RAS E-93

April 7, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chairman
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of	)	
Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station, Units 2 and 3)	)	Docket Nos. 50-247-LR and 50-286-LR

RIVERKEEPER, INC.'S RESPONSE TO NRC STAFF'S CHANGE IN POSITION REGARDING THE ADMISSIBILITY OF CONTENTION EC-1

Pursuant to the Board's Order dated March 18, 2008, Riverkeeper, Inc., ("Riverkeeper") hereby responds to the U.S. Nuclear Regulatory Commission ("NRC") Staff's change in position regarding Environmental Contention No.1 ("EC-1"), which challenges Entergy's failure to adequately analyze the environmental impacts of Indian Point's cooling system.[1] As discussed below, NRC Staff's change in position is unjustified. Contention EC-1 satisfies the requirements in 10 C.F.R. § 2.309(f)(1), and should be admitted in this proceeding as necessary to fulfill the applicable NRC and National Environmental Policy Act ("NEPA") requirements.

[1] Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Plant (November 30, 2007) ("Hearing Request"), at 24-54; Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene (February 15, 2007) ("Reply"), at 20-44.

TEMPLATE = SECY-037 SECY-02

A. Background

NRC Staff did not oppose the admission of Contention EC-1 in its response to Riverkeeper's Hearing Request.[2] In its Answer, NRC Staff stated:

> The Staff does not oppose admission of this contention, to the extent that Riverkeeper has raised genuine issues of fact with respect to heat shock, impingement, and entrainment caused by the once-through cooling system.

NRC Staff's Response at 110.

NRC Staff changed its position during the Oral Argument, both with respect to Riverkeeper's Contention EC-1 and New York State's Contentions 30 and 31, on the grounds that these contentions fall outside the scope of license-renewal. Notably, the reasons for the change in position with respect to these contentions are the same for both Petitioners. Tr. 467-469; 587 (10-13); 606 (12-17).

During the Oral Argument, Chairman McDade noted that "there are two issues. The first issue is ... [whether the contention is] within the scope of our proceeding? And then the next is ... [whether] the discussion of this issue in the ER by Entergy, [is] then, adequate?" Tr. 467-468. In addition, Chairman McDade stated:

> And it was my understanding before I came in here today that the staff was of the opinion that: one, it was within the scope and then the issue was joined as to the adequacy of it based on what was presented by New York and what was presented by Entergy, that the statements made by the staff today indicated that based on the existence of an adequate 316 permit, that it no longer is in play. It is outside the scope of the proceeding.

Tr. 467-469.

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[2] NRC Staff's Response to Petitions to Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) The State of New York, (5) Riverkeeper, Inc., (6) the Town of Courtland, and (7) Westchester County (January 22, 2008) ("NRC Staff's Response").

The first issue frames Riverkeeper's response herein, and will be addressed *infra* under sections B and C below. The second question with respect to admissibility of Contention EC-1 is whether the discussion of Category 2 aquatic ecology impacts in the ER by Entergy is adequate. Tr. 467-468. There is no need to address this issue here since NRC Staff counsel has conceded that "Riverkeeper has raised genuine issues of fact with respect to heat shock, impingement, and entrainment caused by the once-through cooling system." NRC Staff's Response at 110. Based upon the transcript of the Oral Argument, NRC Staff said nothing that would change this element of Riverkeeper Contention EC-1.[3]

B. Contention EC-1 is Within the Scope of License Renewal

As stated previously, NRC Staff now takes the position that Riverkeeper's Contention EC-1, as well as New York's Contentions 30 and 31, are outside the scope of this proceeding. During the Oral Argument, NRC Staff explained the change in position, as follows:

> When the staff received the license renewal application, the environmental report did not explicitly state that the 316(b) determinations had been met. ... *However, as counsel for Entergy explained, the section 7 of the SPDES permit, which cites the Hudson River settlement agreement and states that it meets the state thermal discharge criteria, as the staff has continued with its review, we have come to the understanding that it does, in fact, meet the 316(b) requirements.* It wasn't readily apparent on the face of the environmental report and the attached documentation, but as we have read into this further in reviewing Entergy's answer to the contentions and also New York's reply, which does not rebut any of what Entergy has asserted, we believe that it does, in fact, satisfy those criteria.

