

11-10-75

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of	:	
CONSOLIDATED EDISON COMPANY	:	Docket No. 50-286
OF NEW YORK, INC.	:	
(Indian Point Nuclear	:	
Generating Station, Unit	:	
No. 3)	:	

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BRIEF OF THE HUDSON RIVER FISHERMEN'S  
ASSOCIATION AND SAVE OUR STRIPERS IN  
SUPPORT OF VACATING ALAB RULING

The Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS") submit this brief pursuant to the Order of the Nuclear Regulatory Commission ("Commission") dated October 23, 1975 requesting submission of written briefs in connection with tis review of the decision of the Atomic Safety and Licensing Appeal Board in the above-captioned matter, ALAB-287. This memorandum addresses the five issues proposed for consideration by the Commission and certain other issues critical to resolution of the matters being heard.

PRELIMINARY STATEMENT

At the outset, it must be noted that the decision of the Atomic Safety and Licensing Appeal Board (hereinafter

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"ALAB" or "Appeal Board") conflicts with the Commission's stated policy favoring settlement of contested issues, 10 C.F.R. §2.759. Furthermore, the ALAB decision violates due process of law and the Atomic Energy Act, as amended, in that the Appeal Board approved in form but not in substance the stipulation of the parties which the Atomic Safety and Licensing Board ("Licensing Board") had approved. In materially construing the stipulation in a way to alter its provisions, the ALAB deprived the parties of their right to a hearing and further, modified a previous decision on the Indian Point Unit No. 2, ALAB 188, without notice and opportunity for hearing.

The ALAB materially modified the Stipulation in a manner which is also directly contrary to the intent of the parties, and contrary to both the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq. ("NEPA"), and the Commission's Rules. The Appeal Board affirmed the Licensing Board's authorization of the issuance of a facility operating license after finding the environmental review under NEPA inadequate. In doing so ALAB misconstrued NEPA.

For these reasons, HRFA and SOS filed a Petition For Review of ALAB-287 in the U.S. Court of Appeals for the Second Circuit on October 2, 1975, Docket No. 72-4512. The relief requested in that petition is the setting aside of the ALAB Order, the setting aside or staying of any operating

license to be issued, and the remanding of the case to the Commission with instructions to either approve the Stipulation without modification, as approved by the Atomic Safety and Licensing Board in its June 12, 1975 order or, alternatively, reject the Stipulation and reinstate the right of HRFA and SOS to a hearing.

With this as a preface, we turn to the issues now before the Commission. It is important initially to review the origin of the Stipulation, the intent of the parties in entering into the Stipulation and the consistency of the Stipulation with the public interest.

I. The Stipulation Is A Fair Interim Resolution of Adversarial Positions

Indian Point Unit No. 3 is a sister plant to Indian Point Unit No. 2. It is located on the same site and has the same general characteristics of power capacity, water withdrawal and heat discharge to the Hudson River. Operation of the plant raises essentially the same non-radiological environmental issues addressed in the Indian Point Unit No. 2 proceeding.

The NRC Staff Memorandum in Support of Proposed Order Approving Stipulation, filed with the Atomic Safety and

Licensing Board sets out the history of the Indian Point Unit No. 2 proceeding. Rather than repeat that history, suffice it to say that the Indian Point Unit No. 2 proceeding addressed highly complex questions of aquatic biology, resource economics and environmental impact. The administrative proceedings were lengthy and the expense for groups such as HRFA, an active party to that proceeding, was substantial.

Because the issues were essentially the same, the parties to the Indian Point Unit No. 3 proceeding agreed that a lengthy hearing would certainly be required. It might lead to substantially similar license requirements as that imposed for Indian Point Unit No. 2, namely the requirement of installation of a closed-cycle cooling system, by some fixed future date. It was recognized that the resources, time and expense of all the parties would be conserved if a Stipulation were entered into a lieu of proceeding through such a hearing. In addition, because the parties were not in agreement as to the meaning of the ALAB decision in Indian Point Unit No. 2, ALAB-188, and uncertainty existed as to the future course of proceedings in that case, the parties sought to avoid a repetition of the protracted proceedings of the Unit No. 2 precedent and establish procedural certainty for Indian Point Unit No. 3. The basic purpose was to avoid unnecessary litigation at every step of the way for Unit 3.

