UNITED STATES
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY ITEM
CONSENT CALENDAR ITEM

July 11, 1980

SECY-A-80-98

For: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: INDIAN POINT (COOLING TOWERS)

Purpose: To provide the Commission with an analysis of the issues raised in ALAB-487, relating to the issue of the cooling system at Indian Point Unit 2,

EY.5

Discussion:

I. Background

On November 15, 1978, the Commission issued a memorandum and order taking review, on its own motion, of the Appeal Board's decision in ALAB-487. No party had requested review.

In ALAB-487, the Appeal Board summarily affirmed a Licensing Board decision that held, among other things, (a) that Consolidated Edison of New York (Con Ed) could proceed with construction of cooling towers at its Indian Point Unit 2 facility, and (b) that operation of the plant with once-through cooling could continue until May 1, 1982. A license condition imposed by the NRC requires termination of once-through cooling by that date in order to protect the eggs and fry of the striped bass which spawn in the Hudson River.

The Commission's decision to take review reflected a conundrum which has the following essential components:

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1. The NRC license condition, adopted pursuant to the NRC's NEPA responsibilities, is designed to protect the fish in the Hudson River.

2. The NRC stated in its Seabrook decision (Public Service Company of New Hampshire, 5 NRC 503, (1977)) that in accordance with the Clean Water Act (Federal Water Pollution Control Act Amendments of 1972, or FWPCA) and the NRC-EPA Second Memorandum of Understanding, it would defer to EPA as to the proper type of cooling system for nuclear power plants.

3. A major objective of the Federal Water Pollution Control Act Amendments of 1972, reflected by the Commission in the Seabrook opinion, was the elimination of duplicative agency reviews of water quality issues. Congress specifically had the Indian Point license condition in mind when it acted.

4. EPA currently has underway a proceeding to determine the proper type of cooling for Indian Point Unit 2 and three other Hudson River facilities. That proceeding was on appeal from EPA's initial decision, which agreed with NRC that cooling towers were needed at Indian Point Unit 2.

5. The effectiveness of the initial EPA decision was automatically stayed when an appeal was taken, and the final EPA decision may not be rendered for some time.

6. It takes approximately 3-1/2 years to build cooling towers.

7. If the Commission retains unchanged the license condition barring once-through cooling after 1982, Con Ed may be forced to shut down Unit 2 in 1982 unless and until it has cooling towers in place.

8. If Con Ed builds cooling towers now in order to be sure of being able to continue operation after 1982, any future decision by EPA permitting once-through would render the cooling towers unnecessary.

9. If the NRC decides that in deference to EPA's ultimate decision on cooling systems, it will now drop its requirement for changeover from once-through cooling in 1982, EPA will not be able to fill the regulatory void left by NRC until it reaches its decision on Hudson River cooling; until then, neither agency may be protecting the river's fish.

10. If the Commission decides that it will now conduct a further NEPA analysis to determine whether the facility can continue to operate with once-through cooling after May 1982, it will be duplicating the effort now going on in the EPA proceeding, and drawing away NRC resources that are now assisting EPA.

11. The Commission's decision on the license condition at issue here will affect the legal status of license conditions in other NRC permits and licenses, dealing with such non-radiological water quality matters as discharges of chlorine.

Thus the licensee is placed in a dilemma: should it build towers that may turn out to be unnecessary, or should it instead risk being forced to shut down Unit 2 in 1982 for lack of towers?

This in turn places the Commission in a predicament: does the Commission have the responsibility to extricate its licensee from a dilemma that has its origin in the overlapping responsibilities of two federal agencies (but which was exacerbated by EPA's inability, in part because of its own procedural requirements, to act expeditiously)?

When the Commission took review of ALAB-487, it asked the parties to address two questions: the implications of the Seabrook decision (in which the Commission had reaffirmed the

primacy of EPA in water quality matters) with respect to closed-cycle cooling at Indian Point Unit 2, and the continuing validity of the license condition requiring termination of once-through cooling by May 1, 1982.

The filings and counter-filings of the parties have been received. The purpose of this memorandum is to describe these documents, and to propose a solution to the problem presented. Before doing so, it may be useful to review briefly the identity and essential objectives of the parties to this complicated proceeding.

1. Consolidated Edison. Con Ed does not want to build cooling towers if it can avoid doing so, because they are costly and cause a loss of operating efficiency. It is participating in the ongoing EPA proceeding to determine the proper type of cooling for Hudson River plants. In the meantime, it wants the NRC to relieve it of the obligation to end once-through cooling by May 1982.

