April 21, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR/286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	

NRC STAFF'S REPLY TO STATE OF NEW YORK AND RIVERKEEPER, INC.'S RESPONSES TO THE STAFF'S CHANGE IN POSITION ON NEW YORK CONTENTIONS 30 AND 31 AND RIVERKEEPER CONTENTION EC-1

INTRODUCTION

Pursuant to the Licensing Board's Orders dated March 18, 2008, April 9, 2008, and April 21, 2008,[1] the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby replies to the April 7, 2008 responses filed by the State of New York and Riverkeeper, Inc. regarding the Staff's change in position with respect to New York Contentions 30 and 31 and Riverkeeper Contention EC-1.[2] As more fully set forth below, the Staff respectfully submits that New York and Riverkeeper's Responses do not establish the admissibility of their contentions.

BACKGROUND

New York Contentions 30 and 31 and Riverkeeper Contention EC-1 raise various environmental issues involving the aquatic impacts of operation upon license renewal. The Staff originally did not oppose the admission of these contentions to the extent that they

[1] *See* (1) "Order (Scheduling Briefing Regarding the Effect of License Amendment 2 on Pending Contentions)" (Mar. 18, 2008); (2) "Order (Granting Riverkeeper, Inc.'s Motion and Amending Briefing Schedule)" (Apr. 9, 2008); and (3) "Order (Granting the NRC Staff's Motion For Leave To Reply - Riverkeeper EC-1)" (Apr. 21, 2008).

[2] *See* (1) "Petitioner State of New York's Response to NRC Staff's Change in Position To New York's Contentions 30 and 31" (Apr. 7, 2008) ("New York Response"); (2) "Riverkeeper, Inc.'s Response to NRC Staff's Change in Position Regarding the Admissibility of Contention EC-1" (Apr. 7, 2008) ("Riverkeeper Response").

challenged the adequacy of the heat shock, impingement, and entrainment analyses contained in Entergy's Environmental Report ("ER").[3] During oral argument on the admissibility of contentions, however, the Staff stated that it had changed its position on the admissibility of these contentions.[4] As Staff Counsel explained during oral argument on March 11, 2008, the Staff had not opposed the admission of these issues in its initial responses to contentions because it was not readily apparent to the Staff, in reviewing Entergy's ER, that Indian Point's current State Pollutant Discharge Elimination System ("SPDES") permit would satisfy the option provided in 10 C.F.R. § 51.53(c)(3)(ii)(B); under that provision, an applicant may submit current Clean Water Act § 316(b) determinations in lieu of an analysis of heat shock, impingement, and entrainment. However, after the Staff filed its January 22, 2008 response to contentions, the Staff came to understand, based on other pleadings[5] and additional research, that the current SPDES permit does, in fact, satisfy this provision of § 51.53(c)(3)(ii)(B). The Staff therefore determined that New York Contentions 30 and 31 and Riverkeeper Contention EC-1 are not admissible.

DISCUSSION

I. Challenges to NRC's Responsibilities Under NEPA are Premature

In its Response, New York contends that the NRC must comply with NEPA by assessing the environmental impacts of license renewal. New York Response at 5. This assertion is premature. The Staff is in the process of preparing a Supplemental Environment Impact Statement ("SEIS") for the Indian Point license renewal application, as required by

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[3] *See* "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), at 85-87, 109-10.

[4] *See* Tr. at 468, 586-87.

[5] The Staff's change of position was informed by its own review as well as pleadings filed by New York and Entergy. *See* (1) "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 New York"); and (2) "New York State Reply in Support of Petition to Intervene" (Feb. 22, 2008) ("New York Reply").

10 C.F.R. Part 51 and NEPA. This document, unlike the Applicant's ER, has not yet been issued; accordingly, any challenge to the Staff's environmental review is premature.

II. Entergy Holds a Valid SPDES Permit Which Includes Current § 316 Determinations

A. The Licensing Board Must Accept the SPDES Permit As Valid

Riverkeeper asserts in its Response that the Board must defer to the forthcoming SPDES permit, but not the current SPDES permit. Riverkeeper Response at 14-15. This assertion is without merit. The Commission recently held that the NRC may only examine "whether the EPA or the state agency consider[s] its permit to be a [§ 316] determination." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385-86 (2007). The Commission further explained that the Clean Water Act prohibits the NRC from looking behind a SPDES permit "to make an independent determination as to whether [the permit] qualifies as a *bona fide* [§ 316] determination." *Id.* at 387. Finally the Commission, quoting its earlier opinion in *Seabrook*, stated that NRC adjudicatory boards must defer to the EPA or the state permitting agency when that agency "has made the necessary factual findings for approval of a specific once-through cooling system for a facility after full administrative proceedings." *Id.* at 389 (*quoting Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 26 (1978)).

Riverkeeper misinterprets the *Seabrook* language by suggesting the Board can only defer to the EPA or state agency after that agency has conducted a full administrative hearing. *See* Riverkeeper Response at 14. Riverkeeper continues this misunderstanding by arguing that the Board should not defer to the 1987 SPDES permit because it has been administratively extended, but it must defer to the forthcoming permit when it is finally issued. *Id.* at 15.

