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NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

(Indian Point Station,
Unit No. 2)

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Docket No. 50-247
OL No. DPR-26
(Selection of Preferred Alternative
Closed-Cycle Cooling System)

NRC STAFF'S COMMENTS IN RESPONSE
TO COMMISSION'S NOVEMBER 15, 1978 ORDER

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. History	3
II. The Commission's Identified Questions	12
A. The Implication of the <u>Seabrook</u> Decision	12
B. Whether the License Condition Should Be Modified	19
III. Indian Point 3.....	20
IV. Conclusion.....	22

TABLE OF AUTHORITIES

<u>Court Cases</u>	Page
<u>Appalachian Power Co., et al., v. Train</u> , 545 F2d 1351 (1976).....	14
<u>Consolidated Edison Company of New York, Inc. v. Walter Hoffman, et al., as the Zoning Board of Appeals of the Village of Buchanan</u> , 43 N.Y. 2d 598 (1978).....	6

Administrative Cases

Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)

ALAB-487, 8 NRC 69 (July 1978)	1, 6
LBP-78-21, 7 NRC 1048 (June 1978).....	1
LBP-73-33, 6 AEC 751 (1973).....	3
ALAB-188, 7 AEC 323 (1974).....	3, 4
LBP-76-43, 4 NRC 598 (1976).....	5
LBP-77-39, 5 NRC 1452 (1977).....	7
Unpublished Appeal Board Order, July 19, 1977	7

Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 3)

LBP-75-31, 1 NRC 593 (1975)	4
ALAB-287, 2 NRC 379 (1975).....	4
CLI-75-14, 2 NRC 835 (1975).....	4

Public Service Company of New Hampshire (Seabrook)

CLI-78-1, 7 NRC 1 (January 1978).....	1, 12, 13, 17, 18
ALAB-366, 5 NRC 39 (1977).....	12

Statutes

Page

Federal Water Pollution Control Act

33 USC §1251, et seq.	12
33 USC §1371(c)(2)(B).....	13,14

National Environmental Policy Act of 1969

42 USC 4321, et seq.	12,13
---------------------------	-------

Legislative History

History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, 93rd Congress, 1st Session, Committee Print 93-1, January 1973	15
--	----

Regulations

40 CFR §125.35(d)(2)	9
40 CFR §125.36(b and c).....	9
40 CFR §125.36(1).....	9,10
40 CFR §125.36(n).....	10

Miscellaneous

Federal Register Notices

43 FR 49082 (October 20, 1978).....	9
41 FR 46522 (October 21, 1976).....	6
41 FR 12933 (March 29, 1976).....	6
40 FR 60115 (December 31, 1975).....	12, 14

Environmental Statements

Draft Environmental Statement for Selection of the Preferred Closed-cycle Cooling System at Indian Point Unit No. 3, NUREG-0296, August 1977..... 6

Final Environmental Statement for Facility License Amendment for Extension of Operation with Once-through Cooling, Indian Point Unit No. 2, NUREG-0130, November 1976..... 7

Final Environmental Statement Related to Operation of Indian Point Nuclear Generating Station, Unit No. 3, NUREG-75/002, February 1975..... 4

License Amendment

Carolina Power & Light Company (Brunswick), License Amendment No. 17 for Unit 1 and No. 42 for Unit 2, dated December 15, 1978..... 17, 18

INTRODUCTION

On November 15, 1978, the Nuclear Regulatory Commission issued an order announcing its intent to review ALAB-487.^{1/} ALAB-487 was a one-paragraph affirmance of the Licensing Board's June 14, 1978 order finding that, upon the issuance of the requested zoning variance, paragraph 2.E(1)(b) of the Unit 2 license had been satisfied in that all governmental approvals required to proceed with the construction of the tower had been received.^{2/} The relationship of the NRC and the Environmental Protection Agency in the area of aquatic impacts of operation of nuclear power plants was not fully raised as an issue before the Licensing and Appeal Boards. The Commission has now asked the parties to the captioned proceeding to address, with particular reference to the role of EPA:

- 1) The implication of the Seabrook decision^{3/} with respect to closed-cycle cooling at Unit 2 and the existing termination date of May 1, 1982 for operation of Unit 2 with once-through cooling; and

1/ Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-487, 8 NRC 69 (July 1978)

2/ LBP-78-21, 7 NRC 1048.

3/ Public Service Company of New Hampshire (Seabrook, CLI-78-1, 7 NRC 1 (January 1978)).

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

The Commission also invited the comments of EPA and the Power Authority of the State of New York (PASNY), the licensee for Indian Point, Unit 3.

In response to the Commission's order, the NRC Staff herein concludes:

- 1) the NRC is required by law to defer to EPA's limitations upon cooling water intake and discharge at the Indian Point Station once NPDES permits have been issued by EPA as a final agency action;
- 2) since the closed-cycle cooling requirements in the NPDES permits for these units are stayed, the NRC is not precluded from conditioning the operating licenses for Indian Point, Units 2 and 3 so as to minimize the impact on aquatic biota of the plant; and
- 3) as a matter of discretion, the NRC should, however, take such actions as will avoid any conflict between the conditions of the NRC licenses for Units 2 and 3 and the potential requirements of the NPDES permits.

