiveness over detail. The applicant's approach has been to study everything in sight (subsidized by the ratepayers), hoping that it will eventually be able to establish its case.

The DES assessment of the applicant's study program does not highlight the inherent limits in Con Edison's ability to determine what is going on in the river.

The DES cites two examples of how the research program has already improved "the scientific basis for assessing the impact of the Indian Point plants "(p.3-8), but the through-plant mortality study of striped bass ichthyoplankton has since been discredited, according to Con Edison's own experts, by subsequently discovered problems in the sampling technique, and the f_I factors to be produced by Con Edison's studies were, according to the IP 3 FES, not received by the staff in time to be included in the FES (FES, p.V-90).

We have identified four general issues which remained in dispute at the conclusion of the Indian Point 2 hearings and which could change the determination reached in the earlier hearings: (1) f_I factors; (2) stocking; (3) contribution to the Mid-Atlantic fishery, and (4) compensation. Had Con Edison confined its studies substantially to these pertinent issues, we believe it could have completed them in sufficient time to seek a license amendment eliminating the requirement for closed-cycle cooling without the requested extension. Instead, Con Edison has undertaken a massive study program examining all sorts of peripheral issues, as a result of which it may not be able to put its case before the NRC without an extension of time. The critical question unexamined by the DES is whether Con Edison will be able to present any new empirical data on these four crucial issues as a result of its extensive efforts. While the DES examines this issue in scattershot fashion, the Attorney General believes that the DES has failed to zero in on these significant issues in the context of the research program. We further believe that such an analysis would show that the applicant's studies do not add much to the relevant information available at the earlier hearings, and when they do (as in stocking), they tend to support the staff's position in favor of closed-cycle cooling at the Indian Point 2 hearings.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
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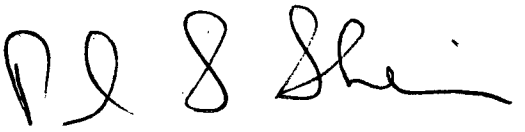

PSS:fc

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