This argument takes entirely too narrow a view of Commission precedent regarding NRC deference to EPA or state SPDES permits. The *Seabrook* opinion did not require Licensing

Board deference *only* to those permits that were issued following full administrative proceedings; rather, it merely addressed the situation when a full administrative proceeding has already been held, and states that a Licensing Board must defer to that decision. The *Seabrook* decision did not address the situation present here, where a valid permit was issued and continues in effect, subject to continuing appellate review. Furthermore, the Commission stated in *Vermont Yankee* that it and the Atomic Safety and Licensing Appeal Board "have *repeatedly* interpreted [Clean Water Act §] 511(c)(2) as requiring [the NRC] to take a [§ 316] determination *at face value*. . . ." *Vermont Yankee*, CLI-07-16, 65 NRC at 387 (emphasis added). In any event, moreover, even if Riverkeeper's reasoning were correct, the Board would still be required to defer to the 1987 SPDES permit because it incorporates the Hudson River Settlement Agreement ("HRSA"), which was a settlement agreement arising out of adjudicatory hearings before the EPA regarding the imposition of closed-cycle cooling at Indian Point.[6]

B. The 1987 SPDES Permit Is Current and Valid

In their Responses, New York and Riverkeeper attempt to distinguish a "valid" permit from a "current" or "administratively extended" permit. *See, e.g.*, New York Response at 4; Riverkeeper Response at 11, 12. These distinctions have no basis in law, and neither petitioner has provided any legal authority to support them.

There can be no question as to the current SPDES permit's validity. Section 401(2) of New York's State Administrative Procedure Act ("SAPA") provides that "[w]hen a licensee has made timely and sufficient application for the renewal of a license . . . , the existing license does not expire until the application has been finally determined by the agency. . . ." N.Y. A.P.A. LAW § 401(2) (Consol. 2008). There is no differentiation between permits that have yet to reach their

[6] *See In the Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC,* 2006 WL 295113, at *2 (N.Y. Dept. Env. Conserv. Feb 3, 2006).

expiration dates and those that operate as extended under the SAPA: They are equally valid under New York law.

The history of the Indian Point SDPES permits and applications has been well documented in this proceeding,[7] and does not bear repeating here. However, it is beyond dispute that until New York takes final action on the pending SPDES renewal application, the current SDPES permit—issued in 1987—will remain valid. *See* Tr. at 469-71, 479-80.

Riverkeeper also argues that 10 C.F.R. § 51.53(c)(3)(ii)(B) asks for *current* 316(b) determinations, as opposed to those that are merely *valid*, Riverkeeper Motion at 12-13, in Riverkeepr's view, this means that, under *Vermont Yankee*, the NRC must defer to NYSDEC's "*most current* § 316(b) determinations." Riverkeeper Response at 13 (*citing Vermont Yankee*, CLI-07-16, 65 NRC at 385) (emphasis added). In other words, Riverkeeper would like the Board to defer to the 2003 Draft SPDES Permit – *i.e.,* a permit which has no legal effect.

The *Vermont Yankee* decision does not require deference to what Riverkeeper argues is the "most current" (meaning the most recently drafted) § 316 determinations; instead, it requires deference to current § 316 determinations, *i.e.*, permits which are currently in place. Here, the current § 316(b) determinations are those contained in the current SPDES permit, which was issued in 1987. It does not matter that there exists a draft SPDES permit that contains different determinations than the current permit; what matters is that there is, currently, a valid SPDES permit for Indian Point Units 2 and 3 – *i.e.*, the permit that was issued in 1987 and which is currently in effect.

Further, as Riverkeeper itself has noted, "[t]he only relevant inquiry here is 'whether the EPA or the state agency considered its permit to be a Section 316(a)[/(b)] determination[s].'" Riverkeeper Response at 11 (*citing Vermont Yankee*, CLI-07-16, 65 NRC at 385). Clearly,

[7] *See, e.g.*, Tr. at 462-65. *See also* Entergy Answer to New York at 168-76; New York Reply at 154-58.

despite New York's protestations in this proceeding, *see, e.g.*, Tr. at 469-70**,** the 1987 SPDES permit *does* include § 316 determinations. This permit, attached to the ER, states on the first page that it was issued "in compliance with Title 8 of Article 17 of the Environmental Conservation Law of New York State and in compliance with the Clean Water Act, as amended, (33 U.S.C. § 1251 *et seq.*) . . . ." Moreover, Additional Requirement 7, located on page 11 of the SPDES permit, incorporates the HRSA by reference and states that the HRSA satisfies New York State Criteria Governing Thermal Discharges.[8] On this basis, there can be no question that the current, 1987 permit includes the necessary § 316 determinations. Therefore, further inquiry is neither required nor permitted under Commission precedent.