Tr. 467-469 (emphasis supplied).[4]

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[3] NRC Staff counsel admitted, however, that the Staff is undertaking an analysis of Category 2 entrainment, impingement, and heat shock/thermal impacts in preparation of the Draft Environmental Impact Statement pursuant to 10 C.F.R. § 51.71. Tr. 607 (6-9) (15-22); 608 (1, 5, 8-9); 609 (12-13).

[4] Chairman McDade's follow up question framed the issue in precise terms, as follows:

Specifically, with respect to Contention EC-1, NRC Staffs' counsel noted:

> As we said yesterday [on March 11, 2008] our interpretation of [§] 51.53(c)(3)(2)(b), [is that] so long as ... [a] *valid* 316B determination has been submitted, there is no analysis that is required to be conducted in the environmental report.

Tr. 606 (12-17) (emphasis added).

In short, NRC Staff now takes the position that Entergy has submitted current Clean Water Act ("CWA") § 316 determinations in the Environmental Report ("ER"). 33 U.S.C. § 1326(c). NRC Staff has adopted Entergy's flawed argument that because the 1987 SPDES Permit for Indian Point states that the Hudson River Settlement Agreement ("HRSA") dated December 19th, 1980, which is an annex to the permit, "satisfies New York State criteria governing thermal discharges," Entergy has complied with 10 C.F.R. § 51.53(c)(3)(ii)(B).[5] Tr. 463 (5-15); Entergy's Answer at 69 & 75.

In other words, NRC Staff Counsel now posits that Entergy has complied with 10 C.F.R. § 51.53(c)(3)(ii)(B) because a "valid [CWA] 316(b) determination has been submitted, [so] there is no analysis that is required" to be conducted in the ER. Tr. 606 (12-17). NRC Staff views the HRSA, an annex to the 1987 SPDES Permit, as a valid and

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CHAIRMAN McDADE: So, again, just to make sure I understand it, initially the answer to that was yes, it is within the scope. At that point you made that determination because it was not clear that the 316 requirements had been met. At this point you are satisfied that the 316 requirements have been met. So you are of a view that because of that, it is now outside the scope of this proceeding?
MR. CHANDLER: That is correct, Your Honor.

Tr. 468 (22-25) & 469 (1-6).

[5] The 1987 SPDES Permit, Additional Requirement No. 7, reads: "The Hudson River settlement agreement [HRSA], dated December 19th, 1980, is annexed to this permit ... as appendix 2 and is incorporated herein as a condition to this permit. The settlement agreement satisfies New York State criteria governing thermal discharges." *See* ER, Attachment C (the HRSA was not provided in the ER). A copy of the HRSA was submitted by New York State as Exhibit C to the Declaration of William G. Little ("Little Declaration").

current CWA § 316(b) determination. Accordingly, NRC Staff is satisfied that Entergy has complied with NRC regulations and, hence, is exempt from analyzing Category 2 entrainment, impingement, and heat shock/thermal impacts in the ER.

As discussed below, Entergy has not satisfied 10 C.F.R. § 51.53(c)(3)(ii)(B) because neither the HRSA, or the subsequent consent orders that followed, or even the 1987 SPDES Permit—as administratively-extended—is a current CWA § 316 (b) determination.[6] Thus, Entergy is not exempt from analyzing Category 2 impacts on aquatic ecology simply by attaching the 1987 SPDES Permit in the ER.

1. The Hudson River Settlement Agreement ("HRSA") is not a current CWA § 316 determination

The HRSA settled disputes arising out of NRC decisions and EPA's preliminary CWA § 316 determinations which required the installation of closed-cycle cooling in order to minimize entrainment, impingement, and heat shock/thermal impacts at Indian Point. Tr. 605 (9-13); Hearing Request at 27; Reply at 24-25.[7] The HRSA was entered into precisely because, after several years of hearings that began in 1977, final CWA § 316 determinations could not be reached. *Id.* at 2. The signatories to the HRSA negotiated in good faith "for the purpose of resolving a protracted controversy through negotiation in a manner designed to serve the public interest." *Id.* at 36. Notably, the HRSA did not resolve

[6] Entergy does not hold a CWA § 316(a) thermal variance because neither the HRSA, or the consent orders that followed the HRSA, or even the 1987 SPDES Permit—as administratively-extended—included a CWA § 316(a) variance. Nor has Entergy received approval of any such variance or approval of a thermal demonstration study by the NYSDEC. *See* Tr. 591 (16-21).