The central aim of HRFA and SOS in the Indian Point Unit No. 3 proceeding is to assure that the environmental impact of Indian Point Unit No. 3 on the Hudson River and its aquatic biota be minimized in accordance with the requirements of NEPA. To that end a closed-cycle cooling system must be installed at Indian Point Unit No. 3 if it is to be operated. HRFA and SOS have insisted that a key term of the Stipulation be the requirement that the applicant or any successor-in-interest must undertake to construct a closed-cycle system for Indian Point Unit No. 3 and that any operation prior to completion of such a system would be conducted in such manner as to minimize significant adverse effects on the resources of the Hudson River.

In return for the Applicant's consent to such terms, HRFA and SOS agreed to a timetable for construction of a closed-cycle cooling system, giving the Applicant an opportunity for further studies and the chance to prove at a later date that closed-cycle cooling may not be needed. Thus, the parties were able to achieve their major goals through reasonable compromise.

On balance the Stipulation represents an acceptable resolution of the present stage of the Indian Point Unit No. 3 controversy for HRFA, SOS and the other parties in that it represents a proper weighing of resources, the likely outcome of litigation, and the ultimate interests of the parties.

The intervening parties yield certain immediate procedural rights in return for the Applicant's agreement to proceed to install a closed-cycle cooling system.

In consideration of these factors, the Licensing Board approved the Stipulation in its Memorandum and Order of June 12, 1975. The Licensing Board correctly recognized the basic scheme of the Stipulation:

"The Board emphasizes here that the stipulation requires construction of a closed-cycle cooling system for Indian Point Unit No. 3, unless the Applicant or some other party produces convincing evidence that the adverse impact of once-through cooling is not serious, or that the most acceptable alternative will have a more seriously adverse impact." Slip Op. at 11.

In its consideration and review of the Stipulation, the Licensing Board took account of the record made in the Indian Point Unit No. 2 proceeding, the Applicant's Environmental Report for Unit No. 3, the NRC Staff's Final Environmental Statement related to operation of Indian Point Unit

No. 3, information and reports from the Applicant's on-going aquatic research programs and the Applicant's report on the "Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point, Unit No. 2" (December, 1974).

With this background in mind, we proceed to address the five issues raised by the Commission in connection with the ALAB decision.

II. Response To Issues 1 And 2 Posed  
By The Commission

Queries on the ALAB's impermissible interpretations and modifications of the Stipulation and its non-binding nature as a result.

In the interests of preserving the Stipulation, an effort was made by the parties, without participation by the NRC Staff, to agree on a common response to the issues posed by the Commission. Following is the substance of the agreement negotiated by all parties except the NRC, and ultimately agreed to by all Intervening Parties, but not the Applicant.

RECOMMENDED DISPOSITION AGREED TO BY THE  
FOLLOWING PARTIES TO THE STIPULATION:  
THE HUDSON RIVER FISHERMEN'S ASSOCIATION,  
SAVE OUR STRIPERS, THE ATTORNEY GENERAL  
OF THE STATE OF NEW YORK, THE NEW YORK  
STATE ATOMIC ENERGY COUNCIL

By its terms in paragraph 12, the stipulation of the parties in NRC Docket No. 50-286 provides that the stipulation will not be binding until approved by

the Atomic Safety Licensing Board and Appeal Board. The Licensing Board so approved the stipulation on June 12, 1975; the Appeal Board commented on the meaning of the stipulation in view of the ruling in ALAB-188 and then gave its approval as it interpreted the stipulation on September 3, 1975.

