

April 22, 2008 (8:00am)

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF**

**ATOMIC SAFETY AND LICENSING BOARD**

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

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	ASLBP No. 07-858-03-LR-BD01
	)	April 21, 2008

**ENTERGY NUCLEAR OPERATIONS, INC.'S REPLY TO RIVERKEEPER, INC.'S  
AND STATE OF NEW YORK'S RESPONSES TO NRC STAFF'S  
CHANGE IN POSITION REGARDING AQUATICS CONTENTIONS**

**I. INTRODUCTION**

Pursuant to this Board's March 18, 2008 Order ("Order"),<sup>1</sup> Entergy Nuclear Operations, Inc. ("Entergy") submits this response to: (1) Petitioner State of New York's ("NYAG") Response to NRC Staff's Change in Position to New York's Proposed Contentions 30 and 31; and (2) Riverkeeper, Inc.'s ("Riverkeeper") Response to NRC Staff's Change in Position Regarding the Admissibility of Proposed Contention EC-1 (collectively "Responses").<sup>2</sup>

<sup>1</sup> Licensing Board Order (Scheduling Briefing Regarding the Effect of License Amendment 2 on Pending Contentions) (Mar. 18, 2008). *See also* Licensing Board Order (Granting Riverkeeper, Inc.'s Motion and Amending Briefing Schedule) (Apr. 9, 2008). Entergy recognizes that the NRC Staff, out of an abundance of caution, filed a Motion (unopposed by Entergy and Riverkeeper) in which it asked the Board to modify the briefing schedule in order to allow it to file, no later than April 21, 2008, a Reply to Riverkeeper Inc.'s April 7, 2008, Response to the NRC Staff's Change in Position Regarding the Admissibility of Riverkeeper Contention EC-1. The Board granted that Motion today. Entergy did file not a similar motion because it reasonably construed the Board's March 18 Order, particularly when read in conjunction with statements made by the Board and parties during the March 2008 oral argument, to allow Entergy the opportunity to reply to both Riverkeeper's and NYAG's April 7 filings.

<sup>2</sup> Collectively, NYAG's Contentions 30 and 31 and Riverkeeper Contention EC-1 will be referred to herein as "aquatic contentions." Riverkeeper and NYAG filed those contentions on November 30, 2007. *See*

Despite clear direction from the Board, neither Petitioner addresses the validity of the NRC Staff's conclusion that Indian Point Energy Center's ("IPEC") indisputably-current New York State Pollution Discharge Elimination System Permit ("SPDES Permit") necessarily contains New York state-equivalent Clean Water Act, Section 316 ("Section 316") determinations in satisfaction of 10 C.F.R. § 51.53(c)(3)(ii)(B). Rather, and tellingly, Petitioners do not, and cannot reasonably, dispute the legal principle expressly affirmed at oral argument; namely, that the New York State Department of Environmental Conservation ("NYSDEC") cannot issue a SPDES permit, except in compliance with all applicable New York law.

Thus, Petitioners do not, and cannot, controvert the fact that IPEC's SPDES Permit necessarily—as a matter of New York law—contains NYSDEC's New York State-equivalent Section 316 determinations. Likewise, neither Response provides a single reason why the NRC Staff should be precluded from adopting this position. Instead, Petitioners simply repackage their respective Reply Briefs<sup>3</sup> that have been previously-submitted to the Board, repeating their prior arguments and offering nothing new to support admission of Riverkeeper Proposed Contention EC-1 or NYAG Proposed Contentions 30 and 31. Accordingly, they have failed to furnish adequate factual or legal support and to establish a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(v)-(vi).

## II. BACKGROUND

In support of its license renewal application ("LRA"), Entergy submitted, *inter alia*, IPEC's current SPDES Permit. In its Answer to Petitioners' aquatic contentions, Entergy

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Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant, (Nov. 30, 2007) ("Riverkeeper Contentions"); New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) ("NYAG Contentions").