ARGUMENT

I. History

Following a full adjudicatory hearing, an AEC (now NRC) Licensing Board determined, prior to issuance of an operating license for Indian Point Unit 2, that, in order to protect the resources of the Hudson River fishery, the plant should operate with closed-cycle cooling and set May 1, 1978 as the date for termination of operation with once-through cooling.^{4/} Selection of a preferred closed-cycle system was deferred pending a study and Environmental Report from the licensee. On review of the Licensing Board's decision, the Appeal Board let stand the Licensing Board's requirements with a change of the date for termination of once-through cooling until May 1, 1979 (ALAB-188).^{5/} In ALAB-188 the Appeal Board expressed uncertainties about the adequacy of the Staff's analysis of the impacts of the plant on the Hudson River aquatic ecosystem and directed the Staff to take a "fresh look" at the subject. 7 AEC 407. The termination date was also made contingent upon the licensee's acquisition (acting with due diligence) of all necessary governmental approvals for construction of the closed-cycle system.

^{4/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), LBP-73-33, 6 AEC 751 (1973).

^{5/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 322, 406 (1974).

Following ALAB-188, the Staff prepared an FES in connection with the issuance of an operating license for Unit 3, which dealt with the impacts from simultaneous operation of all three units at the site^{6/} and addressed the inadequacies identified by the Appeal Board.^{7/} This FES provided the underpinning for a stipulation entered into by all parties to the Unit 3 operating license proceeding, which set a once-through cooling termination date of September 15, 1980 subject to certain contingencies which could defer that date.^{8/} This stipulation, which settled the last remaining issue among the parties to the proceeding, was approved by the Licensing Board.^{9/} Both the Appeal Board^{10/} and the Commission^{11/} reviewed the decision.

In its review of ALAB-287, the Commission focused on the adequacy of the "fresh look" taken in the Unit 3 FES and held:

- ^{6/} Unit 1 is shut down indefinitely and no question is raised by the Commission with respect to that unit.
- ^{7/} NUREG-75/002, February 1975 (2 vols.)
- ^{8/} Stipulation dated January 13, 1975, reproduced at pp. XVI through XXXI of NUREG-75/002.
- ^{9/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 3), LBP-75-31, 1 NRC 593 (1975).
- ^{10/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 3), ALAB-287, 2 NRC 379 (1975).
- ^{11/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 3), CLI-75-14, 2 NRC 835 (1975).

Our independent review of the regulatory staff's environmental statement leads us to differ with the Appeal Board's conclusion. Having been told by the Appeal Board in ALAB-188 to correct certain deficiencies, the regulatory staff produced an environmental statement for Units 2 and 3 which we deem thoroughly responsive to the Board's concerns. Our central concern, however, is whether the statement was adequate to satisfy NEPA's requirements, in particular with respect to the requirement that closed-cycle cooling be installed for the last 35 years of the useful lives of these reactors. All of the parties agree that the FES is adequate. And our independent review discloses no deficiencies. (Footnotes omitted). ^{12/}

By operation of paragraph 2(e) of the stipulation (paragraph 2.E(1)(e) of the Unit 3 license), termination of once-through cooling at that facility is now set for September 15, 1982. ^{13/}

Under the licenses for both units, the licensees were to submit environmental reports regarding their choice of preferred closed-cycle cooling systems. These reports were to be reviewed by the Staff and appropriate amendments issued following notice of opportunity for hearing. With respect to Unit 2, a hearing was requested and held, after which the Licensing Board found that a natural draft cooling tower is the preferred closed-cycle system and that all necessary governmental approvals had been obtained such that once-through operation could be terminated by May 1, 1980. ^{14/} The question of the Village of Buchanan's

^{12/} Id. at 838.

^{13/} Paragraph 2.E(1)(3) provides for a one year extension in the termination date for each striped bass spawning season during which Unit 3 operated below a certain power level for a specified number of days. The licensee is, however, entitled to only two such extensions and has already availed itself of both. See: Notices of Extension of Interim Operation Period, dated September 8, 1975 and August 27, 1976.

^{14/} Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), LBP-76-43, 4 NRC 598 (1976).

right to withhold the requested zoning variance was raised both before the Licensing Board, Appeal Board, and the New York state courts. Upon the decision of the New York Court of Appeals^{15/} that the Village could not withhold the variance, it was issued on April 13, 1978. As noted above, the Licensing Board thereupon determined that all necessary governmental approvals had been obtained. The Appeal Board's affirmance of this holding (ALAB-487) is the action now under review by the Commission.

The choice of the closed-cycle cooling system for Unit 3 has followed a similar path, with the environmental report being submitted, notice of opportunity for hearing being published,^{16/} and a hearing being requested and granted.^{17/} A hearing has not yet been held in that matter.^{18/}

On June 6, 1975, Consolidated Edison Company (Con Edison), the licensee for Unit 2, requested a two-year extension of operation with once-through cooling (from May 1, 1979 to May 1, 1987). The Staff issued a Draft Environmental Statement supporting the extension. The DES evoked substantial comment. The EPA argued, without substantial elaboration, that any action by NRC to amend the operating license would undermine EPA

^{15/} Consolidated Edison Company of New York, Inc. v. Walter Hoffman, et al., as the Zoning Board of Appeals of the Village of Buchanan, 43 N.Y. 2d 598 (1978).

^{16/} 41 FR 12933 (March 29, 1976).

^{17/} 41 FR 46522 (October 21, 1976).

^{18/} The DES, which supported the selection of a natural draft tower, was issued in August 1977 (NUREG-0296).

processes.^{19/} Partially prompted by vigorous comment, the NRC Staff reanalyzed the effect of continued once-through operation upon the fishery and opposed the extension in the FES. Following an adjudicatory hearing, the Licensing Board granted an extension of once-through operation at Unit 2 May 1, 1982.^{20/} No party appealed the decision,^{21/} and the Appeal Board let it stand.^{22/}

19/ The EPA stated:

An exact date has not yet been set for the adjudicatory hearing requested by Con Edison on the closed-cycle cooling requirement and the related compliance schedule (although the hearing is expected to take place during the spring of 1977). To base the proposed amendment on an as yet unspecified date for the hearing is both unsound and premature. Extending the termination date for the purpose of awaiting EPA's decision on Con Edison's requests is not only unwarranted but also contradictory to the NPDES permit requirements and in conflict with EPA's decision-making authority.