[7] The HRSA stated that "in 1975 the EPA issued NPDES permit to the utilities [including Entergy's predecessors] which in effect required the retroffiting of cooling towers [closed-cycle cooling] at the Hudson River Power Plants [including Indian Point]," and also acknowledged that, at that time, NRC's licenses for Indian Point also required closed-cycle cooling at these facilities. HRSA at 1 & 34.

or determine the levels of entrainment, impingement, and heat shock/thermal impacts at Indian Point.[8]

It is critically important to note that the HRSA did not specifically state that it satisfied New York State criteria governing thermal discharges. The agreement simply stated that the parties would not object to the issuance by the New York State Department of Environmental Conservation ("NYSDEC") of a SPDES permit for Indian Point, as follows:

> DEC, in accordance with applicable law, shall issue to each of the Utilities SPDES permits for their respective Hudson River Plants which will permit, during the entire ten-year term of this Agreement, continued operation with the existing once-through cooling unaltered by thermal or intake requirements, subject only to performance by the Utilities of their respective covenants as set forth in this Agreement. *This Agreement shall be annexed to the SPDES permits and shall be incorporated therein as a condition of said permits*." *Id.* at 17-18 (emphasis supplied).

Thus, the fact that the HRSA is annexed to the permit does not change the nature or the duration of the agreement. Tr. 605 (20-24); Hearing Request at 27; Reply at 25-25. On the contrary, it was conceived as a temporary settlement that would only be applicable for a fixed amount of time. Moreover, despite the HRSA being executed "in accordance with applicable law," it cannot be interpreted as current CWA § 316 determinations for purposes of compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B).

Regardless, the issue here is not whether the HRSA was a *valid* CWA § 316 (b) determination at the time when it was executed; the issue here is whether the HRSA is a *current* CWA § 316 (b) determination that satisfies 10 C.F.R. § 51.53(c)(3)(ii)(B). Clearly,

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[8] Instead, the HRSA established an "endowment of $12 million to fund an independent research program to advance the scientific understanding and management of the Hudson River fishery." HRSA at 14. In addition, it required a "biological monitoring program on the Hudson River ... at a cost of at least 2 million per year," and required that the "[t]he monitoring requirements in the SPDES permits to be issued by DEC [the NYSDEC] ... be consistent with the biological monitoring program []." *Id.* at 15.

the answer is no because the HRSA lapsed in 1991.[9] Thus, it expired by its own terms on May 1991. The HRSA itself explicitly stated: "At the expiration of said term no party hereto shall have any further obligation hereunder." *Id.* As a result, NRC Staff Counsel and Entergy counsel's stated reliance on the expired HRSA as representing "current" CWA § 316 determinations is simply without merit, and should be rejected by the Board.

2. The Consent Orders are not current CWA § 316 determinations

During the period 1992-1998, pursuant to judicially-approved consent orders, Entergy's predecessors (herein the "utilities") committed, not to the entire HRSA requirements, but to certain conditions, including flow constraints, operation of the fish hatchery between 1992 and 1995, and to provide funding for the biological monitoring program. Fourth Consent Order at 10-11; 15-16; 20.[10] Tellingly, the consent orders did not say that they satisfied New York State criteria governing thermal discharges. In fact, the consent orders expressly noted that nothing in the orders shall "*be construed as acknowledgement by any of the parties that the provisions agreed to herein are, or are not, required under the utilities' existing SPDES permits or federal or state law or regulation.*" Fourth Consent Order at 23 (emphasis supplied). The consent orders simply meant that, provided that the utilities complied with the terms of the consent orders, no party would allege that utilities were in violation of the CWA or New York Environmental Conservation Law ("ECL") for operations during the time the consent orders were in effect, from 1991-

[9] It was executed on December 19, 1980, and extended for 10 years from the date on which it became effective (May 1981). *Id.* at 29.

