8005130 009

G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

December 15, 1978

OFFICE OF
GENERAL COUNSEL

Samuel J. Chilk, Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 50-247,
OL No. DPR-26
(Indian Point Unit No. 2)

Dear Mr. Chilk:

Pursuant to the invitation in the Commission's Order of November 29, 1978, I am enclosing the U.S. Environmental Protection Agency's comments in the above-referenced matter. We are also serving copies on the parties.

Very truly yours,

Richard G. Stoll, Jr.
Deputy Associate General Counsel
Water and Solid Waste Division
(A-131)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point Station Unit No. 2)	Docket No. 50-247 OL No. DPR-26 (Determination of Preferred Alternative Closed-Cycle Cooling System)

COMMENTS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY IN RESPONSE TO THE COMMISSION'S ORDER OF NOVEMBER 15, 1978

On November 15, 1978, the Commission (NRC) ordered the participants in this proceeding to brief the issue of whether and to what extent NRC has authority to determine the type of cooling system to be used in nuclear power plants. NRC also invited the United States Environmental Protec ion Agency (EPA) to submit comments.

Our comments may be summarized as follows: the National Environmental Policy Act (NEPA) does not authorize NRC to impose any cooling requirement other than one which is established by EPA (or a State) pursuant to the Clean Water Act. */ This lack of NRC authority is clear both on the face of the Clean Water Act and in its legislative history.

Section 511(c)(2) was added to the Clean Water Act in 1972. It provides in part:

*/ P.L. 92-500 (1972) as amended by P.L. 95-217 (1977), 33 U.S.C. §1251 et seq. Until the 1977 Amendments, this legislation was generally known as the "Federal Water Pollution Control Act."

> Nothing in [NEPA] shall be deemed to --
>
> (B) authorize any [Federal] 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.

Only EPA or a State can establish an effluent limitation pursuant to the Clean Water Act. §§101(d), 401, 402(b). Thus, the only water quality requirements which NRC could include as license conditions under NEPA authority would be those which have been established by EPA or a State.

The legislative history shows that Congress was well aware of the NRC (then AEC) Indian Point closed-cycle license condition and that §511(c)(2)(B) would nullify the condition. The most pertinent history is a discussion between Senators Buckley and Muskie during debate on the final version of the 1972 Conference Bill. A copy of the full discussion is attached to these comments.

Senator Buckley first introduced into the record New York Times and Washington Post articles about the AEC staff recommendation to impose closed-cycle cooling on Indian Point No. 2. He stated "it appears to me that environmental decisions of this type are barred by clause 511(c)(2)(B)," and that "the AEC is precluded from setting higher standards than those imposed by EPA." Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works Serial No. 93-1 (1973), at 198. (This document will hereinafter be cited as "Legis. Hist.")

Senator Muskie, who has been described by the Supreme Court as "perhaps the Act's principal author," */ repeatedly stated in response to Senator Buckley's questions that §511(c)(2)(B) prohibited the AEC from imposing more stringent conditions than imposed by EPA under the Clean Water Act. Legis. Hist. at 198-99. Senator Jackson, a principal author of NEPA, stated immediately thereafter: "I read §511(c)(2)(B) as prohibiting the AEC-Indian Point action." Legis. Hist. at 202.

The legislative history on the House side is equally strong. The "Highlights" summary of the Conference Report states that under §511(c)(2)(B), nothing in NEPA "may be construed as the basis for the establishment by other Federal agencies of more stringent controls on the discharge of pollutants than those provided under this Act . . . ." Legis. Hist. at 239, emphasis added. Congressman Dingell said that the section "seeks to overcome that part of the Calvert Cliffs decision requiring AEC or any other licensing or permitting agency to independently review water quality matters." Legis. Hist. at 256. Congressman Wright stated that the section "has primary application to the Atomic Energy Commission." Legis. Hist. at 538.

EPA's own contemporaneous interpretation of the statute is in agreement with the legislative history. Then-Administrator Ruckelshaus, in offering EPA's formal comments on the pending legislation for the record, stated that §511(c)(2)(B) "requires

*/ duPont v. Train, 430 U.S. 112, 129 (1977).