The parties agree that the record in this proceeding provided a sufficient basis for a finding by the Licensing Board and Appeal Board that the stipulation is in the public interest. 10 C.F.R. §2.759. The parties agree that the comments of the Appeal Board interpreting the stipulation were not necessary to the approval.

Accordingly, the parties agree that so much of the Appeal Board decision in ALAB-287 set forth as follows should be vacated by the Commission: (a) Page 6, the last full sentence of the first full paragraph beginning "Given the similarities ..."; (b) All of page 7; (c) All of page 8; (d) All of page 9; (e) All of page 10; (f) The first three lines of page 11; (g) The first two lines of page 13 provided that the paragraph begin by adding the words "The intent of paragraph 5 was to provide ..."; (h) The last full sentence of the first paragraph of page 13 beginning "This intent of ..."; (i) The last paragraph of page 13; (j) All of page 14; (k) The first three words of page 21 reading "As interpreted above."

The parties agree that the stipulation should be approved based solely on the Licensing Board's approval, as modified by the Appeal Board ruling in Section II, C, of ALAB-287 at pages 15 through 18.

Commission approval of the stipulation on this basis will be deemed by the parties to satisfy paragraph 12 of the stipulation.

Until the Commission approves the Stipulation on the terms outlined above, HRFA and SOS take the position that there is no binding Stipulation and no legal basis for the issuance of any license for Indian Point Unit No. 3.\* If the Commission does not approve the stipulation on these terms, the Stipulation never will be effective and HRFA and SOS' right to a hearing must be honored forthwith.

The above-named parties have agreed to vacatur of the above-noted portions of ALAB-287 because each of these intervening parties agrees that the portions of ALAB-287 which are proposed for deletion do materially modify the Stipulation. HRFA and SOS' specific objections to ALAB-287 are herein set forth. We understand that the Regulatory Staff adopts a similar position and to the extent that the substantive positions of the HRFA and SOS coincide with those of the Regulatory Staff, HRFA and SOS support the Staff position.

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\* In the appended letter from counsel for HRFA and SOS to Benard C. Rusche, Director of Nuclear Reactor Regulation, NRC, dated November 3, 1975, the grounds the parties' objections to the issuance of any license are set forth.

A. ALAB-287 Materially Modified The Stipulation In Contravention Of The Clear Language Of The Stipulation And The Stated Intent Of The Parties.

The intent of the parties in entering into the Stipulation is clear from the language of the Stipulation, the submissions of the parties in support of the Stipulation, and their oral argument. First and foremost, was the intent to settle for the present the question of the type of cooling system with which Indian Point Unit No. 3 would operate:

Operation of Indian Point Unit No. 3 ("the Plant") with the once-through cooling system will be permitted during an interim period, the termination date for which will be September 15, 1980 ("the September 15 date"). Paragraph 2 of stipulation.

As the Licensing Board stated, the Stipulation requires the construction of a closed-cycle cooling system for Unit No. 3, unless the Applicant or some other party proves that the adverse impact of once-through is not serious, or that the most acceptable alternative will have a more seriously adverse impact.

Appended hereto is a copy of the original Authorization of the HRFA and SOS to accept the Stipulation, as submitted to the Licensing Board. That Authorization speaks for itself and is incorporated herein by reference. Only the

Applicant's agreement to proceed to install closed-cycle cooling made the Stipulation possible for HFRA and SOS to accept.

Similarly, at the oral argument before the Appeal Board the parties stated that under the Stipulation, no further action was needed on the part of the NRC Staff to require installation of closed-cycle cooling, absent a request by the Applicant:

MS. CHASIS: It has been our position throughout that we are interested in protecting the aquatic biota of the Hudson River. To adequately do that, a closed-cycle cooling system is required at Indian Point 3.

The Stipulation reflects this position of the Fishermen and SOS. It requires installation of closed-cycle cooling pursuant to a schedule agreed to by the parties.

. . . .