[10] The Fourth Consent Order is Exhibit H to the Little Declaration. Notably, the utilities did not commit to do outages at Indian Point, as Entergy admits. Entergy Answer at 68.

1998. *Id.* Based on the plain language excerpted above, the consent orders cannot take the place of "current" CWA § 316 determinations.

NRC Staff has adopted Entergy's flawed argument that the consent orders have been "replaced by a voluntary agreement." Tr. 463 (16-20); Entergy's Response at 68. As explained by counsel for Entergy at the Oral Argument:

> Now, the HRSA expired. It was replaced by consent orders. The consent orders extend into 1998 and in 1998 was replaced by a voluntary agreement by the parties to continue to comply with a fourth amended consent order.

Tr. 463 (16-20).

This argument contradicts Entergy's own ER for Indian Point, which reads: "[t]he most recent Consent Order expired in 1998." ER at 4-10. Entergy retracted this statement in its answers to Contention EC-1 (and New York State's Contentions 30 and 31), and took the position that "[a]lthough the HRSA expired in 1991, its substantive conditions *(except with respect to IPEC outage requirements)* were continued in *seriatim* judicially approved consent orders, *the last of which continues to govern today*, pending the issuance of a renewed SPDES permit by the NYSDEC." Entergy Answer at 68 (emphasis supplied).[11] New York State and Riverkeeper—signatories to the HRSA and the consent orders—reject this assertion as being erroneous and misleading. On its face, the last consent order expired in 1998.[12] Tr. 595 (24-25); 596 (1-12); Hearing Request at 26-27; Reply at 20-29.

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[11] *Id.*

[12] Specifically, the last consent order stated that it would remain in effect until February 1, 1998 or until renewal SPDES permits for Indian Point (and the other HRSA facilities) are finally effective, "whichever first occurs." Fourth Consent Order at 7. Noting that "After that date [February 1, 1998] this Fourth Amended Consent Order shall impose no further obligations upon the utilities arising from paragraphs 3 to 13 hereof [dealing with outages, flow rates, hatchery biological monitoring program, and access to data]. Except

Incredibly, Entergy and the NRC Staff are asking this Board to determine that the HRSA and the 1998 consent order are still valid and effective simply because the utilities, and subsequently Entergy, independently decided to "voluntarily" extend its conditions. This request is not only absurd, it is beyond the Board's authority and must be rejected. Moreover, it is unnecessary to make any such findings under 10 C.F.R. § 51.53(c)(3)(ii)(B). The Board merely needs to decide whether Entergy has provided "current" CWA § 316 determinations based on the controlling nature of the permitting agency's language in the supporting documentation to the respective permit. *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385, (2007). Besides, as NRC Staff has argued in this proceeding, "*any discussion of the validity of the SPDES permit ... [is] beyond the authority of the NRC under the Clean Water Act.*" NRC Staff's Response at 110 (emphasis supplied).

In sum, the NRC Staff's newfound belief that the HRSA and subsequent consent orders somehow equal current CWA § 316 determinations fails in its entirety, because the consent orders were separate and independent from the HRSA, included a legal disclaimer with respect to compliance with federal and state law, and the last consent order expired by its own terms in 1998. Fourth Consent Order at 7.

3. The 1987 SPDES Permit is Not a Current CWA § 316 determination

Pursuant to the CWA, SPDES permits must be issued "for fixed terms not exceeding five years." CWA § 402(b) (1)(B), 33. U.S.C. 1342(b)(1)(B); *Vermont Yankee*, CLI-07-16, 65 NRC 371, 383 (2007). Indeed, as Judge Wardwell has indicated, the EPA

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as otherwise provided in paragraphs 14 through 17, 19, 28, 29 and 32 hereof, after February 1, 1998 this Fourth Amended Consent Order shall have no further force and effect."[dealing with record-keeping of outages, technical fund, and disclaimers). *Id.*

or state agencies have "the opportunity to re-address these effluent limits every five years during renewal of the NPDES [/SPDES] permit, and to modify the parameters, if necessary, to protect the aquatic biota." *Vermont Yankee*, ASLBP No. 06-849-03-LR, (2006) (Dissenting Opinion of Judge Wardwell on Admissibility of New England Coalition's Contention 1 (Environmental), at 6). In addition, Judge Wardwell has noted that, "[i]n essence, the NPDES[/SPDES] renewal period provides an on-going assessment of cumulative impacts throughout the life of the plant." *Id.*