2. Hudson River Fishermen's Association (HRFA). HRFA is concerned to protect the striped bass fisheries of the Hudson from the effects of once-through cooling on eggs and fry. Fearing that NRC deference to EPA will cause severe harm to the Hudson fisheries, it wants NRC to enforce the license condition requiring termination of once-through cooling by 1982.

3. Power Authority of the State of New York (PASNY). As a licensee of Indian Point Unit 3, PASNY entered into a stipulation by which once-through at Unit 3 must terminate in September 1982. It wants NRC to defer to EPA's ultimate decision, and to eliminate all conflicting regulatory requirements from all NRC permits, including the license conditions requiring termination of once-through cooling by 1982 at both Unit 2 and Unit 3.

4. Environmental Protection Agency. EPA wants NRC to accept its view that the 1972 amendments to the Water Act divested NRC of any jurisdiction to set effluent limitations other than those established by EPA.

5. Utility Water Act Group (UWAG). UWAG, a group of NRC-licensed utilities filing a brief as friends of the court, wants the elimination of all NRC-imposed license conditions, from all NRC permits and licenses, that deal with non-radiological water quality matters. It favors complete NRC deference to EPA on such issues.

6. NRC Staff. The Staff is prepared to follow EPA's decision on Hudson River cooling once it is rendered, but in the meantime, does not want to remove the license condition that was imposed to protect the biota of the river.

7. Village of Buchanan. No longer an actor in this proceeding, the Village originally opposed construction of towers, citing aesthetic and environmental harms. A state court later ruled that the Village did not have the legal power to block construction of towers.

With that as background, we turn to a presentation of the views of the parties. Though the parties filed initial briefs and reply briefs, their views, including their responses to the contentions of other parties, are presented here in consolidated form.

II. Contentions of the Parties

A. NRC Staff.

By way of history, an AEC licensing board determined that as part of the operating license for Indian Point Unit 2, the plant should be required to terminate once-through cooling on May 1, 1978, in order to protect the fisheries of the Hudson River. The termination date was subsequently extended. In response to an Appeal Board decision, the

NRC staff took a fresh look at the likely impacts on the Hudson fisheries, and prepared a Final Environmental Statement dealing with the impacts on the river of the simultaneous operation of Units 1, 2 and 3. This FES served as the basis of a stipulation, agreed to by all parties and approved by the Licensing Board in 1975, that once-through cooling at Unit 3 would end on September 15, 1980. Under a provision of the stipulation allowing for necessary extensions of time, the termination date for Unit 3 is now set for September 1982.

In 1977, Con Ed applied for a license amendment eliminating the requirement to convert Unit 2 to closed-cycle cooling; it also requested an extension of the date for termination of once-through cooling. The staff has not acted on the request for a license amendment, and it has denied the request for an extension. The basis for its denial was that NRC would be required to conform the Unit 2 license to the decision reached by EPA. Since that decision was expected in advance of the 1982 date for termination of once-through, the staff expected it would have time to take appropriate action. Thus Con Ed would not be harmed by denial of the relief requested. PASNY subsequently requested an extension of the termination date for once-through at Unit 3, and its request was denied for the same reasons.

The EPA proceeding, which is examining the same issues that have concerned NRC (that is, the effect of once-through cooling on the Hudson fisheries), will result in a decision by the Regional Administration establishing an approved mode of cooling and a compliance date. NRC is not a party, but has been giving substantial assistance to EPA.

Turning to the questions posed by this case, the NRC is required to defer to EPA's decisions on cooling water intake and discharge, once EPA takes a final agency action. Since EPA's decision requiring closed-cycle at Indian Point is stayed, however, the NRC can condition the licenses for Units 2 and 3 to minimize

the impact on the Hudson River biota. As a matter of discretion NRC should take actions calculated to minimize conflict with the potential requirements of the EPA decision.

In Seabrook, the Commission decided that in its overall NEPA cost-benefit analysis of whether to license the facility, it could accept without independent inquiry EPA's judgment as to the impacts of the plant on the marine environment. Here, in contrast to the situation in Seabrook, EPA has not taken final agency action. Section 511(c)(2) of the Clean Water Act states that NEPA does not authorize agencies that issue licenses to impose, as a condition for receiving the license, "any effluent limitation other than any such limitation established pursuant to this Act." Here, no such limitation has been "established", since EPA's decision is not final. NRC is therefore not precluded from imposing its own license conditions for the protection of the river, pending final action by EPA.