The U.S. Department of Commerce, the U.S. Department of the Interior, the New York State Attorney General's Office and private environmental groups also opposed the extension.

20/ Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), LBP-77-39, 5 NRC 1452 (1977). The Board granted an extension beyond the date originally requested by the licensee on the ground that the greater time period was dictated by the Staff's need to review the application to eliminate the once-through cooling system requirement (see *infra*) and the possibility of a hearing thereon. 5 NRC 1468-71.

21/ The Staff (June 24, 1977) and Hudson River Fishermen's Association (June 27, 1977) initially filed exceptions, but subsequently withdrew them (letters dated July 12, 1977).

22/ Order (unpublished), dated July 19, 1977.

On March 15, 1977, Con Edison filed an application for an amendment to the Unit 2 license eliminating the requirement of conversion to closed-cycle cooling. The application included a request for the "ancillary relief" of extension of the termination date for operation with once-through cooling so as to allow the NRC to reach a final agency decision on the application to "eliminate", plus any judicial review thereof.^{23/} While the Staff has not taken any action on the application to "eliminate", it has denied, for the present time, the licensee's request for an extension of the once-through cooling termination date.^{24/}

On August 7, 1978, PASNY applied to the NRC for an extension of the once-through cooling termination date set for Unit 3 similar to that sought by Con Edison in its "ancillary relief".^{25/} For the same reasons as stated in its letter of denial to Con Edison, the Staff denied PASNY's request.^{26/} The Staff published a "Notice of Denial of Amendment

^{23/} Application, pp. 3-4.

^{24/} Letter from Harold R. Denton, Director, Office of Nuclear Reactor Regulation, to Edward J. Sack, Counsel for Con Edison, dated July 24, 1978. A copy of which is appended as Attachment 1 to this brief.

^{25/} PASNY actually requested an amendment extending the date so that no procurement or construction activities on a closed-cycle cooling system would have to be undertaken until such time as EPA renders a final decision on the cooling system for the plant and any judicial review thereof is completed.

^{26/} Letter from Harold R. Denton to Paul J. Early, Assistant Chief Engineer-Projects, PASNY, dated October 13, 1978. A copy of which is appended as Attachment 2 to this brief.

Application" in the Federal Register, which noted the right of the licensee and other affected parties to request a hearing on the Staff's action.²⁷ By reply letter of November 13, 1978 (Early to Denton), PASNY stated:

We do not agree with every assertion in your letter, but your letter does as a practical matter provide the firm commitment we had sought...We do not feel a hearing at this time would be appropriate.

No other person requested a hearing.

No other person requested a hearing.

EPA issued NPDES permits on February 24, 1975 for Unit 2 and on June 25, 1975 for Unit 3. The dates for compliance (computed on the basis of the number of months necessary to design and construct a close-cycle system) were therein set as May 1, 1979 and September 15, 1980, respectively. Pursuant to 40 CFR §125.36(b and c), Con Edison requested an adjudicatory hearing in April 1975 and the request was granted in May 1975. In July 1975, PASNY also requested an adjudicatory hearing, which was granted in August 1975. The effect of the grant of the hearings is to stay the effectiveness of the contested permit conditions (40 CFR 125.35(d)(2)).

The EPA adjudicatory hearing is a consolidated proceeding affecting four Hudson River Power plants. It is being conducted before an Administrative Law Judge, who will certify the record to the Regional Administrator of EPA Region II (40 CFR 125.36(1)). Subject to the grant of a petition for review by the EPA Administrator, or his election

²⁷/43 FR 49082 (October 20, 1978).

to review the decision sua sponte (40 CFR 125.36(n)), the Regional Administrator's decision will constitute final agency action (40 CFR 125.36 (1)(4)). The Regional Administrator will establish, as part of his decision, a compliance date, calculated as described above, which will be incorporated in the permit.

The primary issues involved in the EPA proceeding are essentially the same as those which have underlain NRC's NEPA considerations, viz, the impact of once-through cooling upon the aquatic environment affected by the Indian Point Station (in conjunction with the effects of other area Hudson River power plants). The New York State Attorney General's Office and Department of Environmental Conservation, the Hudson River Fishermen's Association, PASNY and Con Edison are, among others, parties to the proceeding.^{28/} These parties have also been the principal participants (in addition to the NRC Staff) in various NRC proceedings relating to the aquatic impacts of the Indian Point plants. The NRC Staff, while not a party to the EPA proceedings, has been lending substantial assistance to the development of the EPA record through involvement of members of its Office of Executive Legal Director and the Oak Ridge National Laboratory, under contract to NRC.^{29/}

^{28/} The National Oceanic and Atmospheric Association (NOAA) of the Department of Commerce is also a party on the single issue of threats from the power plants to shortnosed sturgeon (an endangered species which has been found in impingement counts at these power plants).

^{29/} See: Letters of September 23, 1977 and February 6, 1978, from Edson G. Case and Richard C. Browne (NRC) to Meyer S. Olnick (EPA-Region II). Copies of which are appended as Attachment 3 to this brief.

The timing of a final agency decision by EPA is very difficult to predict. Cross-examination of the utilities' direct case is virtually complete and the direct case of EPA and the intervenors is to be filed within ninety days of the completion of cross-examination. Thereafter, the utilities may present a rebuttal case. A realistic expectation for a decision by the Regional Administrator appears to be early 1980. Assuming review is sought and granted by the Administrator, the final decision should be issued by late 1980 or early 1981.

