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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

RESPONSE OF THE
HUDSON RIVER FISHERMEN'S ASSOCIATION
TO COMMISSION MEMORANDUM AND ORDER

The Hudson River Fishermen's Association ("HRFA") submits this response to the Memorandum and Order of the Nuclear Regulatory Commission ("NRC" or "Commission") dated November 15, 1978. The Commission in that Order requested comments in connection with its review of the decision of the Appeal Board in ALAB-487 on the following issues:

(1) the implication of the Seabrook decision with respect to closed-cycle cooling at Indian Point Unit No. 2; and the existing termination date of May 1, 1982 for operating Indian Point Unit No. 2 without once-through cooling; and

(2) to what extent the license conditions 2.E.(1)(a-d) should be modified to take proper account of EPA's authority.

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SUMMARY OF HRFA'S RESPONSE

There are key facts which distinguish the Seabrook and Indian Point Unit No 2 cases. Thus the conclusions reached by the Commission in the Seabrook decision respecting the relationship between the NRC and EPA are not applicable to Indian Point Unit No. 2. The present NRC license conditions for Indian Point Unit No. 2 requiring cessation of operation with once-through cooling by May 1, 1982 should remain as they are. Finally, a procedure should be established for NRC use of the EPA record and determinations (if reached) as the basis for its own decision as to whether the present license requirement for closed-cycle cooling should be altered.

Responsibilities of the NRC and EPA With Respect to Indian Point Unit No. 2

The NRC and EPA each possess important duties with respect to protection of the environment. The NRC's legal duty arises under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq. and requires that the agency consider possible environmental effects associated with plant construction and operation and, where possible, mitigate those impacts. Pursuant to this legal duty, the NRC, after extensive proceedings in which the question of the impact of operation of Indian Point Unit No. 2 on the Hudson River fishery was extensively litigated, ordered that the plant could not operate after May 1, 1979 with its present once-through cooling system. NRC Facility Operating

License No. DPR-26, Amendment No. 6, issued on May 6, 1974. This requirement was imposed because of the finding that severe long-term reductions in the Hudson River fishery would result from the entrainment and impingement of fish as a result of the operation of the plant's once-through cooling system.

The NRC's requirement for closed-cycle cooling is final. While the date for cessation has been extended by three years until May 1, 1982 to permit an independent review of new data developed by Con Edison, the ultimate requirement still stands and can only be removed by a license amendment. The controversy between once-through and closed-cycle cooling is ended unless a wholly new proceeding is commenced and reaches a contrary conclusion based on new data. Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit No. 3), Commission Memorandum and Order, NRCLI-75-14 (December 2, 1975).

The EPA also possesses important legal duties for environmental protection, including the duty to ensure that the design and capacity of cooling water intake structures of power plants reflect the best technology available for minimizing adverse environmental impact. Section 316(b) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1326 (FWPCA). Pursuant to this duty, the United States Environmental Protection Agency (EPA) proposed on February 8, 1975 a National Pollutant Discharge Elimination System (NPDES) permit for Indian Point Units

No. 1 and 2, requiring in effect that Con Edison cease operation of Indian Point 2 with once-through cooling by May 1, 1979. The permit did not differ from the NRC license; indeed, it tracked it precisely by selecting the same termination date. This EPA condition, however, was automatically stayed as a result of Con Edison's request for an adjudicatory hearing. That stay is still in effect. Indeed, it appears that the adjudicatory hearing begun before EPA in December, 1977 will not be completed until the spring of 1980 and a final decision will not be reached until several months thereafter.

Furthermore, because of arguments being pressed by Con Edison and the other utilities which challenge EPA's authority to impose a requirement for closed-cycle cooling under Section 316(b) and also challenge EPA's jurisdiction in this case, it may be several years before a final decision is made by EPA; indeed, there may never be a decision by EPA.

As the above discussion reveals, the NRC and EPA, in exercising their legal responsibilities to protect the environment, have found themselves addressing the same issue with respect to Indian Point 2. In the NRC's case, a final license requirement exists as a result of the exercise of its legal duty. In EPA's case, a final decision is several years off and remains uncertain. The question raised by the Commission's order is how these decisions and overlapping agency responsibilities should relate to each other.

Section 511(c)(2) of the FWPCA

In Section 511 of the FWPCA Congress sought to sort out the respective environmental responsibilities of EPA under the Water Act and other federal agencies under NEPA. To this end, Congress delegated to EPA exclusive jurisdiction over water quality issues notwithstanding other agencies' independent obligations under NEPA:

> (2) Nothing in the National Environmental Policy Act of 1969 shall be deemed to--
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> > (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or
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> > (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter. FWPCA §511(c)(2), 33 U.S.C. §137Ic)(2).