The 1987 SPDES Permit was a renewal of the initial SPDES Permit for Indian Point issued in 1982. Tr. 605 (10-13). The 1987 SPDES Permit was due to expire on October 1, 1992. ER, Attachment C. Nonetheless, "Entergy's 1987 SPDES Permit has been administratively continued pending issuance of a final SPDES permit currently subject to an adjudicatory process." Hearing Request at 26;[13] Reply at 27-28; Tr. 593 (20-21), 594 (4-18). Fourth Consent Order at 4.[14]

During the Oral Argument counsel for Entergy also argued that "as a matter of New York law, a permit that is issued must comply with all applicable requirements. All applicable requirements include 316(a) and 316(b) ... So necessarily any state permit issued has to comply with federal law." Tr. 462 (2-5; 18-19). "And so the mere fact that there is a SPDES permit means that there is a current determination with respect to all aspects of New York law that are required to be in the SPDES permit." Tr. 466 (13-14). In short, "if there is a SPDES Permit, it must contain the 316(b) determination." Tr. 599 (15-16). This discussion

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[13] NRC Staff's Response stated that "Riverkeeper bases its contention on the assertion that the Applicant's SPDES permit *is not valid*." *Id.* at 109. Clearly, NRC Staff misread Riverkeeper's position regarding the status of the 1987 SPDES Permit.

[14] The Fourth Consent Order, at 7, noted that the 1987 SPDES Permit bears "the expiration date of October 1, 1992, but have been continued in force and effect pursuant to 6 N.Y.C.R.R. § 621.13(i)."

in entirely academic; there is no dispute that a SPDES permit issued by New York should meet all applicable federal and state requirements. Tr. 605 (9-13; 20-24).

Furthermore, this debate has no place in this proceeding. The Board is not required to decide, nor should it, whether the 1987 SPDES Permit complies with federal and New York law. The only relevant inquiry here is "whether the EPA or the state agency considered its permit to be a Section 316(a)[/(b)] determination[s]." *Vermont Yankee*, CLI-07-16, 65 NRC 371, 385 (2007). The question here is whether the 1987 SPDES Permit presently contains current CWA § 316 determinations. In 2003, the NYSDEC issued the Final Environmental Impact Statement ("FEIS"), pursuant to a mandamus action, which also resulted in a court ordering that a draft SPDES permit be issued for Indian Point. Hearing Request at 30-35. The 2003 draft SPDES permit, together with Fact Sheet, contains the most current and up to date CWA § 316 determinations for Indian Point. Based on these facts, the answer to this question is clearly "no." Thus the required inquiry under 10 C.F.R. § 51.53(c)(3)(ii) must continue.

C. NRC's Staff Position is Contrary to NEPA and Unsupported by NRC's Regulations and NRC Precedent

In this proceeding, NRC Staff is interpreting 10 C.F.R. § 51.53(c)(3)(ii)(B) in a way that is contrary to NRC's NEPA mandate to conduct a thorough review of the Category 2 impacts on aquatic ecology at the license renewal stage. Tr. 588 (7-13). The basic ER obligation is set forth in § 51.53(c)(3)(ii): the ER "*must contain analyses ... for those issues identified as Category 2 in Appendix B.*" 10 C.F.R. § 51.53(c)(3)(ii) (emphasis added); 10 C.F.R. § 51.71 (d); 10 C.F.R. § 51.95 (c); Tr. 588 (19-25); Tr. 589 (1-11).

Nonetheless, as discussed previously, the required assessment of Category 2 impacts on aquatic ecology may be satisfied by the applicant submitting specific, current documentation of CWA § 316 determinations which essentially provide the EPA or state agency's findings regarding these impacts. 10 C.F.R. § 51.53(c)(3)(ii)(B). These CWA determinations are the purview of the EPA, or the state agency, in this case the NYSDEC that has delegated CWA authority. CWA § 316(b), 33 U.S.C. § 1326(b); CWA § 402(b), 33 U.S.C. § 1342(b); CWA § 511(c)(2), 33 U.S.C. § 1371(c)(2).