The only further decision of the Commission that the Stipulation contemplates with respect to the imposition of closed-cycle cooling is the decision to approve an alternate form of closed-cycle cooling.

. . . .

This is the reason that HFRA and SOS entered the Stipulation. It is essential that this Board, as the Licensing Board understood it -- the parties have in essence resolved the issue for now as to whether or not closed-cycle or once through is permissible.  
App. Bd. Tr. 51 - 56

MR. GALLO: The Stipulation provides the applicant or licensee an opportunity to come in at some future date pursuant to a schedule that the Stipulation indicates, to make application to try and demonstrate that indeed closed-cycle cooling is not required.  
App. Bd. Tr. 71.

MR. VOIGT: . . . the Stipulation is a determination as of now that once through cooling can only continue for the period of time permitted.

. . . The parties have resolved the issue [the cost-benefit balance of a once through cooling system versus a closed-cycle system] for now.  
App. Bd. Tr. 105-107.

The intent of the parties on this critical issue is thus clearly set forth in the record.

In addition to this main concern, it was also the intent of the parties in entering into the Stipulation to by-pass repetition in Indian Point No. 3 of the morass of meaning and procedure which the ALAB decision gave the parties in Indian Point No. 2, ALAB-188. It was their intent to establish a clear procedure which would guide the future course of action by the parties before the Commission. The concern for procedural certainty is reflected in the careful drafting of the provisions of the Stipulation relating to the procedures by which the parties may seek modification of the terms of the license and exercise their hearing rights. The desire for clarity and definiteness is also reflected in the clear requirement of closed-cycle cooling.

ALAB-287 materially modified the Stipulation in a manner directly contrary to the intent of the parties as revealed in the plain language of the Stipulation, the submissions to the Licensing and Appeal Boards and the statements of the parties on the record. The Applicant may argue that the language of the ALAB decision did not affect nor modify the Stipulation. If it is mere excess verbiage, let it be struck. However, the decision itself makes clear it was intended to affect interpretation of the Stipulation. The Applicant's view of the ALAB ruling is too facile and calls into question the genuineness of their commitment to the Stipulation. If the Applicant will not agree to vacatur of the ALAB ruling as set forth above, the HRFA and SOS want to proceed to hearing now.

The ALAB ruling affects the Stipulation and Applicant should not be heard to argue otherwise. At the end of the decision, the Appeal Board clearly states that

"As interpreted above, the stipulation is approved." [first emphasis supplied].  
Slip. Op. at 21.

Moreover, the Appeal Board in ruling on the Applicant's exception to the Licensing Board's construction of the standard for the quantum of proof required to establish

the superiority of the once-through cooling system, clearly states that

"Contrary to the Staff's argument, we think that a Licensing Board's construction of a stipulation it is approving could have a bearing on a subsequent interpretation of the stipulation."  
Slip Op. at 18 ftn. 18.

The language of the ALAB thus has the effect of materially modifying the Stipulation and must therefore be vacated.

The Appeal Board's most material modification is their interpretation of the Stipulation as an agreement to operate the plant and see what happens pending scientific studies and actual experience before making the final decision regarding a permanent cooling system. This is directly contrary to the intent of the parties as expressed in the Stipulation. The ALAB arrived at its crabbed interpretation in a manner spelled out below.

The ALAB's initial step was to hold that the terms and conditions of ALAB-188 govern the Stipulation. Slip. Op. at 6. While the Stipulation is based on the parties understanding of ALAB-188 and the course of the Indian Point Unit No. 2 proceeding, nowhere in the Stipulation nor on the record have the parties hinted at much less

expressed a uniform opinion that they intended that the Stipulation be ruled by ALAB-188. One of the purposes of the Stipulation was to avoid the confusion and disagreement over the meaning of ALAB-188 and set up a clear scheme for the future which was agreeable to all parties. ALAB-188 was to be isolated and kept distinct and not govern the Indian Point 3 proceedings.