Federal agencies to accept effluent limitations of EPA and State certificates with respect to water quality as conclusive . . . ." Legis. Hist. at 151.

We should note in conclusion that nothing in the Clean Water Act prohibits NRC from imposing closed-cycle cooling requirements on non-water quality grounds. Nor does the Clean Water Act prohibit NRC from imposing more stringent water quality conditions under any non-NEPA legislative authority it may have. In fact, §301 (b)(1)(C) of the Clean Water Act requires that water pollution dischargers achieve any more stringent limitations necessary to meet "any other Federal law or regulation." Because of §511(c)(2)(B), however, NEPA is not among the "other" Federal laws on which NRC could rely to impose water quality conditions.

Respectfully submitted,

December 13, 1978

Joan Z. Bernstein

JOAN Z. BERNSTEIN
General Counsel

93d Congress
1st Session

COMMITTEE PRINT

A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

TOGETHER WITH

A SECTION-BY-SECTION INDEX

PREPARED BY THE

ENVIRONMENTAL POLICY DIVISION

OF THE

CONGRESSIONAL RESEARCH SERVICE

OF THE

LIBRARY OF CONGRESS

VOLUME 1

JANUARY 1973

SERIAL NO. 93–1

Printed for the use of the Committee on Public Works

U.S. GOVERNMENT PRINTING OFFICE

87-313 O WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 - Price $5.55 domestic postpaid or $5 GPO Bookstore
Stock Number 5270–01759

regulatory action. He undertook to undertake a study on the question, the results of which are not yet available. The sensible course would be to get the results of this study, have it reviewed by the appropriate committees, and take such action as is appropriate.

The exemption presently contained in Section 511(c)(1) is a bad precedent. I regret that it cannot be deleted from the water legislation.

(SENATOR BUCKLEY) →

As I say, Mr. President, I am deeply concerned about clause 511(c)(2)(B). This clause may, I understand, bar any Federal permitting or licensing agency, such as AEC, from imposing, as a condition precedent to the issuance of any license or permit, any effluent limitation other than limitations established pursuant to S. 2770.

Mr. President, at this point I ask unanimous consent to have printed in the Record an article from today's New York Times entitled "Environmentalists Hail AEC Ruling on Con Ed" and an article from today's Washington Post, entitled "AEC Orders Con Ed to Halt Thermal Pollution of River."

[From the New York Times, Oct. 4, 1972]

ENVIRONMENTALISTS HAIL AEC RULING ON CON ED

(By David Bird)

Environmentalists, who generally have been critical of the Atomic Energy Commission, were openly praising it yesterday for the decision to ask Consolidated Edison to add an expensive cooling system to its nuclear plant to protect fish life in the Hudson River.

"It's unprecedented for the A.E.C. to order a utility to do something that it doesn't want to do," said Angus Macbeth, attorney for the Hudson River Fishermen's Association, which has been opposing the original design of the plant on the Hudson River at Indian Point on the ground that it would kill much of the river's fish.

A spokesman for the A.E.C. said it was the first time the agency had said a utility must modify its cooling system to protect the environment.

The original design called for a "once-through" system, which draws water from a lake or river, passes it through the cooling system once and then dumps it back where it came from, heated.

The staff report, issued in Washington on Monday, still must be approved by the A.E.C. licensing board, which has been conducting hearings on the nuclear plant. The plant is virtually complete but has not yet received a license.

The report said Con Edison should be required to submit a plan for a self-contained, or closed-cycle, cooling system by July 1. It would have to be installed by Jan. 1, 1978.

Licensing hearings are expected to resume next month or in December. But environmentalists are already counting the A.E.C. staff report a solid victory that could set a precedent.

With a once-through system, the nuclear plant would suck some 2,650 cubic feet of water from the river every second and the Fishermen's Association said this would kill much of the river's fish by heating and battering them.

Con Edison has argued that the fish kill would be minimal and that any other system than the "once-through" method would be prohibitively expensive.

MILLIONS ARE INVOLVED

A Con Edison spokesman said that providing a self-contained cooling system for the plant that was now awaiting a license would add up to $97-million to the plant's $200-million cost.