Until EPA acts, the Commission should attempt to preserve the status quo, and in recognition of the fact that EPA will ultimately be the decisionmaker, NRC should avoid taking actions which might lead to conflicts. Thus the NRC staff has refused requests from Con Ed and PASNY that the licenses for Indian Point Units 2 and 3 be amended to extend the termination date for once-through cooling. The staff denials were based on the staff's expectation that there will be sufficient time, once EPA has acted, to take appropriate action in advance of the 1982 termination dates. Policy considerations also played a role in the staff's denial of the Con Ed and PASNY requests. First, the staff's consultants at Oak Ridge are intensively involved in the EPA proceeding, as part of NRC's assistance to EPA in that proceeding. Diverting them to work on the requested license amendment would limit or prevent their assistance to EPA. Second, since all parties have been involved actively in the EPA proceeding, it is in the best interests of all that it remain the sole forum for investigating the effects of the plant on the Hudson fisheries. Finally, the staff

could not conduct the necessary analysis for the proposed license amendments without speculating both as to the effluent limitations EPA will promulgate and the compliance schedule it will set.

Since NRC is not required by the Clean Water Act to modify the license conditions terminating once-through cooling in 1982, the question then remains whether the NRC should modify them. The staff believes the conditions should be left in effect. The license conditions do not require the commencement of construction of cooling towers. The licensees thus suffer no prejudice from NRC's leaving the conditions in effect, pending a final decision by EPA.

With regard to Indian Point Unit 3, the termination of once-through cooling was stipulated by all parties including the NRC staff. The Commission explicitly approved this stipulation. EPA endorsed the staff's recommendation in favor of closed-cycle cooling, and at no time suggested that NRC lacked authority to require such a condition. Since the time that the stipulation was executed, the stay of effectiveness of the EPA decision has made the September 1982 compliance unrealistic, but it would nevertheless be premature to alter that date in advance of the EPA decision.

B. Consolidated Edison.

The Commission's decision in Seabrook should be followed, and the NRC should therefore defer to EPA's judgment as to whether cooling towers are required. Until that decision is rendered, NRC should either delete altogether the license condition requiring changeover from once-through cooling, or at least approve Con Ed's application for an extension of the termination date for once-through.

The legislative history of the Federal Water Pollution Control Act Amendments of 1972 specifically identifies the AEC's imposition of a cooling tower requirement at Indian Point as the sort of duplicative action which those Amendments were designed to prevent. The purpose of the law was to give EPA sole authority for

setting effluent limitations, not subject to second-guessing by such agencies as the AEC. Not only are other agencies barred from second-guessing EPA decisions that have already been made, they are also prohibited from "beating EPA to the punch" by making water quality decisions in situations where EPA has yet to act.

The approach taken by the Commission in Seabrook should be taken here as well. The factual distinctions between the two cases are not material, even though Seabrook involved a plant seeking a construction permit, and an EPA proceeding that was further along than is the EPA Hudson River proceeding. The NRC Staff incorrectly distinguishes between the two cases on grounds that in Seabrook, though not here, the Administrator had made a "final" decision. The fact that the Administrator's decision in Seabrook was not in fact final was demonstrated when the First Circuit Court of Appeals reversed it.

The Staff is also incorrect in stating (in the July 24, 1978 letter from Harold Denton to Con Ed) that Con Ed is not harmed by the Staff's refusal to process its application for an extension of the termination date. The Staff's reasoning -- that a decision can be expected from EPA before the May 1982 termination date -- ignores without an adequate basis for doing so, the fact that it takes up to four years to build cooling towers and assumes, that EPA will set a compliance schedule and that the license can then be amended accordingly.

By leaving the license condition in place, the Staff is effectively establishing an effluent limitation, contrary to Congressional intent. Staff should not be exercising any authority whatever related to water pollution control, such as requiring the non-radiological monitoring conditions of the Environmental Technical Specifications Requirements. The Staff should follow the example it set for itself regarding the Brunswick facility, where it amended the license to provide that the date for installing cooling towers would not be established finally until EPA made its final decision on the type of cooling to be used.

C. Hudson River Fishermen's Association.

The license condition requiring termination of once-through cooling in May 1982 should be retained. Seabrook does not require any other result. In Seabrook, the Commission ruled that it would not allow an issue which had been properly decided by EPA to be relitigated before the NRC. Indian Point, on the other hand, involves a determination properly made by NRC before EPA entered the picture. That NRC determination should not now be set aside simply because at some undetermined point in the future, EPA may rule on the same issue. Congress did indeed intend to prevent duplicative agency proceedings, and the second-guessing of EPA determinations by other agencies; it did not intend that in the name of avoiding duplication, the job of protecting Hudson River biota would be performed by neither NRC nor EPA. Yet that would be the result if the NRC deleted a license condition effective in 1982 in deference to an EPA-imposed requirement that might not be effective until years later.