<sup>3</sup> See New York State Reply in Support of Petition to Intervene, 154-71 (Feb. 22, 2008) ("NYAG Reply"); Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene, 23-29 (Feb. 15, 2008) ("Riverkeeper Reply").

explained, *inter alia*, that this submission fulfilled 10 C.F.R. § 51.53(c)(3)(ii)(B),<sup>4</sup> because “every NYSDEC-issued SPDES permit necessarily reflects NYSDEC’s ‘determinations’ under [the Clean Water Act (“CWA”) and New York state water quality regulations]. Thus, the proposition is simple: The NYSDEC-issued IPEC SPDES Permit reflects New York State-equivalent § 316(a) and (b) determinations.”<sup>5</sup> For informational purposes, Entergy also provided a detailed assessment of potential aquatic impacts relating to heat shock, impingement and entrainment.<sup>6</sup>

NRC Staff, in its response to the NYAG’s and Riverkeeper’s proposed contentions (a response filed simultaneously with Entergy’s Answers), recognized the jurisdictional considerations at play, noting that “[i]t is well settled that ‘the responsibility with respect to particular water quality matters covered by the [Clean Water Act] no longer resides with the Commission but, rather, has been allocated to EPA and the states.’”<sup>7</sup> While the NRC Staff did “not oppose” the admission of Petitioners’ aquatic contentions to the extent those contentions raise “genuine issues of fact with respect to heat shock, impingement, and entrainment caused by the once-through cooling system,”<sup>8</sup> it did not suggest that: (1) the SPDES Permit was neither current, nor without state-equivalent Section 316 determinations, (2) Section 51.53 requires an

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<sup>4</sup> “If the applicant’s plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment.” 10 C.F.R. § 51.53(c)(3)(ii)(B).

<sup>5</sup> Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene (Jan. 22, 2008) (“Entergy Answer to NYAG”) at 169; Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper Inc.’s Request for Hearing and Petition to Intervene (Jan. 22, 2008) (“Entergy Answer to Riverkeeper”) at 64-65.

<sup>6</sup> Entergy Answer to NYAG at 185-92, 194-201; Entergy Answer to Riverkeeper at 82-101.

<sup>7</sup> NRC Staff’s Response to Petitions for 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 Cortlandt, and (7) Westchester County (Jan. 22, 2008) (“NRC Staff Answer”) at 85 (citations omitted).

<sup>8</sup> NRC Staff Answer at 110. Likewise, in evaluating NYAG’s Petition, NRC Staff did not oppose it “to the limited extent that [NYAG] challenges the adequacy of the . . . analysis provided in the ER.” *Id.* at 85.

applicant to submit both its current SPDES Permit and a full aquatic assessment, or (3) that the aquatic assessment was inadequate.

Without doubt, Petitioners had a full opportunity to respond to Entergy's Answers in their reply briefs. At that time, neither disputed the principle of New York law that IPEC's SPDES Permit necessarily contains NYSDEC's Section 316 determinations.<sup>9</sup> Likewise, at oral argument, neither Petitioner disputed this legal principle in response to questions from the Board, and neither asserted a contrary proposition.<sup>10</sup>

At oral argument, NRC Staff stated—with respect to the NYAG's Proposed Contentions 30 and 31—that “in reviewing Entergy's answer to the contentions, and also New York's reply, which does not rebut any of what Entergy has asserted,” it was persuaded that the SPDES Permit submitted by Entergy “does, in fact, meet the 316(b) requirements.”<sup>11</sup> It echoed this position with respect to Riverkeeper's proposed Contention EC-1.<sup>12</sup>

### III. ARGUMENT

This Board offered Petitioners a limited opportunity to address the NRC Staff's change of position regarding a tenet of New York law as it relates to IPEC's SPDES Permit; namely, that a NYSDEC-issued SPDES Permit must comply with New York law, including the state-equivalent Section 316 provisions. The Board explained that, in their supplemental pleading, the Petitioners may only discuss the “change of position on the part of the NRC Staff.”<sup>13</sup> Unable to contradict

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<sup>9</sup> See generally, NYAG Reply at 154-71; Riverkeeper Reply at 23-29.