II. The Commission's Identified Questions

A. The Implication of the Seabrook Decision

In its January 1978 Seabrook decision the Commission faced the question of "whether [it] may accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental impacts from the cooling system in striking an overall cost-benefit balance for the facility".^{30/} The Commission concluded that it could thus rely on EPA, and on the facts of Seabrook it should do so.^{31/}

The NRC had previously acknowledged in adjudicatory opinions^{32/} and in the Second Memorandum of Understanding between NRC and EPA^{33/} that it lacked authority to set different limitations from those imposed by EPA pursuant to the Federal Water Pollution Control Act (FWPCA) 33 U.S.C. §1251 et seq. However, these earlier statements and the Commission's January, 1978 Seabrook decision reflect the responsibility of NRC under NEPA to evaluate the magnitude of the marine environmental impacts from the project (given a cooling system which meets the EPA-imposed limitations) in striking an overall cost-benefit balance for the facility.^{34/}

^{30/} CLI-78-1, 7 NRC at 23-24.

^{31/} Id.

^{32/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC 39 (1977).

^{33/} 40 F.R. 60115 (December 31, 1975).

^{34/} See: ALAB-366, 5 NRC at 51; Appendix A to 40 F.R. 50115 at paragraph 5; CLI-78-1, 7 NRC at 23-24.

The Commission has now asked the parties to this proceeding to state their views as to the implications of its Seabrook decision on the closed-cycle cooling conditions in the Indian Point Unit 2 license, in particular on the May 1, 1982 date for termination of operation with once-through cooling. The facts presented in Seabrook were different from those presented in the instant case in the significant respect that, at the time of the Commission's ruling in Seabrook,^{35/} EPA had completed final agency action following an adjudicatory hearing. As noted above in the description of the EPA proceedings on the Hudson River power plants, an initial decision has not yet been issued by the Regional Administrator and the closed-cycle cooling requirement in the NPDES permit for Unit 2 is stayed.

The fact that a final determination had been reached by the Administrator was an essential factor underlying the Commission's Seabrook holding.^{36/} Section 511(c)(2)(B) of the FWPCA, which the Commission was interpreting, only prohibits the NRC (or any other Federal agency) from imposing, under NEPA, a license condition for the protection of aquatic biota different from one

^{35/} Subsequent to the Commission's decision, the Court of Appeals for the First Circuit remanded the determinations to the EPA Administrator. Following further proceedings before him, the Administrator reaffirmed his earlier findings.

^{36/} CLI-78-1, 7 NRC at 23, 26-28.

established pursuant to FWPCA when such an effluent limitation has been established.^{37/} Since the limitation in question here, namely, the requirement of conversion to closed-cycle cooling, has been stayed, no limitation has, at the present time, been established pursuant to the FWPCA.^{38/}

The Staff has also looked at the Second Memorandum of Understanding and at the legislative history of §511(c)(2) and has found nothing which specifically addresses the division of responsibility between NRC and EPA prior to the establishment of a limitation under the FWPCA. The Second Memorandum only addresses the situation where there are "applicable limitations or other requirements promulgated or imposed pursuant to the FWPCA".^{39/} Similarly, the statements made during debate on §511(c)(2) seem

^{37/} 33 U.S.C. §1371(c)(2)(B), which reads:

(2) Nothing in [NEPA] shall be deemed to -

(B) 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 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.

^{38/} Since the thermal effluent guidelines for the steam electric generating plant category were remanded to EPA by the Fourth Circuit in Appalachian Power Co. et al. v Train, 545 F.2d 1351 (1976) and have yet to be repromulgated by EPA, there are also no category-wide effluent limitations applicable to the Indian Point Station.

^{39/} Paragraph 3 of Appendix A to the Second Memorandum -- Policy Statement on Implementation of Section 511 of [FWPCA], 40 F.R. 60120, supra.

to accept as a premise that applicable limitations exist under FWPCA.^{40/}

In the circumstances of this case, where there is no present limitation imposed under FWPCA, the Commission is not precluded from conditioning the Unit 2 license so as to minimize the impacts on aquatic biota from operation of the Indian Point Station.

During the pendency of the EPA determination, the Commission should direct its efforts, under NEPA, to the maintenance of the status quo and the protection of the environment. At the same time, it should give due recognition to the fact that once limitations are established under the FWPCA it will not be able to impose any different requirements. The position taken by the Staff is set forth in the letter from Mr. Denton to Mr. Sack (Con Edison), supra. By that letter, the Staff denied Con Edison's request for extension of the termination date for once-through cooling until the Commission had reached a final determination on the application to eliminate the closed-cycle cooling requirement and any judicial review thereof had been completed. The bases for that denial (as summarized in

^{40/} History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, 93rd Congress, 1st Session, Committee Print 93-1, January 1973 (2 Vols). See, for example, pages 183 and 239.

the subsequent letter from Mr. Denton to Mr. Early (PASNY), supra.)

were:

1. NRC will be required to conform its license conditions to whatever compliance schedule is adopted by EPA.
2. The §316 proceeding involving the closed-cycle cooling requirement for IP2 (and other facilities on the lower Hudson River, including IP3) is in process.
3. If the compliance date ultimately established by EPA is beyond the May 1, 1982 date for termination of operation with once-through cooling, or if EPA allows life-of-plant operation with once-through cooling, NRC will have to determine, on a cost-benefit basis, whether IP2 may continue to operate for the designated period.
4. NRC Staff anticipates a final EPA administrative decision ^{4/} well in advance of May 1, 1982, so that the Staff will have sufficient time to take whatever action might be required prior to that date. No prejudice to Con Edison arises, therefore, from a continuation of the present license condition. 5/

4/ For purposes of the taking of necessary actions by it, the Staff considers that reliance on final decisions of EPA need not await the completion of any judicial review thereof. Public Service Company of New Hampshire (Seabrook), Commission Memorandum and Order, August 9, 1978, slip op. at 3; CLI-78-1, 7 NRC 1 at 28; CLI-77-8, 5 NRC at 521 n. 20.