But that could be only the beginning. The A.E.C. staff report dealt in detail only with the plant called Indian Point No. 2, which is now under consideration. The report said, however, that it was reasonable to expect that the same requirements would be placed on the Indian Point No. 1 plant, which has been in operation for 10 years, and on Indian Point No. 3 which Con Edison is adding to that generating complex 25 miles north of New York City.

Con Edison had no estimate on how much more it would cost to equip its other plants with self-contained cooling systems.

USUAL SYSTEM DESCRIBED

Usually self-contained cooling systems are giant cylindrical towers, or chimneys, where the water is allowed to cool in a draft of air and then returned to the plant to be used over and over again.

While generally pleased with the A.E.C. report, Mr. Macbeth said that when the hearings resume he expects to press for speeding up the schedule to require the plant be ready by 1977.

Rod Vandivert, environmental consultant to the Scenic Hudson Preservation Conference, said the A.E.C. staff's reasoning should apply just as well to Con Edison's pumped-storage plant at Storm King, which would pump Hudson River water up to a mountaintop reservoir to be tapped to power generators during times of peak demand.

[From the Washington Post, Oct. 3, 1972]

AEC ORDERS CON ED TO HALT THERMAL POLLUTION OF RIVER

(By Thomas O'Toole)

The Atomic Energy Commission yesterday told Consolidated Edison Co. it must stop removing large volumes of water from the Hudson River to cool its two atomic power plants at Indian Point, N.Y. It was the first time the AEC has acted to regulate the way a power plant is cooled.

In a move sure to have far-reaching legal, environmental and financial implications, the AEC told Con Ed it must install a "closed cycle" cooling system at Indian Point, which could cost Con Ed as much as $150 million to build and another $75 million to operate over the plant's 30-year lifetime.

The AEC gave Con Ed until 1978 to have the closed cycle cooling system in operation, partly because the power crisis is so critical in New York and partly because the nuclear plants at Indian Point give Con Ed a chance to close older plants that are polluting the air in New York City.

The AEC moved against Con Ed because it felt that continued operation of dian Point's present cooling system would kill the entire striped bass population in the waters around New York, since the fish spawn in the Hudson River right at Indian Point.

At present, the two nuclear power plants at Indian Point draw more than 1.1 million gallons of water a minute out of the Hudson River pulling in thousands of fingerlings and fish larvae with it. A third nuclear plant at Indian Point will raise the intake to almost 2 million gallons a minute, which the AEC feared would be disastrous not only to the striped bass but to other fish in the Hudson.

What the AEC wants Con Ed to do is to install giant cooling chimneys at Indian Point, chimneys that recycle the water taken from the river through the plant so that the water can be used over and over again.

Without the cooling chimneys, the water is dumped back into the river 20 degrees warmer than it was when taken from the river. This heat not only means a continuous use of river water for cooling, it also threatens the river itself.

The AEC figures that Con Ed will need at Indian Point at least two cooling chimneys, each 400 feet high. The chimneys could cost as much as $75 million each and an estimated $1 million a year to operate.

The move against Con Ed is the first time the AEC has acted to regulate what might be called a "non-nuclear" activity in an atomic power plant. The move is a direct result of an action last year by a Federal appeals court, which told the AEC in the Calvert Cliffs, Md., case it had to regulate discharge of heated water into rivers, lakes and streams.

The AEC has given Con Ed a year to come up with a cooling plan, but fully expects the company to challenge the move in court.

"The question of legality is likely to be raised again," a source said, "just to see how far AEC authority extends."

Mr. BUCKLEY. Mr. President, the articles document an important environmental policy decision. For the first time the AEC had said to

a utility that it must add an expensive "closed cycle" cooling system to its second nuclear plant at Indian Point, N.Y., to protect fish life in the Hudson River.