The second step that the ALAB took was to reinterpret the decision in ALAB-188 in a manner contrary to the clear holding of that decision and to the parties understanding of that decision. The Appeal Board states that:

It should be apparent, however, that we have never sanctioned the use of closed-cycle cooling at the Indian Point site. In ALAB-188 we viewed -- and still view -- the cooling question as open, and we required that there be a full NEPA review of that question. [ftn. omitted]. ALAB-287, Slip. Op. at 7.

The Board continues at a later point:

In ALAB-188 we did not say that data necessary to make an adequate review did not exist, but rather that the evidence presented on the record did not support the closed-cycle finding. Since this fact necessitated a reconsideration of the issue either on the basis of existing data, if any, or on the basis

of new data, particularly those forthcoming from the applicant's programs, we deferred the ultimate decision pending the results of these programs ... In those circumstances, the better course was to await the presentation of new information prior to making a final determination on a permanent cooling system. ALAB-287, Slip. Op. at 10.

These statements stand in direct contradiction to the plain requirements of the facility operating license for Indian Point Unit No. 2. Condition 2.E.(1) of that license requires the cessation of once-through cooling after May 1, 1979. Absent the granting of an application for a license amendment, the Applicant must construct a closed-cycle system at Indian Point Unit No. 2 or not operate the plant. No further decision of the Commission is required except with respect to the preferred alternate closed-cycle system.

Even if this were not so substantively, as matter of procedure by reinterpreting ALAB-188 in the above fashion and holding that it governs the Stipulations, the ALAB has modified that portion of the Stipulation most critical to HRFA and SOS. Without notice and an opportunity to be heard on the ALAB-188, HRFA which is a party to both proceedings has been denied its due process rights in the Indian Point 2 proceeding.

It was because of the conditional finality on the issue of closed-cycle cooling embodied in the Stipulation, and only because of this finality, that HRFA and SOS entered into the Stipulation and waived their right to a hearing. See the attached Authorizations of HRFA and SOS to Stipulation; Transcript of Oral Argument before ALAB at 56, 62, 114, 119:

MS. CHASIS: I wish to reiterate that it is the -- it is the only acceptable to HRFA and SOS that the stipulation be read to provide for installation of closed-cycle cooling with no opportunity for a full reopening of cost-benefit relative to once-through versus closed cycle absent application of the licensee, absent some kind of proposal for modification by the staff pursuant to the stipulation.

It is only on those terms that we are willing to stick with the stipulation. If that is rejected then the stipulation must fall and we will have to go to full hearing. This is the firm position of the Intervenors in this proceeding. ALAB-287, Slip. Op. at 119.

No intent could have been stated more clear. No intent could have been as clearly disregarded by the Appeal Board.

The ALAB has also materially modified paragraph 5 of the Stipulation in a manner contrary to the parties' intent. The purpose of the Stipulation was to provide procedural certainty and to settle litigation rather than promote it. The Appeal Board's interpretation of paragraph 5

undermines that intent by placing on the NRC Staff the responsibility of initiating the hearing procedures established by the Stipulation whenever new evidence is presented to the Staff which might give it reason to believe that "a 'reasonable mind' might conclude that, on balance, there is reasonable doubt about which cooling system is most appropriate." Slip. Op. at 14. The Appeal Board is here establishing a heavy standard of reasonable doubt, analogous to criminal law, to be applied by the Staff in evaluating new evidence. Such a standard is unprecedented and makes the Stipulation into a vehicle for litigation rather than settlement.

Adequate provision is made under the Stipulation in order that the parties may trigger their hearing rights on the basis of new evidence. Paragraph 4 and 5 of the Stipulation. Furthermore, the parties were aware of the provisions of 10 C.F.R. §2.202 which affords opportunity for interested persons to seek an order to show cause why the license should not be modified based on new evidence. Thus both the Stipulation and the Commission Rules of Practice provide adequate opportunity for parties and interested persons to raise the issue of once-through versus closed-cycle cooling at a later date. The ALAB's interpretation of paragraph 5 is merely another example of their hostility to the terms of agreement reached by the parties. Their interpretation is a patent attempt to undermine these terms.