5/ The operating licenses for IP2 and IP3 do not contain any compliance schedules, i.e., they do not establish intermediate dates by which the licensees must have passed certain milestones in the construction of their towers. It follows that Con Edison and PASNY could not be in noncompliance until the actual date for termination of operation with once-through cooling. Furthermore, in the event that the final EPA administrative decision has not been handed down as the termination dates in the licenses draw near, the Staff will undertake the necessary reviews to either amend the licenses or take other appropriate action.

The position taken in the Denton letter was also based upon a policy assessment related to the need for the Staff to prepare an assessment of the environmental impacts and effect on the cost-benefit balance of any

amendment modifying or deleting the requirement for termination of once-through cooling on May 1, 1982. Where such an assessment has been required, it has entailed a substantial level of staff effort.^{41/} The policy considerations factored into the Staff's determination are outlined below.

1. The analysis required in connection with an amendment modifying the present once-through cooling license condition would necessitate substantial efforts by the Staff's consultants at Oak Ridge National Laboratory (ORNL) who are currently intensively involved in the EPA proceeding. As noted previously, the assistance of these technical experts was requested by EPA Region II, since they had developed considerable expertise in assessment of power plant impacts on Hudson River aquatic biota. This expertise grew out of their participation in the AEC-NRC licensing proceedings on Units 2 and 3 dating back to at least 1972. Any efforts which ORNL personnel would have to expend on an amendment to the Unit 2 license would detract from, if not prevent, their continued assistance to EPA.

2. In accordance with the Commission's concern with avoiding "protracted relitigation of . . . factual issues",^{42/} the Staff believes it is in the best interest of all parties interested in the choice of cooling system for the Hudson River plants to concentrate their efforts

41/ See: Carolina Power & Light Company (Brunswick), License Amendment No. 17 for Unit 1 and No. 42 for Unit 2, dated December 15, 1978.

42/ CLI-78-1, 7 NRC at 26.

on the EPA proceeding. In view of the active participation in that proceeding of all parties who have had a continuing interest in that choice, the Staff believes that it may be able to rely upon the record developed on the magnitude of aquatic impacts, without necessity of an independent review in performing its ultimate cost-benefit analysis. NRC would then be in a position to give the kind of reliance on EPA findings that it was able to give in Seabrook.^{43/}

3. At present, EPA has made no final determination as to the effluent limitations and compliance date it will impose on Unit 2. Any analysis which the Staff would undertake at this time would necessarily entail speculation as to both the limitations imposed and the compliance date.^{44/} So long as it is within the Commission's discretion to postpone such an analysis, the Staff believes it is preferable to undertake the necessary analysis once these determinations have been made by EPA.

The Staff believes that its action represents the most reasonable means of discharging its responsibilities and that Seabrook does not require it to take any present action with regard to the once-through cooling requirement in the Indian Point Unit 2 license.

43/ CLI-78-1, 7 NRC at 26-28.

44/ See, Brunswick, supra.

B. Whether the license conditions should be modified

We have taken the position, above, that in the absence of a limitation established pursuant to the FWPCA the NRC has continuing responsibilities to insure the protection of the Hudson River aquatic biota. The Unit 2 once-through cooling license conditions have this as their objective. To modify in any way these conditions could upset the environmental status quo. Until EPA (or the State of New York) has imposed applicable limitations, it would be premature to modify the license. NRC has taken no action, pursuant to these conditions, to impose any mitigation steps upon the licensee. Nor does the license require commencement of construction of any cooling system. In these circumstances, the Staff perceives no prejudice to licensee in preservation of these conditions and clear environmental protection benefits from leaving this authority with NRC during the interim period while EPA has yet to establish applicable limitations.

III. Indian Point 3

In its November 15, 1978 order, the Commission also invited the comments of PASNY (and, we presume, others) with respect to the September 15, 1982 cutoff date for operation with once-through cooling established for Unit 3. As discussed above, the factual background with respect to the Unit 3 license condition is essentially the same as for the Unit 2 condition. Unit 3 is also one of the plants being reviewed in the EPA proceeding and there is equal reason, therefore, to defer to EPA on the determination of a compliance date.

It is true that the license conditions regarding termination of once-through cooling at Unit 3 are based directly upon the stipulation entered into among the parties in settlement of the operating license proceeding. The NRC Staff (then AEC Regulatory Staff) was a signatory to this stipulation. In executing the stipulation, the Staff was mindful of the division of jurisdictional responsibility in the water quality area between the NRC and EPA existing by virtue of the FWPCA. At the time of the execution of the stipulation, EPA had not yet issued a final NPDES permit for Unit 3. EPA had, however, offered comments on the Unit 3 DES. EPA there endorsed the Staff's recommendation that a closed-cycle cooling system be required at Unit 3 and expressed its thoughts on an appropriate implementation schedule for such a system.^{45/}

^{45/} NUREG-75/002 at XII-32 to XII-33.