<sup>10</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), 50-247-LR & 50-286-LR, Transcript of Oral Argument on Admissibility of Proposed Contentions (“Tr.”), at 470-77, 596-98 (Mar. 11, 2008).

<sup>11</sup> Tr. at 467-69.

<sup>12</sup> Tr. at 586-87.

<sup>13</sup> This Board only invited NYAG to submit additional briefing “based on that,” *i.e.*, based on the “change of position on the part of the NRC staff.” Tr. at 490. The Board also invited Riverkeeper to provide “a written submission, based on the Staff's change of position . . . .” Tr. at 586. The Board did not invite either to submit a general response to Entergy's position regarding Section 51.53.

settled New York law, Petitioners inappropriately stray far from the limited scope of supplementation set by this Board and reargue their prior briefing.

As detailed below in Section III.A, Petitioners are precluded from offering additional written defense of their respective contentions following reply briefs outside the scope of this Board's Order.<sup>14</sup> Moreover, as detailed in Section III.B, the NRC Staff's current understanding of New York SPDES permitting law, and its establishing as much on the record at oral argument, not only is to be expected, but also is the essence of sound regulatory action fully in the public interest. Indeed, it underscores the very soundness of the jurisdictional limits on NRC's authority with respect to SPDES Permits—an area of law beyond its authority. Lastly, as summarized in Section III.C, IPEC's SPDES Permit is, in the words of the NYSDEC counsel charged with its administration, "current" and necessarily contains Section 316 determinations.

A. NYAG and Riverkeeper Have Provided Duplicative Briefings Redundant of their Original Replies to Entergy Answers, Contrary to the Board's March 18, 2008 Order

Except as specifically allowed by the Order, Petitioners are precluded from submitting additional briefing regarding their proposed contentions following their replies, particularly where such briefing is designed to bolster inadequate proposed contentions.<sup>15</sup> The Order allowed Petitioners limited supplemental briefing on the legal question of whether New York law

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<sup>14</sup> See *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (stating that "[a]llowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements"); cf. Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2,203 (Jan. 14, 2004) (stating that "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer").

<sup>15</sup> 10 C.F.R. § 2.309(h)(3) (disallowing other written briefing regarding contentions following petitioner's reply); see also, e.g., *Entergy Nuclear Vt. Yankee LLC* (Vermont Yankee Nuclear Power Station), 50-271-LR, 64 NRC 131, 152 (2006) (petitioner "may not use its reply to rectify the inadequacies of its petition"); *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004) (disregarding petitioner's statements upon noting that "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions").

requires a SPDES permit, such as IPEC's SPDES Permit, to include state-equivalent Section 316 determinations.<sup>16</sup>

Instead, the vast majority of NYAG's response, and the entirety of Riverkeeper's, is a recapitulation of previously-briefed arguments, most particularly, that NYSDEC's Section 316 determinations in its conceded current SPDES Permit are not ideal or may be subject to revision through pending and future SPDES permitting processes.<sup>17</sup> Riverkeeper also attempts to reconstrue its own counsel's admissions at oral argument. For example, Riverkeeper states:

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 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.<sup>18</sup>

The transcript reflects the following colloquy:

[CHAIRMAN McDADE:] I just want to make sure I'm clear. Under 51.53(c)(3)(ii)(b) if they submit a permit isn't the permit the 316 determination and regardless of whether they voluntarily submit more, doesn't that end our inquiry here? If they submit a valid permit, that satisfies 51.53(c)(3)(ii)(b) period. Why did they need to submit anything more? Isn't it only if they don't have a valid permit that they need to submit additional documents and then we have to look at the adequacy of those?

**MR. TAFUR: It's not the permit. It's the assessment that goes along with the permit.**<sup>19</sup>

<sup>16</sup> Order (Mar. 18, 2008) (allowing NYAG to respond to NRC Staff's change of position on Contentions 30 and 31); Tr. at 490 ("Today there was a change of position on the part of the NRC staff and . . . if there is anything further that New York wishes to submit based on that, we would give them the opportunity to do so"); Tr. at 586 ("in light of that Staff change of position, we certainly want to hear from [Riverkeeper] today on this particular point . . . but if you did wish additional time within which to submit a written submission, based on the Staff's change of position," the Board is willing to grant such relief).

