

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

ENERGY NUCLEAR INDIAN POINT 2, LLC,
ENERGY NUCLEAR INDIAN POINT 3, LLC, and
ENERGY NUCLEAR OPERATIONS, INC.

Docket Nos.
50-247-LR & 50-286-LR

INDIAN POINT NUCLEAR GENERATING UNITS 2 & 3

ASLBP No.
07-858-03-LR-BD01

Regarding the Renewal of Facility Operating Licenses
No. DPR-26 and No. DPR-64 for an Additional 20-year Period

**PETITIONER STATE OF NEW YORK'S RESPONSE
TO NRC STAFF'S CHANGE IN POSITION TO
NEW YORK'S CONTENTIONS 30 AND 31**

Background

In Contentions 30 and 31, the State of New York has demonstrated that the Environmental Report that Entergy filed as part of its License Renewal Application (LRA) for Indian Point Units 2 and 3 has failed to adequately analyze the environmental impacts from once-through cooling. In its Response dated January 22, 2008, NRC Staff supported these two contentions.¹ At oral argument on the petitions filed by New York and other petitioners, held in White Plains on March 10-12, 2008, NRC Staff – for the first time and without any prior written submission – informed the Board and New York that Staff changed its position on these two contentions and no longer supported them. In its Order dated March 18, 2008, this Board

¹ Specifically, the NRC Staff stated that it did not oppose Contention 30 “to the limited extent that it challenges the adequacy of heat shock analysis provided in the ER” (NRC Staff Response to Petitions for Leave to Intervene at 85) and that it did not oppose Contention 31 “to the limited extent that it challenges the impingement and entrainment analysis provided in the ER” (Id. at 87).

authorized New York to submit a response to NRC Staff's change in position by April 7, 2008. This submission complies with that Order.

As demonstrated below, not only is the NRC Staff's amended answer without merit with respect to Entergy and the NRC's obligations under the National Environmental Policy Act (NEPA) and the NRC's regulations (10 C.F.R. § 51.53(c)), NRC Staff failed to follow NRC rules to inform the Board and other parties of its change in position.

NRC Staff Change in Position Has No Merit

Not only did NRC Staff fail to formally plead its change in position, that change in position is wholly without merit because New York's Contentions 30 and 31 are within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii).

NRC regulations promulgated pursuant to NEPA specifically provide that for plants with once-through cooling systems, the impacts from heat shock, impingement, and entrainment are "Category 2" impacts that must be assessed by the applicant for a license renewal (10 C.F.R. Part 51, Subpart A, Appendix B), and those impacts must be ultimately evaluated by the NRC as part of NEPA's mandate to identify and address environmental impacts and mitigation measures. NEPA § 102, 42 U.S.C. § 4332; *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.")

It is beyond dispute that Entergy uses a once-through cooling system that consumes 2.5 billion gallons of Hudson River water for operation of Indian Point Units 2 and 3 each day. The significant and dramatic aquatic impacts from the operation of this outmoded system are within the scope of this proceeding. The NRC's NEPA regulations require Entergy to identify and discuss all these impacts and mitigation measures in an Environmental Report submitted with the

License Renewal Application. 10 C.F.R. § 51.53(c). This regulation is designed to ensure that the applicant provides the NRC Staff with a comprehensive discussion on the environmental impacts resulting from twenty years of additional operation of a power reactor. As discussed below, 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.

Nor can Entergy claim any protection under Clean Water Act section 316, as NRC Staff now assert. NRC regulations provide that

If the applicant's plant utilizes once-through cooling . . . 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 cannot 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) (emphasis added).

Section 316(b) provides that

Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available [BTA] for minimizing adverse environmental impact.

33 U.S.C. § 1326(b).

Under section 316(a), a Clean Water Act permittee can seek a variance from effluent limitations for thermal discharges if it demonstrates that its discharges "will assure the protection and propagation of a balanced, indigenous population" of aquatic resources in the receiving waterbody. 33 U.S.C. § 1326(a).

Operating in concert, these three provisions mean that in an NRC license renewal proceeding, an applicant whose plant uses a once-through cooling system can tender a current BTA determination and, if necessary, a variance from applicable thermal discharge effluent

limitations, along with all “supporting documentation,” including all relevant studies and analyses which comprise the record before the state permitting agency, and not have to submit any further analyses to the NRC in support of its license renewal application. As demonstrated below, Entergy has not submitted a current BTA determination or a variance. It also has not merely submitted all the relevant “supporting documentation,” but has chosen to offer its opinion about what that documentation proves and thus it cannot claim any shield that 10 C.F.R. § 51.53(c)(3)(ii)(B) may bestow.