Therefore, 10 C.F.R. § 51.53(c)(3)(ii) simply allows the NRC, and in this case the Board, to defer to analyses of Category 2 impacts on aquatic ecology by the EPA or delegated state agency, which—in exercise of its permitting authority under the CWA—has currently performed such analyses and made the required CWA § 316 determinations for the facility in question. Tr. 589 (12-25), 590 (1-21). *See also* Tr. 591 (16-25), 592 (1-14), 593 (2-6); 595 (14-25); Tr. 603 (17-25); Reply at 38-39, 43-44); CWA § 511(c)(2); 33 U.S.C. 1371(c)(2); *Vermont Yankee*, CLI-07-16, 65 NRC 371, 384-389 (2007).[15]

Again, it is essential that the Board recalls the specific language of 10 C.F.R. § §51.53 (c)(3)(ii)(B), which uses the word *current*, not the word *valid* to modify the required determinations. The choice here, as spelled out in the regulation, is between a "current CWA § 316(b) determinations" or "equivalent state permits and supporting documentation." 10 C.F.R. § 51.53(c)(3)(ii)(B). Nowhere in this section of the regulations

[15] *Citing Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 26 (1978)); *Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 712 (1978); *Carolina Power & Light Co.* (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 558 (1979)). Riverkeeper relied on these cases during the Oral Argument and/or in its Reply. *See* Tr. 589 (12-25), 590 (1-21). *See also* Tr. 591 (16-25), 592 (1-14), 593 (2-6); 595 (14-25); Tr. 603 (17-25); Reply at 38-39, 43-44).

does it say "current permit." *Id.* Consequently, as counsel for Riverkeeper stated in the Oral Argument:

> The question here is not whether Entergy has a current permit, but whether the EPA or the State has made a current [CWA § 316] determination that can be used as a NEPA analysis to consider those category 2 impacts that the Board and the Agency has to deal with here.

Tr. 588 (19-25).

The CWA § 316(b) determinations involves an analysis of impacts on aquatic ecology from a facility's cooling water intake system, and a determination of the best technology available to minimize such impacts. CWA § 316(b), 33 U.S.C. § 1326(b). It is essentially a focused environmental assessment and technology review document.[16] Tr. 589 (12-25); Tr. 590 (1-21); 33 U.S.C. 1326(b).

The inquiry under 10 C.F.R. § 51.53(c)(3)(ii) does not stop if the applicant has submitted an CWA administratively continued permit, or even a valid permit; the NRC must defer to the EPA or the state agency's most current CWA § 316 determinations. *Vermont Yankee*, CLI-07-16, 65 NRC at 385 (2007). It is clear here that presently the applicant does not hold, and has not provided, current CWA § 316 determinations. As counsel for Riverkeeper noted, 10 C.F.R. § 51.53(c)(3)(ii)(B) does not instruct the applicant to

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[16] *See, e.g.*, EPA Region 1, Clean Water Act NPDES Permitting Determinations for Brayton Point Station's Thermal Discharge and Cooling Water Intake in Somerset, MA, July 22, 2002 (MA0003654), *available at* http://www.epa.gov/NE/braytonpoint/pdfs/BRAYTONtableofcontents-chapter1.PDF; http://www.epa.gov/NE/braytonpoint/; EPA Region 1, Clean Water Act NPDES Permitting Determinations for Thermal Discharge and Cooling Water Intake from Mirant Kendall Station in Cambridge, MA, July 22, 2002, *available at* http://www.epa.gov/NE/npdes/mirantkendall/assets/pdfs/draftpermit/Kendall_Determin-Doc_06_08_04.pdf; http://www.epa.gov/NE/npdes/mirantkendall/index.html. These are two EPA's CWA § 316 determinations for power stations in Massachusetts, where EPA has not delegated its authority under the CWA's NPDES program to the state. *See also Riverkeeper et al. v. EPA*, 358 F.3d 174 (2nd Cir. 2004) *(Riverkeeper I)*; Riverkeeper et al. v. EPA, 475 F.3d 83 (2nd Cir. 2004) *(Riverkeeper II)*.

submit a valid CWA permit: "It's the [CWA § 316] assessment that goes along with the permit." Tr. 597 (7-8). That is, the CWA § 316 determination inclusive of the analyses of impacts on aquatic ecology that must be provided with the ER in lieu of undertaking such analyses in the ER. Tr. 598 (1-8). As noted above and under section A (1-3) *supra*, Entergy has not satisfied this requirement.