At no time did EPA express to NRC (AEC) the thought that NRC (AEC) had no authority to impose a once-through cooling requirement and termination date. In fact, during that period, the actions of the two agencies were totally consistent. The September 15, 1980 once-through cooling termination date (since extended to September 15, 1982) established in the NRC license was also adopted as the compliance date in the Unit 3 NPDES permit.^{46/} Since the execution of the stipulation, the compliance date in the NPDES permit has been stayed and EPA has become involved in a protracted proceeding regarding the closed-cycle cooling requirement. As a result, the termination date in the stipulation, even as extended to September 15, 1982, no longer reflects reality and a determination has yet to be made as to the compliance date (assuming closed-cycle cooling is ultimately required by EPA). As noted above, it is apparent to the Staff that EPA is responsible for determining what cooling system will be required for Unit 3 and the related compliance date. In these circumstances, the stipulation can no longer control the termination date for once-through cooling. The Staff has acknowledged that EPA's determination will be controlling as to the choice of system and the termination date.^{47/} For the same reasons as with Unit 2, however, the Staff has chosen to defer any amendment to the Unit 3 license until EPA has reached its final decision.

^{46/} June 25, 1975 NPDES permit, supra, condition 10(b), p. 10.

^{47/} Letter, Denton (NRC) to Early (PASNY), supra.

IV. Conclusion

For the reasons set forth above, the Staff has concluded:

1. Seabrook does not require the Commission to modify the Indian Point, Units 2 and 3 operating licenses; and
2. The once-through cooling conditions in these licenses do not need to be modified to properly reflect the division of responsibilities between NRC and EPA.

Respectfully submitted,

Stephen H. Lewis
Stephen H. Lewis
Counsel for NRC Staff

for *Stephen H. Lewis*
Marcia E. Mulkey
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of December, 1978.



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Attachment 1

July 24, 1978

Edward J. Sack, Esq.
Law Department
Consolidated Edison Company
of New York, Inc.
4 Irving Place
New York, New York 10003

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
(Application to Eliminate Closed-Cycle Cooling Requirement)

Dear Mr. Sack:

I appreciated the opportunity to meet with you and Messrs Jannarone and Szeligowski on May 19, 1978. The discussions were useful in clarifying for me your application to eliminate the closed-cycle cooling requirement and for "ancillary relief." After considering all of the relevant factors, including the position articulated by you at the meeting, the Staff has decided to take the following present actions with respect to your application.

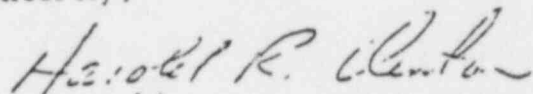
1. Your request for "ancillary relief" (i.e., extension of the termination date until such time as the NRC completes its administrative review of the application to eliminate the closed-cycle cooling requirement (and any judicial review thereof is concluded)) is denied. This denial is based upon the fact that NRC will be required (pursuant to Section 511(c)(2) of the FWPCA) to conform its license condition to whatever compliance schedule is adopted by EPA. Since the EPA 316(b) proceeding is still in process, a compliance schedule for installation of a closed-cycle cooling system at Indian Point 2 has not yet been established. Thus, there is no present certainty that EPA will establish a compliance date later than the May 1, 1982 termination date currently required in the NRC license. If the final EPA administrative decision allows compliance with the closed-cycle cooling requirement after May 1, 1982, the NRC will have to determine, on a cost-benefit basis, whether Indian Point 2 may continue to operate with once-through cooling until the EPA compliance date. We anticipate that the final administrative decision (through the Administrator) in the 316(b) proceeding will be issued sufficiently in advance of May 1, 1982.

that the NRC will be able to complete its analysis and take whatever licensing action is appropriate before "bumping up against" the May 1, 1982 termination date. Thus, there should be no prejudice to Con Edison from a continuation of the present license condition.

2. The NRC will not finally act upon your application to eliminate the closed-cycle cooling requirement until after a final EPA administrative decision in the 316(b) proceeding. This course of action is dictated by the Commission's decision in Seabrook. (Public Service Co. of New Hampshire (Seabrook), CLI-78-1, 7 NRC 1, 23-29 (1978)).

Once again, I enjoyed the opportunity to discuss these matters with you. Should you have any further questions, please feel free to contact me.

Sincerely,



Harold R. Denton, Director
Office of Nuclear Reactor Regulation

cc: Samuel W. Jensch, Esq.
Dr. Franklin C. Daiber
Mr. R. Beecher Briggs
Sarah Chasis, Esq.
Carl R. D'Alvia, Esq.
Honorable George V. Begany
Joseph D. Block, Esq.
Jeffrey C. Cohen, Esq.
Peter H. Schiff, Esq.
James L. Kelley, Esq.
Atomic Safety and Licensing
Board Panel
Atomic Safety and Licensing
Appeal Board Panel
Docketing and Service Section



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Attachment 2

October 13, 1978

Docket No. 50-286

Mr. Paul J. Early
Assistant Chief Engineer - Projects
Power Authority of the State of New York
10 Columbus Circle
New York, N.Y. 10019

Dear Mr. Early:

This letter constitutes the NRC Staff's response to your August 2, 1978 letter enclosing PASNY's "Application for an Extension of the Period of Interim Operation Using the Installed Once-Through Cooling System and Motion for Expedited Commission Consideration" (dated August 7, 1978) and the supporting "Affidavit of Paul J. Early" (dated August 1, 1978).

Pursuant to the provisions of paragraph 2.E(1) of Operating License No. DPR-64 the date for termination of operation of Indian Point Unit No. 3 ("IP3") with once-through cooling is presently designated as September 15, 1980. 1/ By virtue of operation of paragraph 2.E(1)(e), that date has, however, been extended to September 15, 1982 2/ and License No. DPR-64 will be appropriately amended.

1/ Paragraph 2.E(1) of the license contains the provisions of a stipulation, dated January 13, 1975 among the parties to the IP3 operating license proceeding.