III. The Clean Water Act Prohibits the NRC from Requiring Closed-Cycle Cooling

New York argues that the NRC should require Indian Point to implement closed-cycle cooling. *See* New York Response at 5. In support of this argument, New York points to the fact that the NRC, and its predecessor agency the Atomic Energy Commission, imposed closed-cycle cooling license conditions on operating licenses for Units 2 and 3. *See id.*

It is well settled precedent that the NRC has no authority over issues covered by the Clean Water Act; that authority rests with the EPA and the States. *See Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979) (citing *Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 712 (1978)). *See also* Clean Water Act, § 511(c)(2), 33 U.S.C. § 1371(c)(2). Following the enactment of Clean Water Act § 511(c)(2), the NRC entered into a Memorandum of Understanding with the EPA delineating the respective responsibilities of the two agencies, including the understanding that "NRC will not require adoption of an alternative pursuant to NEPA in order to minimize impacts

[8] Part 704 of New York's environmental regulations is entitled "Criteria Governing Thermal Discharges," and includes the State's § 316 equivalent. *Compare* 6 N.Y.C.R.R. § 704.5 *with* Clean Water Act § 316(b), 33 U.S.C. § 1326(b).

on water quality and biota that are subject to limitations or other requirements promulgated or imposed pursuant to the [Clean Water Act]."[9]

New York correctly states that license conditions requiring closed-cycle cooling were initially imposed for the Indian Point facility. However, the administrative history of closed-cycle cooling did not end when those conditions were imposed. Significantly, in 1981, the Commission deleted these license conditions because "the licensees, the New York State Department of Environmental Conservation, and the NRC staff agree that this action is compelled by § 511(c)(2) of the Clean Water Act. . . ." *Consolidated Edison Co. of New York, Inc. & Power Authority of the State of New York* (Indian Point, Unit Nos. 2 & 3), CLI-81-7, 13 NRC 448, 449 (1981).[10] Thus, the fact that such conditions were imposed initially is of no effect.

IV. The NRC Staff's Change in Position Was Not Procedurally Defective

New York asserts that the Staff's change in position during the pre-hearing conference was procedurally defective. New York Response at 7-8. However, the State does not offer any legal support for this assertion. Instead, New York states that the Staff should have effected its change in position by filing a motion to amend its January 22, 2008 response to New York's contentions,[11] and it cites Commission precedent relating to the admissibility of contentions as

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[9] Federal Water Pollution Control Act Amendments of 1972: Second Memorandum of Understanding and Policy Statement Regarding Implementation of Certain NRC and EPA Responsibilities, 40 Fed. Reg. 60,115, 60,120 (Dec. 31, 1975).

[10] The Hudson River Fishermen's Association argued an alternative basis for relief, but nonetheless agreed that the license conditions should be removed. *See Consolidated Edison Co. of New York, Inc. & Power Authority of the State of New York* (Indian Point, Unit Nos. 2 & 3), CLI-81-7, 13 NRC 448, 449-50 (1981).

[11] Previously, in a joint motion filed regarding a Staff change in position on New York Contention 26 and Riverkeeper Contention TC-1, New York and Riverkeeper argued that the Staff should not be permitted to change its position at all, until after the Board has ruled on contention admissibility (at which point, presumably, any position change concerning the admissibility of contentions would be meaningless). *See* Joint Motion to Strike Paragraph One of Staff's "Pleading" Letter Dated March 4, 2008, (Mar. 6, 2008), at 3.

support for this argument.[12] There is no merit in New York's position. A party has a "continuing duty" to inform the Board of "'any development which may conceivably affect an outcome.'" *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 406 n.26 (1976) (*citing Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring)). Here, the Staff's change in position was made orally, on the record, and in the presence of the Board, the Applicant, and the Petitioners. New York had the opportunity at that time to object to the Staff's change in position, but declined to do so. Moreover, New York's suggestion that the Staff's change of position was improper or unfair to the petitioner is moot, since the Licensing Board granted the State's request to file a response to the Staff's change in position.[13] Further, by allowing the State to file its Response on April 7, the Board afforded New York 27 days in which to prepare its response. Thus, it cannot reasonably be argued that New York has been unfairly prejudiced or that it was not given sufficient time in which to respond to the Staff's change of position.

[12] New York cites *Oyster Creek* in claiming that the NRC's pleading rules are "strict by design." New York Response at 8. In fact that opinion—and the line of cases which precedes it—makes very clear that the NRC's *contention admissibility rules* are "strict by design." *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) ("The requirements for admissibility set out in 10 C.F.R. § 2.309(f)(1)(i)-(vi) are 'strict by design'. . . .").

[13] Order (Scheduling Briefing Regarding the Effect of License Amendment 2 on Pending Contentions), (Mar. 18 2008), at 2.

CONCLUSION

For the foregoing reasons, the NRC Staff respectfully submits that New York and Riverkeeper's Responses to the Staff's change in position on New York Contentions 30 and 31 and Riverkeeper Contention EC-1 fail to establish that those contentions are admissible.

Respectfully submitted,

/RA/

Christopher C. Chandler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of April 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S REPLY TO STATE OF NEW YORK AND RIVERKEEPER, INC.'S RESPONSES TO THE STAFF'S CHANGE IN POSITION ON NEW YORK CONTENTIONS 30 AND 31 AND RIVERKEEPER CONTENTION EC-1," dated April 21, 2008, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, with copies by electronic mail, as indicated by double asterisk, this 21st day of April, 2008:

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