<sup>17</sup> Petitioner State of New York's Response to NRC Staff's Change in Position to New York's Contentions 30 and 31, 2-6 (Apr. 7, 2008) ("NYAG Response"); Riverkeeper, Inc.'s Response to NRC Staff's Change in Position Regarding the Admissibility of Contention EC-1, 3-16 (Apr. 7, 2008) ("Riverkeeper Response").

<sup>18</sup> Riverkeeper Response at 13-14.

<sup>19</sup> Tr. at 596:21 – 597:8 (emphasis added to Tr. 597:7-8 text cited by Riverkeeper)

The transcript also reflects Riverkeeper's counsel's concession, as follows:

JUDGE WARDWELL: So by issuing that permit and the fact that New York State cannot issue it without meeting all the requirements of the Clean Water Act, by definition says the 316A and B determinations demonstrations have been achieved. Is that not a logical linkage of thought?

MR. TAFUR: Yes, Your Honor; but in the context of the Hudson River settlement agreement, we all agreed that they were in full compliance with the conditions and the text that's in there because DEC have to get them a permit.<sup>20</sup>

In short, Petitioners have ignored this Board's Order and—now, for a third time—have simply re-briefed the sufficiency of Entergy's LRA.

B. The NRC Staff's Position Change was Procedurally Proper and Legally Correct

Tellingly without citation to any legal authority, the NYAG states that the NRC Staff's change of position does "not comply with the NRC rules of procedure."<sup>21</sup> The NYAG is incorrect as a matter of NRC law, and would hold the NRC Staff to a standard that is neither compelled as a matter of law nor in the public interest. Changes in Staff position, even during oral argument, reflect a common-sense standard—namely, that NRC Staff acknowledge their evolving understanding of law and facts.<sup>22</sup>

While NRC Staff are litigants in these proceedings, they are not *only* litigants; rather, as a "protector of the public interest," they must "remain free to change [their] position in light of new information that may be produced in the course of a trial."<sup>23</sup> To require the NRC Staff to blindly adhere to a position once that position is revealed to be erroneous would impede the

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<sup>20</sup> Tr. at 605:14-24

<sup>21</sup> NYAG Response at 7. Riverkeeper does not address the procedural validity of the NRC Staff's position change.

<sup>22</sup> See, e.g., *Shieldalloy Metallurgical Corp.* (Newfield, New Jersey Facility), LBP-07-8, 65 NRC 531, 536 n. 26 (2007) (NRC Staff position change regarding contention deferral issue); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 86 (1979) (NRC Staff position change during oral questioning); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 538 (1977) (NRC Staff position change during oral argument).

<sup>23</sup> *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 94 (1994) (granting intervenor's request to compel NRC Staff to produce amended responses to requests of admission, and explicitly authorizing NRC Staff to change position).

Staff's ability to make the findings required by NRC regulations. Indeed, counsel for all litigants appearing before NRC adjudicatory tribunals "have a manifest and iron-clad obligation of candor," which includes the duty to call to the tribunal's attention material facts of record.<sup>24</sup> In short, the NYAG's position has no basis in law.

C. NYAG's and Riverkeeper's Substantive Criticisms of Entergy's Position Regarding Section 51.53(c)(3)(ii)(B) are Unsupported by New York or NRC Law

While Petitioners add nothing new in response to the Order, both continue to advance arguments that are incorrect as a matter of law or fact. Below, Entergy provides a brief response to three of those erroneous arguments. In short, it remains clear that Petitioners have not proffered any alleged fact, expert opinion, or other information that establishes a genuine dispute on a material issue of law or fact, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi).