2/ Paragraph 2.E(1)(e) provides:

The September 15 date is subject to extension if the empirical data referred to in subparagraph (c) are insufficient solely because the Plant has not operated at at least 40% of rated power for 45 or more full days (8:00 a.m. to 7:59 a.m.) during the period from May 15 to July 31 in each calendar year, commencing January 1, 1975. The September 15 date will be extended one year for each calendar year in which such operation is not achieved. However, no such extension shall be granted after the Plant has achieved such operation in two calendar years, and no more than two such extensions shall be granted. This subparagraph shall not bar an application for an extension under subparagraph (c) because of lack of operation. As long as an extension of the September 15 date is possible pursuant to this subparagraph, whenever the Plant operates at less than 20% of rated power for more than 12 consecutive hours during the May 15 to July 31 period, no more than three circulating water pumps shall be used.

IP3 did not operate at this level during the May 15 - July 31 period in 1975 and 1976.

Your present application asks that DPR-64 be amended so as to extend the date by which PASNY has to commence any procurement or construction activities on a closed-cycle cooling system until such time as the Environmental Protection Agency renders a decision on the cooling system for this plant and any judicial review thereof is completed. 3/

By letter dated July 24, 1978, a copy of which you have received, we denied a somewhat similar request made by Con Edison with respect to Indian Point Unit No. 2 ("IP2"). Briefly, the bases for that denial were:

1. NRC will be required to conform its license condition to whatever compliance schedule is adopted by EPA.
2. The §316 proceeding involving the closed-cycle cooling requirement for IP2 (and other facilities on the lower Hudson River, including IP3) is in process.
3. If the compliance date ultimately established by EPA is beyond the May 1, 1982 date for termination of operation with once-through cooling, or if EPA allows life-of-plant operation with once-through cooling, NRC will have to determine, on a cost-benefit basis, whether IP2 may continue to operate for the designated period.
4. NRC Staff anticipates a final EPA administrative decision 4/ well in advance of May 1, 1982, so that the Staff will have sufficient time to take whatever action might be required prior to that date. No prejudice to Con Edison arises, therefore, from a continuation of the present license condition. 5/

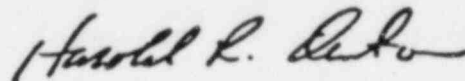
Application, p. 7 n. 4.

- 4/ For purposes of the taking of necessary actions by it, the Staff considers that reliance on final decisions of EPA need not await the completion of any judicial review thereof. Public Service Company of New Hampshire (Seabrook), Commission Memorandum and Order, August 9, 1978, slip op. at 3; CLI-78-1, 7 NRC 1 at 28; CLI-77-8, 5 NRC at 521 n. 20.
- 5/ The operating licenses for IP2 and IP3 do not contain any compliance schedules, i.e., they do not establish intermediate dates by which the licensees must have passed certain milestones in the construction of their towers. It follows that Con Edison and PASNY could not be in noncompliance until the actual date for termination of operation with once-through cooling. Furthermore, in the event that the final EPA administrative decision has not been handed down as the termination dates in the licenses draw near, the Staff will undertake the necessary reviews to either amend the licenses or take other appropriate action.

Your application raises the same set of considerations as were previously weighed with regard to Con Edison's application. We perceive no reason why the result should be different for IP3 and are, therefore, denying your application. This denial is, of course, without prejudice to your right to apply for appropriate relief once the EPA Administrator has rendered his decision in the §316 proceeding.

We are enclosing with this letter a copy of a Notice of Denial of Amendment Application which we have transmitted to the Federal Register for publication. Pursuant to §189 of the Atomic Energy Act, as amended, 6/ you may, of course, request a hearing on the Staff's denial. 7/

Sincerely,



Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosure:
Notice of Denial of Amendment
Application

cc w/enclosure: Sarah Chasis, Esq.
Nicholas A. Robinson, Esq.
Paul S. Shemin, Esq.
Mr. Jeffrey C. Cohen
Leonard M. Trosten, Esq.
Edward J. Sack, Esq.
Mr. George Wilverding

Mr. George T. Berry
Lewis R. Bennett, Esq.
Manager - Nuclear Operations (PASNY)
Mr. Phillip Bayne
Atomic Safety and Licensing Board
Atomic Safety and Licensing Appeal
Board Panel
Docketing and Service Section

6/ 42 U.S.C. §2239

7/ Any other person whose interest may be affected by your application may also request a hearing.

UNITED STATES NUCLEAR REGULATORY COMMISSION
DOCKET NO. 50-286, FACILITY OPERATING LICENSE NO. DPR-64
POWER AUTHORITY OF THE STATE OF NEW YORK
INDIAN POINT NUCLEAR GENERATING STATION, UNIT NO. 3
NOTICE OF DENIAL OF AMENDMENT APPLICATION

The U. S. Nuclear Regulatory Commission (the Commission) has denied the Power Authority of the State of New York's (the licensee) "Application for an Extension of the Period of Interim Operation Using the Installed Once-through Cooling System and Motion for Expedited Commission Consideration" dated August 7, 1978. The licensee seeks amendment of Condition 2.E.(1) of DPR-64 so as to extend the date for termination of operation with once-through cooling ^{1/}to allow for (1) the Environmental Protection Agency (EPA) to reach an administrative decision in the pending discharge permit proceeding involving Indian Point 3 (and other steam-electric generating facilities on the lower Hudson River), (2) any judicial remedies from the EPA decision to be exhausted, and (3) the cooling tower, if required by EPA, to be constructed.