The NRC's recent Vermont Yankee decision supports Riverkeeper's Contention EC-1. *Vermont Yankee* noted that "[i]n future cases where EPA [or, as here, a state permitting agency] has made the *necessary factual findings* for approval of a specific once-through cooling system for a facility *after full administrative proceedings*," Licensing Boards must defer to the agency with permitting authority under the CWA. *Vermont Yankee*, CLI-07-16, 65 NRC at 389 (2007) (*citing Seabrook,* CLI-78-1, 7 NRC 1, 26 (1978)) (emphasis supplied). In the instant case, as discussed *supra* under section A (1-3), it is abundantly clear that the 1987 SPDES Permit for Indian Point has only been administratively extended pending the outcome of the adjudication of the 2003 draft SPDES Permit. The 1987 Permit's underlying documents, the HRSA and the consent orders, have clearly expired and no longer have any legal force. Nor has the NYSDEC finalized its determination, through an administrative proceeding, as to what constitutes the best technology available for Indian Point's cooling water system. Whenever finalized, the pending CWA renewal would be a final CWA § 316(b) determination. Tr. 605 (9-10).

In *Vermont Yankee*, the issue was whether the permitting agency considered the facility's CWA permit—as modified in 2006—and supporting documentation, to encompass a current CWA Section 316(a) determination. *Vermont Yankee*, CLI-07-16,

65 NRC at 385 (2007). The NRC concluded that the Fact Sheet appended to the permit modification "leaves no doubt ... that the [state permitting] Agency considered its permit to be a [CWA] Section 316(a) determination." *Id.* at 386.[17] The Commission explained: "All we may do is examine whether the EPA or the state agency considered its permit to be a Section 316(a) determination." *Id.* at 385-386.

Thus, the holding in the *Vermont Yankee* decision is factually distinguishable from the Indian Point proceeding, and does not support Entergy and NRC Staff's assertion that a facility satisfies 10 C.F.R. § 51.53(c)(3)(ii)(B) by submitting an administratively extended SPDES permit lacking the requisite supporting documentation. NRC Staff's position is contrary to *Vermont Yankee* and the NRC precedents cited therein. Here, the Board needs to evaluate whether the 1987 SPDES Permit represents current CWA § 316 determinations, and the answer to this question is "no."

Moreover, following NRC's instructions in *Vermont Yankee* and *Seabrook*, when the NYSDEC reaches the necessary factual findings for Indian Point's cooling system, after full administrative proceedings, the NRC must defer to the NYSDEC-issued permit. *Vermont Yankee*, 65 NRC at 389 (2007); *Seabrook*, CLI-78-1, 7 NRC at 26 (1978). This is not inconsistent with Contention EC-1 because, independent of NYSDEC's obligation to finalize the CWA § 316 determinations, the NRC must factor the Category 2 impacts on aquatic ecology into its NEPA analysis of the overall impacts of Indian Point's

[17] The NRC also noted that that the Fact Sheet states, among other things, the following: "the Agency has made a *determination* that the proposed increase in thermal effluent limits will maintain a level of quality that fully supports all designated uses;" and that "the Agency has made a *finding* that the Applicant's request meets the requirements for thermal discharges pursuant to § 316(a)." *Vermont Yankee*, CLI-07-16, 65 NRC 386. (emphasis in original).

operation on the environment. *Seabrook*, CLI-78-1, 7 NRC at 26. *See also* 10. C.F.R. § 51.95 (c)(4).

Respectfully submitted,

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April 7, 2008

CERTIFICATE OF SERVICE

I certify that on April 7, 2008, copies of the foregoing Riverkeeper, Inc.'s Response to the NRC Staff's Change in Position Regarding the Admissibility of Contention EC-1 were served on the following by e-mail and first-class mail:

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