The purpose of this section is to prevent federal agencies from second-guessing EPA by undertaking their own analyses and reaching their own conclusions on water quality issues already decided by EPA. The purpose of this section thus fully reflects the overall intent of the FWPCA:

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of

> paperwork and interagency decision procedures and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." §101(f), 33 U.S.C. §1251(f) (emphasis added).

Section 511(c)(2) does not provide that pre-existing determinations of federal agencies made under NEPA are to be undercut or altered by subsequent EPA action. Such a result would only frustrate the national policy cited above. At Indian Point 2, the NRC had been through years of hearings on the issue of the impact of the plant's cooling system on the Hudson River fishery and had reached a final decision on the type of cooling system required before EPA established any effluent limitations or other requirements for the plant. In so doing, the NRC was acting in a manner totally consistent with the mandate of Section 511(c)(2). It was neither reviewing effluent limitations or other requirements established by EPA. Nor was it imposing effluent limitations different from those established by EPA. EPA had not established applicable effluent limitations; in fact, it still has not. Moreover, the NRC license condition is not in the nature of an effluent limitation. The requirement is based on considerations of the impacts of the plant's massive water withdrawals, not on consideration of its discharges.

The present NRC license condition thus fully comports with the mandate of Section 511(c)(2).

Legislative History of the Section 511(c)(2)

The legislative history of Section 511(c)(2) does not support a different conclusion. The following statements on the House-Senate Conference Report, made by Representative Robert Jones, chairman of the managers of the bill in the House, best summarize Congress' intent:

> "Section 511(c)(2) is intended to obviate the need for other Federal agencies to duplicate the determinations of the states and EPA as to water quality considerations."
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> * * *
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> "The Conference agreement provides that nothing in the National Environmental Protection Act may be construed as the basis for establishment by other federal agencies of more stringent controls on the discharge of pollutants than those provided under this Act, nor are such agencies authorized to review or alter effluent limitations issued under this Act."
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> Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works Serial No. 931-1 (1973), at 236 and 239 (emphasis supplied) (Hereafter cited as "Legis. Hist.")

This language makes clear Congress' intent to place limits on federal agency actions taken after EPA limitations are established.

The colloquy between Senators Buckley, Muskie and Jackson in the course of the Senate debate on the Conference Report does not mandate a different interpretation, although it is confusing. (See Legis. Hist. 196-202). This colloquy is full of factual errors. All three Senators rely on articles published

that day in The New York Times and Washington Post. Neither article in its discussion discriminates clearly between intake and discharge of water: both treat the Indian Point 2 case generally as one of thermal pollution. The Post article, for example, headlined "AEC Orders Con Ed to Halt Thermal Pollution of River," stated:

> "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." (Legis. Hist. at 199).

Citing the articles, the Senators expressed concern that §511(c)(2) would appear to bar environmental decisions "of this type." They explained in identical language: "This appears to be an 'effluent limitation' which is a 'condition precedent' to license." (Legis. Hist. at 198, 202). Were the AEC's order exclusively an effluent limitation, the colloquy might be more troubling. As it is neither exclusively nor even primarily an effluent limitation, §511(c)(2)(B) does not apply. Moreover, the colloquy is phrased in terms of "this type of action" rather than in terms of the AEC's particular action at Indian Point.

Senator Buckley asked if "environmentalists will be barred from intervening in AEC license proceedings 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?" Senator Muskie answered: "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 matters which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes." (Legis. Hist. at 198).

This discussion does not address the situation posed by Indian Point 2 where the AEC has imposed a license requirement pursuant to its NEPA responsibilities (and not even a requirement in the nature of an effluent limitation) well before the EPA has set effluent limitations under the Water Act.

The Commission's Seabrook Decisions

The Commission's decisions in Seabrook*/ do not mandate any alteration in the NRC license requirement for Indian Point 2. In Seabrook, the Commission had before it a situation totally different from that presented by Indian Point 2.

In Seabrook, this Commission determined that EPA had the leading role in determining the type of cooling system for the plant through its control over thermal discharges. Once EPA had made its decision, the NRC must accept EPA's determination rather than allow the issue of the plant's water quality impact to be

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*/ Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), CLI-77-8, 5 NRC 503, 508 (1977); CLI-78-1, 7 NRC 1, 25-26 (1978).

re-litigated. The Commission reasoned that Section 511(c)(2) vested EPA with sole responsibility over thermal discharges and the Commission should not thwart that intent by allowing the issue of the plant's impacts to be re-litigated before the NRC.

In contrast to Seabrook, the Indian Point Unit No. 2 case does not involve the re-litigation before the NRC of an issue decided by EPA. In Indian Point, the NRC has already gone through an extensive NEPA analysis and extended hearings on the question of the plant's impact on the Hudson River estuary. It had reached a final decision on this issue well before EPA ever entered the arena.