The legislative history of the Federal Water Pollution Control Act Amendments of 1972 does not bar maintenance of the NRC license condition. In the first place, the Congress was concerned with effluent limitations imposed by agencies other than EPA. The changeover from once-through cooling was not mandated in order to protect the river from effluents, but to limit the intake of water. The discussion of the Indian Point case which appears in the legislative history of the FWPCA, consisting of a colloquy among three Senators, reflected inaccurate accounts in that day's newspapers, incorrectly characterizing the AEC license condition as being directed at thermal pollution.

When EPA addressed the issue of cooling systems for Indian Point, its proposed solution tracked NRC's exactly: it specified the same termination date for once-through cooling. However, under EPA procedure, a request for an adjudicatory hearing automatically stays the effectiveness of the agency's action. In that adjudicatory proceeding, Con Ed is

challenging EPA's authority to impose a closed-cycle cooling requirement. Thus, if the NRC decides it will wait for EPA to act, these essential measures for the protection of the Hudson may remain in abeyance forever.

In 1972, after the FWPCA Amendments were passed, the Licensing Board asked the parties to brief the issue of the effect of the new law on the Indian Point 2 proceeding. Con Ed argued unsuccessfully that the new law had deprived the AEC of jurisdiction. HRFA argued that the law did not deprive the AEC of jurisdiction, because the issue was one of intake, not discharge. Moreover, said HRFA, even if the AEC license condition were viewed as an effluent limitation, the AEC retained its jurisdiction because EPA had yet to set any effluent limitation. The new law was designed to prevent other agencies from second-guessing previously established EPA effluent limitations, but that was not the case here.

When the Licensing Board ruled in 1973 that the license condition would continue in force, and thus that the FWPCA had not deprived the Commission of jurisdiction, Con Ed chose not to appeal that ruling. It should therefore be treated as res judicata, and Con Ed should not now be allowed to relitigate the issue. Likewise, PASNY is successor in interest to a stipulation which set a termination date for once-through cooling at Indian Point Unit 3 on the understanding that NEPA authorized the Commission to impose such requirements.

The EPA hearings on Hudson River plants are proceeding under Section 316(b) of the FWPCA to determine the proper intake structures for Indian Point Units 2 and 3. The Fourth Circuit Court of Appeals has ruled, in a case to which Con Ed was a party, that Section 316(b) regulations are not "effluent limitations", as they deal with withdrawals of water, not discharges. (VEPCO v. Costle, 566 F.2d 446 (1977)). Thus, the NRC is not required to defer to EPA either now or in the future, since Section 511(c) of the FWPCA does not apply.

Nevertheless, the EPA proceedings are a convenient forum in which Con Ed and PASNY can attempt to demonstrate that closed-cycle cooling is not necessary. The NRC should, however, set a date certain, no later than the end of 1980, for deciding whether to grant the utilities' applications to lift the present license requirement. While that decision must be made by NRC, it should use the evidentiary record developed in the EPA proceeding. This assumes that EPA will not have acted by that time.

D. Environmental Protection Agency.

NEPA does not authorize the NRC to impose any cooling requirement other than that established by EPA (or a state) under the Clean Water Act. This is clear both from the face of the statute and the legislative history. The clear intent of Congress was to nullify the AEC-imposed license condition. Senator Muskie, principal author of the Clean Water Act, stated explicitly, in response to questions from Senator Buckley, that the purpose of Section 511(c) of the Act was to prohibit the AEC from using its NEPA authority to impose controls more stringent than those imposed by EPA under the Act. Senator Jackson, principal author of NEPA, agreed. Congressman Dingell stated that the purpose of the section was "to overcome that part of the Calvert Cliffs decision requiring AEC or any other licensing or permitting agency to independently review water quality matters". From the beginning, EPA has taken the position that Section 511(c) requires other agencies to accept EPA decisions as conclusive.

On the other hand, nothing in the Clean Water Act prohibits NRC from requiring cooling towers, provided it does not do so on grounds of water quality. In addition, the NRC could require cooling towers, even on grounds of water quality, but its legislative authority for doing so would have to be some statute other than NEPA.