B. The ALAB's Findings with Respect to the Environmental Review Violate the National Environmental Policy Act.

The Appeal Board has taken the requirements of the National Environmental Policy Act and applied them to both Indian Point Unit Nos. 2 and 3 in a manner which flaunts the basic purposes of NEPA.

First, the Board seeks to modify its decision in ALAB-188 by stating that in the ALAB-188 they meant to require a full new NEPA review of the issue of once-through versus closed-cycle cooling. Slip Op. at 7, 9, 10, 14 ftn. 14 ("the Unit 2 review in progress [40 F. R. 30882, July 23, 1975] does not explicitly extend the consideration of open-cycle vs closed-cycle cooling and therefore does not satisfy the requirements of ALBA-188"). Yet, ALAB-188 never made clear that a full NEPA review would be required. The Appeal Board tries to yoke together two quotes from ALAB-188 to support its present interpretation. Slip Op. at 7 ftn. 6, 8. However, the further NEPA review called for by ALAB-188 and cited to in ALAB-287 (Slip Op. at 7 ftn. 6) related to alternative forms of closed-cycle cooling, not to the basic issue of once-through versus closed-cycle. This is clear from the opinion itself. ALAB-188, 7 AEC at 391. Even if it were procedurally possible for the Appeal Board

to play such games, it is estopped from stating seventeen months after its decision in Indian Point Unit No. 2 that a full new NEPA review will now be required. Such a construction burdens NEPA with unnecessary and cumbersome make-work.

ALAB-188 did order the Staff to take a "fresh look" at certain of the Staff's positions and reconsider the portions of the Final environmental Statement to which they relate. ALAB-188, 7 AEC at 407. Despite the Board's statement that the "fresh look" called for a new review of environmental effects of both once-through and closed-cycle cooling (ALAB-287 Slip Op. at 9), the Board makes clear that the required reconsideration need not necessarily address new data, but may be done on the basis of existing data. Slip Op. at 10. Yet, the Appeal Board finds the Final Environmental Statement related to Indian Point Unit No. 3 inadequate solely on the basis that it did not take into account new studies prepared by the applicant on the effects of various types of closed-cycle cooling. Slip Op. at 9.

Thus, the ALAB has held the following: a full new NEPA review was required for Indian Point Unit No. 2 which has not been carried out; a "fresh

look" by ALAB-188 was required and that has not been adequately carried out; the Indian Point Unit No. 3 Final Environmental Statement is inadequate because it fails to look at new data on the impacts of closed-cycle cooling. However, even accepting these conclusions for the sake of argument, what the Appeal Board is in essence saying is that NEPA has not been satisfied with respect to either plant and that further consideration of the final cost/benefit balance is still required. This is a bizarre conclusion to reach after Indian Point Unit No. 2 has been authorized to operate for over two years and issuance of a license for Indian Point Unit No. 3 has been authorized with closed-cycle cooling. It makes NEPA a sham.

NEPA requires that the cost/benefit balance be made before the major federal action is taken.

Calvert Cliffs Coordinating Committee v. U. S. Atomic Energy Commission, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

The final major federal action here involved is the issuance of any operating license up to and including a full-term, full-power license. In the instant case, the evaluation of costs and benefits and their accomodation must be made in connection with the method of operation of Indian Point Unit No. 3 before the operating license issues, not after. Without the condition that the applicant at once install closed-cycle cooling pursuant to the schedule of the stipulation, NEPA would not be satisfied here.

This is not to say that further evidence

and study with respect to that balance is precluded once such a license is issued. However, the authorization for issuance of an operating license without a decision on environmental protection signifies a deficient environmental review under NEPA. The Stipulation allows a new evaluation for Indian Point Unit No. 3 if the applicant generates new data to warrant that review. In the meantime, the aquatic resources are protected by the preparation for closed-cycle cooling system as NEPA intended.