1. IPEC's SPDES Permit Reflects a Current and Valid Section 316(b) Determination

Much of the NYAG's response, and all of Riverkeeper's response, rests upon the assertion—without citation to legal authority or rationale—that IPEC's SPDES Permit, though admittedly "current," should not be considered as such for purposes of 10 C.F.R.

§ 51.53(c)(3)(ii)(B).<sup>25</sup> Both arguments lack a basis in law.

Whatever the NYAG's euphemism that IPEC's SPDES Permit has been "stretched to the breaking point"<sup>26</sup> is meant to convey, in its response, the NYAG does not controvert its concession at oral argument that the SPDES Permit is valid and must reflect compliance with all New York law, including necessarily the state-equivalent Section 316 determinations.

Likewise, in its response, Riverkeeper does not controvert its counsel's statement during oral argument that "there must be a [Section 316(b)] determination every time" a SPDES permit is

<sup>24</sup> *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 532 (1978).

<sup>25</sup> Riverkeeper Contentions at 28 (admitting SPDES permit is "technically current"); NYAG Contentions at 288 (discussing "conditions in the current SPDES permit").

<sup>26</sup> See NYAG Contentions at 289.



issued.<sup>27</sup> Instead, Riverkeeper takes another tack, contending that the SPDES Permit does not constitute a Section 316(b) “determination,” purportedly because the Permit has been administratively extended. However, Riverkeeper offers no legal authority for the proposition that an administrative continuance compromises a SPDES permit.<sup>28</sup>

As detailed in Entergy’s Answers, New York law is clearly to the contrary: Administrative extension of a SPDES permit does more than protect the permit-holder from liability, it extends the life of the permit itself.<sup>29</sup> Thus, IPEC must be treated as possessing a current and valid SPDES permit for all possibly applicable legal rules, including Section 51.53.<sup>30</sup> There is no legal basis for either Petitioner’s arguments that could give rise to a genuine dispute on a material issue.

2. There Is No Factual Basis for the Suggestion that Entergy Did Not Provide All Necessary Documentation to the NRC in Support of the Environmental Report

The NYAG disputes whether Entergy submitted certain documents in support of its ER.<sup>31</sup> Even Riverkeeper does not go so far, conceding “[t]he Hudson River settlement agreement which is an attachment . . . is part of the FEIS and it’s now in the record, so let’s not quarrel with that.”<sup>32</sup> In any event, the SPDES Permit, the HRSA and the Consent Orders are all unambiguously referenced in the ER, as are the Draft Environmental Impact Statement (“DEIS”), the Final Environmental Impact Statement (“FEIS”), and the Enercon Report.<sup>33</sup>

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<sup>27</sup> Tr. at 591.

<sup>28</sup> See Riverkeeper Response at 9-11.

<sup>29</sup> See, e.g., Entergy Answer to Riverkeeper at 76-77.

<sup>30</sup> See *Queens Farms, Inc. v. Gerace*, 96 A.D.2d 1120, 1121 (N.Y. App. Div. 1983) (dealer with administratively-extended license must be “regarded as a licensed dealer” for purposes of law affording recovery only to licensed dealers).

<sup>31</sup> NYAG Response at 3 (alleging that “Entergy’s Environmental Report has failed to provide the NRC Staff and the public with an up-to-date discussion and analysis of the impacts caused by once-through cooling”).

<sup>32</sup> Tr. at 595.

<sup>33</sup> See, e.g., ER at 4-8 to 4-12; 8-1 to 8-8 (referencing and incorporating supporting documents); Tr. at 488-89, 601 (listing documents incorporated in the ER and provided to NRC).

Furthermore, Entergy submitted the supporting documents to NRC along with its LRA,<sup>34</sup> and the NYAG submitted the *same* documents in support of its Notice of Intention to Participate and Petition to Intervene.<sup>35</sup> Accordingly, there is no factual basis for the NYAG's claim.