E. Utility Water Act Group.

There is no question that once EPA acts to establish what type of cooling system Indian Point must use, the NRC will be required to follow that determination. The question here is whether prior to the EPA determination, the NRC can impose a license condition which may conflict with the later EPA judgment. The answer is emphatically no. It would undermine the purpose of Section 511(c) if the NRC were permitted to require the construction of an expensive and possibly unnecessary cooling system, or to initiate proceedings, simply because EPA had yet to make a final decision.

The legislative history makes clear that Congress enacted Section 511(c) specifically to overturn, and prevent a repetition of, the AEC's action in ordering closed-cycle cooling at Indian Point. Years after Congress acted, however, the Indian Point license still includes that license condition. There is no regulatory gap that would justify this disregard for Congress' intent: EPA has ample authority to assure that the environment is protected pending full implementation of the Clean Water Act and final Clean Water Act determinations. The NRC should act promptly to delete this and all other non-radiological water-quality-related conditions from this and all other NRC permits and licenses.

F. Power Authority of the State of New York (PASNY)

The NRC is barred by Section 511(c)(2) of the Clean Water Act from exercising any responsibility over non-radiological water quality matters. The Commission's Seabrook decision supports this. Thus the NRC does not have the legal power to impose license conditions at Indian Point Units 2 and 3 requiring termination of once-through cooling. The Commission should take action to withdraw from areas that are properly the responsibility of EPA or the states under the Clean Water Act. In this case, that means either eliminating those license conditions or modifying them to conform them to the EPA (or state) determination, whenever it may come. In urging such a

modification, PASNY is not conceding that the NRC has jurisdiction to impose any non-radiological water quality-related license condition. Nor is it conceding that NRC decisions with regard to Indian Point Unit 2 are binding on Unit 3, of which PASNY is licensee.

In August 1978, PASNY requested an extension of the date for termination of once-through cooling at Unit 3. In October of the same year, the NRC staff denied the relief requested. The Staff cited several grounds, including the necessity of conforming the Unit 3 license to whatever compliance schedule EPA decides on. While PASNY does not agree with all of the assertions in the staff reply, the reply nevertheless provides as a practical matter the "firm commitment" PASNY has sought (in that the staff stated that it would withhold enforcement action until EPA acted). However, the need for a climate of "regulatory certainty" nevertheless makes it important that the NRC act to eliminate or modify the license condition.

HRFA erroneously distinguishes Indian Point from Seabrook on the grounds that in Indian Point, the decision to order termination of once-through cooling was "final" agency action. It makes no difference whether the NRC-imposed license condition is or is not final agency action, if the NRC either lacks jurisdiction to take that action or is otherwise obligated by law to defer to EPA. By law, only EPA or a state can require cooling towers at Indian Point. That was decided by Congress, which was not confused about the facts at Indian Point. The Congressional intent to overturn the AEC's action in imposing a cooling tower requirement was explicit. It is wholly immaterial that the AEC's decision against open-cycle was based on the effects of the intake, rather than the discharge, of cooling water.

Contrary to the suggestions of HRFA and the Staff, Congress did not make the legality of the AEC-imposed license conditions hinge on the timing of the EPA decision. At the time of the Senate debates, EPA had taken no action regarding the type of cooling at Indian Point. Congress' intent was simply to

keep other agencies out of an area reserved for EPA. There is thus no reason to distinguish Indian Point from Seabrook on the basis that in Seabrook, EPA had taken final action, whereas in Indian Point, it has yet to do so.

The Staff misinterprets that portion of Section 511(c)(2)(b) which states that nothing in NEPA will authorize any Federal license-granting agency to impose, as a condition precedent to the grant of a license or permit, "any effluent limitation other than any such limitation established pursuant to this Act" -- i.e., established by EPA or a state. The Staff assumes incorrectly that "established", as used in that clause, refers to a limitation that has already been established. Again, the specific references in the legislative history to the Indian Point situation make clear that Congress intended that no other agency should have the power either to alter an EPA decision already made, or to preempt by prior action a decision that EPA had yet to make.

The NRC should not accept HRFA's suggestion that the Commission commit itself to make its own decision by the end of 1980. In the first place, the NRC does not have jurisdiction to make that decision. Second, that decision would have to be conformed to the EPA decision once EPA acts. Third, if NRC required cooling towers, compliance would be expensive and might turn out to be unnecessary. Fourth, it is possible that the EPA hearings may not be complete within the period suggested by HRFA, so that the NRC would be required to make a decision on an incomplete record.

III. Analysis and Recommendations.

Recommendation:

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Attachment:
Draft Order

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, July 29, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT July 22, 1980, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an open meeting during the week of August 4, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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