In Seabrook the NRC had not gone through years of hearings on the issue of entrainment and impingement nor had it established a license condition, mandated by NEPA, requiring use of a particular type of cooling system; moreover, in contrast to Indian Point, at the time the construction permits were issued in Seabrook, the EPA had already acted preliminarily to establish effluent limitations for the plant.

For these reasons, HRFA submits that the Commission's ruling in Seabrook does not affect the present terms of the NRC license.

Need for Procedure Which Will Ensure Final Decision on the Merits

The federal government has the responsibility to protect the environment and produce a final decision on how this protection

is to be accomplished. Neither the interests of environmental protection nor finality are served by preemption of the NRC's decision in order to give another federal agency, EPA, the opportunity to make a decision. This is especially so where that other agency, EPA, may never reach a final decision on the merits. Indeed, the basic environmental mandates under which both the NRC and EPA operate would be completely undercut were the federal government never to reach a final decision in this case simply because responsibility bounced from one agency to the other.

Yet that is precisely what could occur if the NRC were to defer to EPA. EPA may well not reach a final decision for several more years; in fact, it may never reach a final decision on the merits. Con Edison and the other utilities argue that the agency lacks the basic authority to impose a requirement for closed-cycle cooling under Section 316(b) of the FWPCA. That issue will not finally be resolved until after the conclusion of the EPA hearings and court review of EPA's decision. Other arguments Con Edison is making before EPA could, if successful, result in substantial delays in a final decision. For example, it is Con Edison's position that jurisdiction to issue the contested permit condition was transferred from EPA to the New York State Department of Environmental Conservation and, therefore, it is the DEC that should be holding the hearings and making the final decision.*/ Such a transfer, if ordered, would result in a delay

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*/So far Con Edison has not been successful in this argument. See Central Hudson Gas & Electric Co., et al v. EPA, ___F.2d___ (November 3, 1978), petition for rehearing pending.

in the hearings. Con Edison, along with the other utilities, is also arguing that the presently ongoing hearing on the Section 316(b) issues must be expanded to consider other issues raised by the NPDES permits (under Section 316(a), 301 and 304).

If the arguments made by Con Edison were successful, there might never be a final decision by EPA--not because there is not substantial environmental harm occuring to the environment--but because no agency would be in a position to make a final decision on the merits.

The chronology of events to date concerning federal agency protection of the Hudson River fishery and the rendering of final decisions regarding such protection is highly instructive. Summarized below, it shows us the following.

First, although all the federal statutes*/ require protection of the environment and although the issue of fish entrainment and impingement has been a central point of concern since 1965, no single federal agency has yet reached a point where Con Edison has had to actually provide the necessary environmental protections at any one of its plants existing on the Hudson River.**/

Second, studies and hearings on those studies have become

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*/NEPA, FWPCA, the Federal Power Act.

**/The following federal agencies are involved: NRC, FPC (now FERC), the Army Corps of Engineers, EPA.

a substitute for agency decision. This is true even though the issue of fish entrainment and impingement has been studied for over a decade and despite the fact that it is clear that the issues will never be resolved by facts alone--for even if there were agreement by the experts, the issue ultimately requires an assessment and a judgment on risks and costs.

Third, because of the multiplicity of agency forums with overlapping jurisdiction in this stretch of the Hudson River estuary, there is real danger that the parties can play one forum against the other just as each agency can, thus militating against any final decisionmaking.

Chronology

1965 U.S. Court of Appeals for the Second Circuit directs the Federal Power Commission to take into consideration the impact of the proposed Storm King pumped storage plant on the Hudson River fishery due to impingement and entrainment.

1965 to 1968 A study financed by Con Edison of the Hudson River fishery is carried out under the auspices of an intergovernmental committee.

1970 Federal Power Commission concludes that there is no significant harm posed by Storm King to the Hudson River fishery; license for plant construction operation is issued.

1970 to 1972 Army Corps of Engineers issues construction permits for intake structures for two large fossil fuel plants at

Bowline and Roseton (owned in part by Con Edison) without making any assessment of fishery impact. Environmental groups sue.

1971 to 1974 Issue of the impact of operation of Indian Point 2 on the Hudson River fishery is studied by AEC staff, extended hearings take place and a final determination is made that substantial harm to the Hudson River fishery will occur unless once-through cooling ceases by May 1, 1979; the operating license is conditioned accordingly.

1972 to Present Con Edison commences another several-year research program on the Hudson River fishery costing $20 million.

1974 The U.S. Court of Appeals for the Second Circuit orders the FPC to hold further hearings on the fishery issue in light of important new evidence suggesting a major error in the FPC's earlier analysis.

1974 U.S. District Court orders the Corps of Engineers, on consent, to conduct an environmental analysis of the impacts of two new fossil fuel plants (Bowline and Roseton) on the Hudson River fishery.