3. Entergy Did Not, and Could Not, Waive Any Right by Submitting a Complete Environmental Analysis

NYAG's argument that Entergy waived its right to argue that it is not required to submit a detailed environmental analysis in lieu of its administratively-continued SPDES permit is similarly groundless. NYAG contends that Entergy's simultaneous submission of its SPDES documentation and a thermal assessment "constitutes a waiver of any right it may have had to by operation of 10 C.F.R. § 51.53(c)(3)(ii)(B) to not submit" a full assessment of thermal discharge impacts.<sup>36</sup> NYAG does not, and cannot, cite to any legal authority for this assertion.

By definition, a legally-cognizable waiver must be voluntary—that is, an intentional or knowing relinquishment of a right.<sup>37</sup> No facts support NYAG's assertion that Entergy intentionally relinquished its legal right to have the NRC accept its SPDES Permit in satisfaction of Section 51.53 simply by submitting an environmental analysis in the ER. Moreover, neither Entergy, nor any other NRC applicant, can waive the jurisdictional principles that underpin Section 51.53, since the NRC neither implements the requirements of the Clean Water Act nor oversees its application to licensees.

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<sup>34</sup> Tr. at 488-89, 601 (listing documents incorporated in the ER and provided to NRC), 384-89 (statements from Chris Chandler, NRC Staff attorney, affirming statement by Entergy attorneys that the ER incorporates supporting underlying documents and noting that the ER "does contain a large amount of information").

<sup>35</sup> See Declaration of William G. Little in Support of New York State Notice of Intention to Participate and Petition to Intervene (attaching copies of HRSA and consent agreements, SPDES permit, DEIS, and FEIS).

<sup>36</sup> NYAG Response at 6.

<sup>37</sup> *U.S. v. Olano*, 507 U.S. 725, 733 (1993) (waiver is a "voluntary relinquishment or abandonment of a known right") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); see also *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 499 F.Supp.2d 361, 375 (S.D.N.Y. 2007) ("Waiver is a voluntary and intentional relinquishment of a known right with full knowledge of the facts upon which the existence of the right depends.") (citations omitted).

#### IV. CONCLUSION

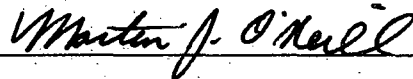
The Board should reject both the NYAG's and Riverkeeper's attempts to ignore the strictures of the Order and reargue positions already presented in their prior briefs. Neither Petitioner addresses the narrow question on which the Board allowed further briefing: whether NRC Staff properly reached the conclusion expressed at oral argument that Entergy's current SPDES permit contains the New York State-equivalent Section 316 determinations and, therefore, Entergy's submission of the SPDES permit in the ER satisfies the requirements of 10 C.F.R. § 51.53(c)(iii)(B). Petitioners cannot avoid the legal conclusion they already conceded at oral argument: the SPDES permit is current and, as a matter of New York law, must contain the relevant Section 316 determinations. Petitioners have cited no authority that prohibits the NRC Staff from adopting this position at oral argument. Nor does common sense support the notion that the NRC Staff, which, like all litigants, has a "manifest and iron-clad obligation of candor," cannot change its position its position in the course of this proceeding.<sup>38</sup>

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<sup>38</sup> *Black Fox Station*, ALAB-505, 8 NRC at 532.

In view of the above, Entergy respectfully reiterates its prior request that the Board reject Riverkeeper Proposed Contention EC-1 and NYAG Proposed Contentions 30 and 31 as inadmissible. Those proposed contentions lack adequate factual or legal support, and fail to establish a genuine dispute on a material issue of law or fact.

Respectfully submitted,



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Dated at Washington, DC  
this 21st day of April 2008

I-WA/2961341.2

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	April 21, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. TO RIVERKEEPER, INC.'S AND STATE OF NEW YORK'S RESPONSES TO NRC STAFF'S CHANGE IN POSITION REGARDING AQUATICS CONTENTIONS," dated April 21, 2008, were served this 21st day of April 2008 upon the persons listed below, by overnight delivery and e-mail as shown below.

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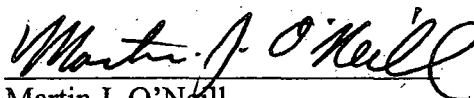
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