The premise of NRC Staff’s change in position is that Entergy presently has a Clean Water Act permit (known as a SPDES permit) to discharge into the Hudson River. As New York has made clear throughout this relicensing proceeding, that permit is twenty-one-years-old, is not “current” either as a matter of law or fact as required by 10 C.F.R. § 51.53(c)(3)(ii)(B), and does not adequately protect aquatic resources. That permit – extended by operation of law under the New York State Administrative Procedure Act – only serves to shield Entergy against an enforcement action for discharging without a permit. It does not mean, as NRC Staff has now apparently concluded, that the discharges comply as a matter of law, and therefore fact, with the Clean Water Act. As set forth in the new draft SPDES permit, Entergy’s operations do not comply and therefore cannot be considered “current.”

Although New York State believes the document submitted by Entergy, a twenty-one-year-old SPDES permit, which has been under review for sixteen years and is now proposed to be replaced with a new permit that requires the use of closed-cycle cooling, is not the equivalent of a current section 316(b) determination contemplated by the regulation, to some extent that issue is beside the point. Since Entergy voluntarily chose to offer its own view of what some of the “supporting documentation” – *i.e.* the relevant studies done over the last twenty-one or more

years – means, Entergy has brought into this proceeding the entirety of the environmental impacts of once-through cooling and the advantages of closed cycle cooling. New York State has every right to challenge those analyses and conclusions which are contained in the Environmental Report and to proffer contentions based upon the errors in Entergy's analysis. The NRC Staff, in changing its position, misses the point of the Contentions 30 and 31 and ignores the significance of the fact that Entergy has chosen to make the meaning of the relevant studies a legitimate issue for contention between Entergy and New York State.

New York is not seeking to have the NRC weigh in on the New York administrative proceeding. That proceeding is outside the jurisdiction of the ASLB. New York is seeking for the NRC to comply with its legal obligations under NEPA, which requires the NRC to assess the environmental impacts of the license renewal action, i.e., whether to issue a twenty-year license extension to Entergy for the operation of Indian Point.

Nor would the NRC be changing an effluent limitation, which it cannot do under Clean Water Act section 511, 33 U.S.C. § 1371. Rather, the NRC has an independent obligation under NEPA to consider mitigation measures. See 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b). Based on the data submitted by New York, mitigation should include the imposition of closed cycle cooling to replace the outmoded destructive once-through cooling at Indian Point. Indeed, a prior generation of NRC Staff did just that at Indian Point – it included cooling towers as a condition of the licenses for Units 2 and 3 and it grounded that condition in NEPA. See *Mtr. of Consol. Edison Co. of N.Y., Inc. (Indian Point Station Unit 2 Operating License)*, 6 A.E.C. 751, 781-83, 1973 WL 18195 at **39-41 (1973); *Mtr. of Consol. Edison Co. of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit No. 3)*, 2 N.R.C. 835, 8361975 WL 20120 at **2 (1975). The substantial data generated over the succeeding years from the Hudson River Settlement

Agreement (HRSA) demonstrate that the condition of closed cycle cooling is even more compelling today.

The NRC's regulations expressly state that

Compliance with the environmental quality standards and requirements of the Federal Water Pollution Control Act [Clean Water Act] (imposed by EPA or designated permitting states) is not a substitute for and does not negate the requirement for NRC to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects.

10 C.F.R. § 51.71(d), n.3. The NRC's obligation to conduct the NEPA review is informed by an operator's Environmental Report, which is a significant part of the License Renewal Application. That report must be complete and accurate. 10 C.F.R. § 54.13. As New York demonstrated in its Petition, Entergy's Environmental Report here is neither complete nor accurate and contains Entergy's view of the relevant data. *See, e.g.,* Declaration of David W. Dijk, Ph.D., ¶¶ 32-39 and Declaration of Roy A. Jacobson, Jr., ¶¶ 18-21.