The Commission's denial is set forth in a letter dated October 13, 1978 from Harold R. Denton, Director -- Office of Nuclear Reactor Regulation to Paul J. Early, Assistant Chief Engineer - Projects of the licensee. Briefly, the bases for the denial are: (1) The Commission will be required to conform its license to whatever decision (including a compliance schedule for tower construction) is ultimately adopted by EPA;

^{1/} Condition 2.E.(1) presently requires termination of operation with once-through cooling by September 15, 1980. By operation of Condition 2.E.(1)(e), that date has now become September 15, 1982. The Commission will appropriately amend the license.

(2) The EPA proceeding is still in process and the Commission does not, therefore, have the benefit yet of an EPA decision; (3) The Commission will have to analyze whatever decision EPA reaches and determine what type of evaluation is required under the Commission's regulations implementing the National Environmental Policy Act; and (4) The Commission expects that the EPA final administrative decision will be rendered sufficiently in advance of the once-through cooling termination date that the Commission will be able to take whatever action might be required prior to that date. On these bases, the Commission determined that it is preferable to await the final EPA administrative decision before determining what action need be taken by the Commission and that there is no prejudice to the licensee from a denial of the application.

For further details with respect to this action, see (1) the licensee's Application and supporting affidavit and (2) the letter from Mr. Denton to Mr. Early. Both of these documents are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W. Washington, D.C. 20555 and at the White Plains Public Library, 100 Martine Avenue, White Plains, New York 10601.

A copy of item (2) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention:

... Director, Division of Site Safety and Environmental Analysis.

Dated at Bethesda, Maryland this 13th day of October, 1978.

FOR THE NUCLEAR REGULATORY COMMISSION

Ronald L. Ballard
Ronald L. Ballard, Chief
Environmental Projects Branch 1
Division of Site Safety and
Environmental Analysis

Attachment 3

September 23, 1977

Docket Nos. 50-247
50-286

Meyer Skolnick, Esq.
Director, Regional Counsel and
Enforcement Division
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, NY 10007

Dear Mr. Skolnick:

As you are aware, the NRC Staff has been working closely with the EPA Region II Staff for the past two years in preparation for EPA's 316 hearings on the Hudson River power plants at Roseton, Bowline and Indian Point. In particular, Dr. Webster Van Winkle and other personnel at the Oak Ridge National Laboratory under contract to the NRC have worked extensively on the substantive technical aspects of this case with members of your Staff and have participated in the Interagency Technical Committee.

As a result of the timing of the respective EPA and NRC hearings on the Hudson River ecosystem (with the EPA hearings proceeding before the NRC hearings) the NRC Staff has offered to substantially increase the amount of manpower and effort available for the EPA proceeding. I understand that NRC Staff attorneys Richard C. Browne and Michael W. Grainey met with Richard Flye of your office on August 9, 1977, to discuss the specific ways in which additional NRC Staff personnel and efforts could be effectively utilized by your Staff. It is the NRC Staff's intention to cooperate as much as possible with your Staff in preparing for and assisting at the 316 hearings.

If you or your Staff have any questions, please contact Richard Browne at (301) 492-7676 or Michael Grainey at (301) 492-7268.

Sincerely,

Original Signed By
E. G. Case

Edson G. Case, Acting Director
Office of Nuclear Reactor Regulation

cc: Docketing and Service Section



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 6, 1978

Meyer Skolnick, Esq.
Director
Regional Counsel and Enforcement
Division
USEPA Region II
26 Federal Plaza
New York, New York 10007

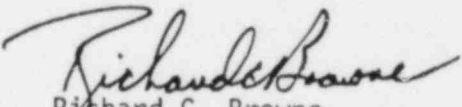
Dear Mr. Skolnick:

This is to confirm the arrangements made between us in our meeting of January 26, 1978 regarding assistance to you and your staff for the pending Hudson River power plant adjudicatory hearings in EPA.

Marcia E. Mulkey and Stephen H. Lewis both lawyers on my staff will be available to you to assist your staff during preparations for and trial of the adjudicatory hearing. It is to be understood that the Nuclear Regulatory Commission is not participating in the proceeding. NRC is merely making experienced NRC staff counsel available to the EPA staff for such consultation and assistance, including active participation in the case on behalf of EPA as you deem appropriate. As we see it, NRC's opportunity to furnish this kind of assistance to EPA is fully consistent with the admonition of Section 101(f) of the Federal Water Pollution Control Act Amendments of 1972 which speaks of encouraging streamlined interagency decision procedures and making the best use of available manpower and funds.

We are pleased to be of assistance to you in this case. Should any questions arise, please do not hesitate to call me.

Sincerely,


Richard C. Browne
Assistant Chief Hearing
Counsel

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S COMMENTS IN RESPONSE TO COMMISSION'S NOVEMBER 15, 1978 ORDER", in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of December, 1978:

*Jerome E. Sharfman, Esq., Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

*Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Lawrence R. Quarles
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College of Marine Studies
University of Delaware
Newark, Delaware 19711

Mr. R. Beecher Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

Sarah Chasis, Esq.
Natural Resources Defense Council
122 East 42nd Street
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Box 306
Croton-on-Hudson, New York 10520

Honorable George V. Begany
Mayor, Village of Buchanan
Buchanan, New York 10511

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Executive Vice President -
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Environmental Protection Agency, A-131
401 M Street, S.W.
Washington, D.C. 20460

Lewis R. Bennett, Esq.
Power Authority of the State
of New York
10 Columbus Circle
New York, New York 10019

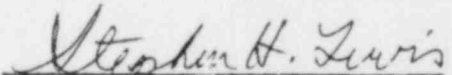
*Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*James L. Kelley, Esq.
Acting General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing
Board Panel
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Washington, D.C. 20555

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555


Stephen H. Lewis
Counsel for NRC Staff