One final point with respect to the ALAB's interpretation of NEPA must be made. The Board held that FES on Indian Point Unit No. 3 inadequate because of failure to consider new data. However, that new data was presented to the Licensing Board and formed a basis for the Licensing Board's approval of the Stipulation. Licensing Board Memorandum and Order, Slip Op. at 9. The Appeal Board makes new and strange law when it rules that (i) environmental review under NEPA is adequate only if the FES is continually updated and recirculated for comment and (ii) that submissions with respect to new data (which are included in the record but not recirculated) constitute insufficient environmental consideration under NEPA. If this is in actuality what the Appeal Board means, then any time after the issuance of an FES, and prior to final action, new

data and Staff analysis thereof must be recirculated to the public as a supplement or revision of the FES, with new hearing rights. The ALAB makes NEPA a procedural stumbling block, not a rational examination of environmental factors.

C. The Deficiencies of ALAB-287 Require Vacatur of the ALAB Ruling With Commission Approval of the Stipulation, or Noticing a New Environmental Hearing, and Reconstituting the Appeal Board in Either Event

By "interpreting" the Stipulation, the Appeal Board sought to have its way and substantially ignore the intent of the parties and at the same time "approve" the Stipulation, thus binding the parties to an agreement interpreted in a manner significantly different from what they had intended.

The ALAB's approval of the Stipulation as interpreted, however, does not constitute an approval of the Stipulation. By materially modifying the Stipulation in a manner contrary to the plain language of the Stipulation and the stated intent of the parties, the Appeal Board has rejected the Stipulation as agreed to by the parties, and attempted to substitute a new agreement in its place. Without ALAB approval, Paragraph 12 of the Stipulation is not satisfied, and the Stipulation is

not final and binding. Until ALAB approval of the Licensing Board decision without gratuitous modification, there has to date been no settlement of the environmental issues in controversy. Pursuant to NEPA and the Commission Rules, 10 C.F.R. Parts 2 and 51, no license may issue in the meantime. Until the Stipulation is either approved without material modification or rejected and a hearing held on the environmental issues in controversy, no final action with respect to the license may be taken.

By attempting to bind the parties to an agreement which had been materially modified, the Appeal Board sought to deprive the parties of their due process and statutory rights to notice and opportunity for hearing. HRFA and SOS only agreed to waive their right to a hearing provided pursuant to the Atomic Energy Act §189, 42 U.S.C. §2239, based on the inclusion in the Stipulation of certain critical requirements. The most important of these was the requirement of installation of a closed-cycle system, absent of course a license amendment. The Appeal Board, in attempting to modify that requirement of the Stipulation without outright rejection of the Stipulation, deprived HRFA and SOS of their right to a hearing.

### III. Response to Issue 3

Under what circumstances do the Commission's Rules of Procedure or the provisions of the Stipulation of January 13, 1975 permit the parties (or only other interested group) to raise at any later time the issue whether a once-through or closed-cycle system should be the required permanent system for this plant?

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The following provisions of the Stipulation provide a mechanism by which the parties to the Stipulation may raise at a later date the issue of whether a once-through or closed-cycle cooling system should be the required permanent system for Indian Point Unit No. 3.

Paragraph 2(c) of the Stipulation specifically provides that the licensee, if it believes that the empirical data it collects justifies an extension of the interim operation period, or other relief, may make an application to the Commission. [emphasis added]. Paragraph 4(a) of the Stipulation provides that if and when such application is made, the NRC Staff shall review it and issue its findings, conclusions and recommendations regarding the relief requested. Under Paragraph 4(b), any party to the Stipulation may serve upon the other parties a request for a hearing based on the Staff's recommendations. If a party makes such request, the other parties agree to support that request.