It appears to me that environmental decisions of this type are barred by clause 511(c)(2)(B) of the conference report on S. 2770. This appears to be an "effluent limitation" which is a "condition precedent" to a license. I would like to ask the Senator from Maine if I am correct in my understanding that environmentalists will be barred from intervening in AEC licensing procedures in order to obtain tougher effluent limitations—perhaps to protect wetlands, wildlife refuges, and so forth—than the limitations prescribed by the standards of the EPA-run water quality program? Am I correct in assuming that environmentalists and citizens groups particularly concerned about the effects of water pollution at, for instance, the sites of proposed industrial powerplants are entirely at the mercy of EPA and the general, nationwide standards it has set?

Mr. MUSKIE. Mr. President, I am not sure I heard clearly all of the Senator's question, but if I may try to state it, the Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.

Mr. BUCKLEY. The AEC is precluded from setting higher standards than those imposed by EPA.

Mr. MUSKIE. Does the Senator mean more rigorous from an environmental standpoint? I must say that such an action by AEC is not a possibility that occurred to the conferees. It has not occurred to me in my experience over the years. We considered that this kind of authority should be in EPA and not in AEC, and in order to put the authority there, we put it in this act, and that is where it is.

Mr. BUCKLEY. It is not the intention of the conference committee to exclude the right of other regulatory bodies to impose more stringent environmental conditions on discharges?

Mr. MUSKIE. Again I must say yes, we gave the authority to EPA. The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment. It did not occur to us that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature described by the Senator but, rather, the opposite, as history demonstrates.

If AEC develops a stringent environmental conscience, and I think it is developing a more stringent environmental conscience than EPA, then we can consider whether or not AEC ought not to have new authority.

Mr. BUCKLEY. Apparently that conscience has been developed, according to what is stated in this morning's newspapers.

Mr. MUSKIE. I do not think I would lend that too much credence.

Mr. BUCKLEY. I just want to reiterate the point here that action on this bill will preclude the right of other agencies to insist on other standards, or the rights of in-depth environmental groups to go to

court and insist that the AEC maintain standards more stringent than those employed by the EPA, which under this legislation is not required to file an environmental impact statement; is that correct?

Mr. MUSKIE. I think I have answered the question. Yes; that is correct.

Mr. JACKSON. Mr. President, I have certain basic questions concerning the policy reflected in section 511(c). I would like to determine, to the extent that we can clarify it, the intent of that section of the conference report.

Therefore, I would like to address some questions to the manager of the report.

First, how broad is the exemption proposed for EPA in section 511 (c)(1)? Does the exemption cover only section 102(2)(C) and the requirement for preparing environmental impact statements? I am referring, of course, to the National Environmental Policy Act. Is it clear that EPA would be subject to all other requirements of NEPA except section 102(2)(C)?

Mr. MUSKIE. Mr. President, may I say first to the Senator, to preface my answer to the question, and in response to something the Senator from New York has said on the same subject, that in my judgment it was clearly intended at the time Congress enacted NEPA that environmental regulatory agencies such as those authorized by the Federal Water Pollution Control Act and the Clean Air Act would not be subject to NEPA's provisions. The Senator and I had discussions on this point, and it was clearly understood, from the colloquies in the Congressional Record on the subject it is clear, that it was the intention of NEPA to put mission-oriented agencies, not the environmental enhancement agencies, under an environmental stricture and that the environmental enhancement or improvement agencies such as the Federal Water Pollution Control Administration and the Clean Air Act would not be subject to NEPA's provisions.

So the effect of the language to which the Senator has referred is to breach that understanding, and to bring activities of the Administrator which would not be under NEPA in terms of that history under NEPA.

So let me answer the Senator's question.

Because the language of 511(c)(1) speaks of "major Federal actions significantly affecting the quality of the human environment"—a phrase which only appears in section 102(2)(C) of NEPA—some will argue that the conferees intended to limit their attention to section 102 (2)(C) and that all of the other provisions are therefore meant to be applicable to actions of the Administrator. I address myself to those who would grasp at this slender straw. The term "major Federal action" and NEPA are synonymous in the minds of the conferees. It is the clear intent of conferees of both Houses—it was certainly the clear intent of the conferees when this provision was unanimously adopted—that all of the provisions of NEPA should apply to the making of grants under section 201 and the granting of a permit under section 402 for a new source and that none of the provisions of NEPA would apply to any other action of the Administrator.