1974 to 1975 Con Edison seeks and obtains a delay in the fishery hearings before the Federal Power Commission on the grounds that it wants additional time to complete its research on the river and the plant is not needed as soon as previously thought.

1975 The parties to the NRC licensing proceeding for Indian Point 3, exhausted by Indian Point 2 hearing, agree to enter into a stipulation which calls for cessation of once-through cooling at Indian Point 3 but provides an opportunity for the license to seek a reopening at a subsequent time. The Commission holds that the license requirements for cessation of once-through cooling at Indian Point 2 and 3 are final, absent a license amendment to the contrary.

1975 EPA issues proposed NPDES permit[5] requiring cessation of once-through cooling at Indian Point 2 and 3, Bowline and Roseton; proposed permit conditions automatically stayed by Con Edison and other utilities' requests for adjudicatory hearings.

1976 U.S. District Court extends time for Corps of Engineer's environmental assessment to 1977.

1976 Con Edison obtains from the NRC a one-year extension of 1979 date for cessation of once-through cooling at Indian Point 2 based on Village of Buchanan's failure to grant a variance for construction of cooling tower.

1977 Con Edison obtains an additional two-year extension from the NRC, until May 1, 1982, to provide time for NRC review of additional data which could possibly affect requirement for closed-cycle cooling.

1977 Corps of Engineers issues DEIS on Bowline and Roseton, but never issues an FEIS.

1977 EPA commences hearings on Con Edison and other Hudson River utilities' requests for adjudicatory hearings.

1977 to 1978 FPC, now FERC, continues deferral of fishery hearings on grounds that EPA hearings are going forward involving many similar issues and because, according to Con Edison, the plant is now not needed until 1992.

1978 U.S. District Court extends time for Corps of Engineers to publish FEIS to April, 1979.

1978 NRC staff denies Con Edison's and PASNY's requests for indefinite extensions of requirements for cessation of once-through cooling and complete removal of license conditions for Indian Point 2 and 3 on grounds that the NRC will have to conform its requirements to those set by EPA.

Thus, at the end of 1978, more than 13 years since the issue of fish protection in the Hudson River estuary was first raised, the question is still in danger of not being finally resolved. The FERC has delayed its hearings on the issue; the Corps of Engineers has still not issued an FEIS; a final decision by EPA is several years off and even then may never be made; the NRC is the only one with a final license requirement, but it now appears to be contemplating turning the whole issue over to EPA. Meanwhile, the existing plants on the river continue to operate.

Proposed Procedure

In granting an extension in the date for cessation of once-through cooling to 1982, the Atomic Safety and Licensing Board contemplated that the additional time would be used for an independent review by the NRC staff of Con Edison's new data, hearings thereon, and a decision prior to the date for commencement of construction of the cooling tower.*/ The NRC staff has determined that, rather than go forward with such a process, it will allow the EPA hearings to function as the forum for resolution of this issue. To the extent the staff views the EPA proceedings as an appropriate forum for the development of a record, HRFA believes the NRC staff approach is a wise one. However, the NRC has ultimate responsibility for making its own determination respecting its own license conditions. It cannot defer indefinitely to the completion of the EPA proceedings. These proceedings may never result in a substantive decision on the merits; even if they do, that decision may not come for many years. In the meantime, the NRC retains its responsibilities under NEPA to protect the environment.

In order to resolve the situation in a practical and fair

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*/ Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), LBP-77-39, 5 NRC 1452, 1468-9 (1977).

way, HRFA proposes the following:

1. The present EPA proceedings should constitute Con Edison's final opportunity to establish that closed-cycle cooling is not required at Indian Point 2;

2. The NRC should set a date certain for decision within the next two years, whatever the status of the EPA proceedings by that date. The NRC should use for its decision the record compiled in the EPA hearing and, if in existence, any decision on the merits reached by EPA (whether an initial or final decision). On the basis of that record and decision (if made) the NRC should make its own decision on whether Con Edison's application to amend the NRC license to eliminate the requirement for closed-cycle cooling should or should not be denied. In the event that EPA's requirement has been finally established by the set date, then the NRC should adhere to EPA's requirement. However, if there is no final decision from EPA, the NRC must reach its own conclusion.

This procedure accomplishes the following: it avoids agency duplication and delay; it ensures that the NRC will rule on this issue once and for all within a definite time period; it allows the NRC to benefit from EPA's consideration of the issue without deferring to an indefinite and perhaps non-existent EPA decision.

CONCLUSION

For the foregoing reasons, the Commission should not alter the present NRC license conditions requiring cessation of once-through cooling at Indian Point 2 by May 1, 1982. It should not suspend or modify that condition for the purpose of deferring to EPA. It should adopt a procedure whereby it can benefit from and use the EPA record and decision in its own determination on Con Edison's application to eliminate the present requirement for closed-cycle cooling.

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