In addition to affording the licensee and other parties such rights, the Stipulation also provides the NRC staff with the right to propose a modification to the license conditions set forth in Paragraph 2 of the Stipulation, including the requirement of closed-cycle cooling. Any such staff action triggers the rights of the parties pursuant to Paragraph 4(b). The Staff's duties and responsibilities under this paragraph are intended to be no more and no less than its duties under the Commission's Rules of Practice, 10 C.F.R. §2.202.

As made clear by the above discussion, the Stipulation establishes a means by which the parties to the Stipulation may raise the issue of once-through versus closed-cycle cooling at a later date.

In addition, the Commission's Rules of Practice provide a means by which any interested person, not merely those parties to the stipulation, may raise the issue at a later date. 10 C.F.R, §2.202 provides that any interested person may apply to the Director of Regulation for a modification of an operating license at anytime. This avenue is always open to interested members of the public who on the basis of a new evidence seek to have a license term or set of terms modified.

IV. Response to Issue 4.

Querie on the present purpose of a hearing.

An environmental hearing at the present time would serve no useful purpose so long as the Stipulation is approved on the basis of the Licensing Board's approval, as modified by the Appeal Board ruling in Section II.C., of ALAB-287, and closed-cycle cooling presently required to protect aquatic resources.

As HRFA and SOS indicated in their Memorandum submitted to the Licensing Board on March 31, 1975, in support of a proposed order approving the Stipulation, an environmental hearing at the present time is likely to result in the same set of license conditions called for in the Stipulation: the requirement of installation of a closed-cycle cooling system at the end of a period of interim operation during which time the licensee has opportunity to collect additional data and seek a license amendment.

If the Stipulation is rejected and the present requirement for closed-cycle cooling is not required, a hearing is needed at once. A hearing at the present time would be lengthy, complex and absorb a great deal of the time and energy of the parties. Furthermore, there would almost certainly be another lengthy hearing at a later date when

the new data from the applicant's ongoing aquatic research program is available, which it presently is not. The scheme set out in the Stipulation incorporates the likely results of a hearing now and provides a means by which a hearing may be held at some later point when all the evidence is in. Such an approach is fair and reasonable. It is, of course, unlikely that any new data will be found to allow a conclusion that closed-cycle cooling is not needed to protect the aquatic resources.

V. Response to Issue 5.

Should the Stipulation be disapproved as a device to defeat the Appeal Board's review authority, as exercised in the Indian Point 2 proceeding?

The Stipulation should not be disapproved as a device to defeat the Appeal Board's review authority. It is not such a device.

The Stipulation was entered into in light of the evidence on fisheries, the prospect that a lengthy hearing would lead to substantially the same license considerations as imposed in the Stipulation and the parties' desire to procedural clarity. By its very terms, the Stipulation requires the approval of the Appeal Board before the Stipulation becomes final and binding upon the parties. The Appeal Board could either accept and approve the Stipulation without material modification, or reject the Stipulation if it

found it not to be fair and reasonable or not in conformity with the public interest. The Appeal Board corrected the Licensing Board's erroneous reading of two parts of the Stipulation, because the Applicant wished such correction. Certainly, HRFA and SOS are now entitled to correct the erroneous ALAB construction to restore the intent of the parties. No attempt was thus made to circumvent ALAB review authority as exercised in the Indian Point 2 proceeding, or improperly to constrain it in Unit 3.

It should also be noted that the Commission's Rules of Practice do not require ALAB approval of a stipulation and that without a hearing, the ALAB's review authority in this case would not have been exercised at all. Only the expressed intent of the parties in this Stipulation has resulted in in ALAB review and this was provided to assure that there would be no circumvention of ALAB consideration.

#### CONCLUSION

For the above-stated reasons, HRFA and SOS ask that the Commission approve the Stipulation based solely on the Licensing Board's approval, as modified by the Appeal Board ruling in Section II, C, of ALAB-287 at pages 15 through 18

and that it vacate those portions of ALAB-287 set forth in detail of the brief.

Dated: New York, New York  
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Respectfully submitted,



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