The fact that Entergy went ahead and submitted an assessment of the environmental impacts of once-through cooling in its Environmental Report constitutes a waiver of any right it may have by operation of 10 C.F.R. § 51.53(c)(3)(ii)(B) to not submit that assessment. Entergy cannot have it both ways. As New York demonstrated in its Petition, supporting Declarations, and Reply, Entergy has failed to submit an accurate assessment of the dramatic and significant environmental impacts to the aquatic resources of the Hudson River.

NRC Staff's Change in Position is Procedurally Invalid

In addition to being without substantive merit, NRC Staff's belated change in position is procedurally flawed. At oral argument on March 11, 2008, NRC Staff informed the Board that it no longer supported Contentions 30 and 31 as being within the scope of license renewal. Tr.

467, 468.² According to NRC Staff, Entergy had not expressly stated in its Environmental Report that it qualified for or had received a Clean Water Act section 316(b) determination from New York State. Tr. 467. Moreover, Entergy provided an analysis of heat shock, impingement, and entrainment, which would not be required if the applicant qualified for a section 316(b) determination. Tr. 467. Therefore, since Entergy did provide that analysis, NRC Staff assumed that Entergy must not have qualified for the section 316(b) determination. Tr. 467.

If NRC Staff was confused up to and including the time that it submitted its January 22, 2008, Response to New York's Petition, any confusion should have been removed by the filing of Entergy's Answer on January 22, 2008, in which Entergy stated that its twenty-one-year-old SPDES permit from the State of New York constituted a Clean Water Act section 316(b) determination. Entergy Answer to New York's Petition at 180-82, 194. Regardless of this legal status, Entergy had submitted an "analysis" of heat shock, impingement, and entrainment in the Environmental Report, which in Entergy's view, ostensibly showed that its operations (which draw and discharge 2.5 billion gallons of Hudson River water each day) do not adversely impact aquatic resources. Entergy Answer to New York's Petition at 191, 196-97. Nonetheless, NRC Staff did not inform the parties or the Board of its new understanding and appreciation of Entergy's position until oral argument on March 11, 2008 – forty-nine days later. This informal and last-minute method of informing the Board and the State of New York does not comply with the NRC rules of procedure.

What the NRC Staff should have done with its change of position on New York Contentions 30 and 31 is to file a motion to amend its January 22, 2008, response to New York's

² References to "Tr." followed by a page number, are to the Transcript of the oral argument on the various petitions held in White Plains, New York, on March 10-12, 2008.

Petition. Clearly, in fairness to New York, a response that bared NRC Staff's confusion should have been issued more formally and more timely than verbally at oral argument. Changing a position in the informal manner that NRC Staff has done here is contrary to the NRC's formal pleading rules, which have been deemed "strict by design." *See Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, 64 NRC 111, 118-19 (2006)). "Strict by design" is not reserved solely for petitioners in NRC proceedings – it should apply equally to all parties. Since any attempt by an intervenor to alter its position from that contained in its Petition to Intervene is severely restricted, no lesser standard should be applied to the alteration of a position by the Applicant or NRC Staff. Otherwise, the Rules of Practice would be used to unfairly prejudice the rights of the public.

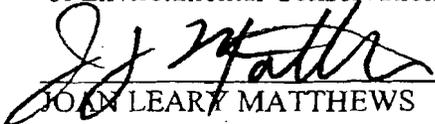
Conclusion

In conclusion, NRC Staff is wrong in now claiming that the assessment of aquatic impacts from thermal discharges/heat shock, impingement, and entrainment are outside the scope of this proceeding. As demonstrated above, these significant aquatic impacts from the daily consumption of the Hudson River – intake and discharge of 2.5 billion gallons of Hudson River water – are within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Entergy, having chosen to address these impacts, is required to assess those impacts completely and accurately, which it has not done in this proceeding.

Albany, New York
April 7, 2008

Respectfully submitted,

ALEXANDER B. GRANNIS
Commissioner
New York State Department
of Environmental Conservation


JOHN LEARY MATTHEWS
Senior Counsel for Special Projects
New York State Department
of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500
(518) 402-9190
jimatthe@gw.dec.state.ny.us

JOHN L. PARKER
Region 3 Attorney
New York State Department
of Environmental Conservation
Region 3 Headquarters
21 South Putt Corners Road
New Paltz, NY 12561-1620
(845) 256-3037
jlparker@gw.dec.state.ny.us

ANDREW M. CUOMO
Attorney General for the State of New York


JOHN J. SIPOS
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 402-2251
john.sipos@oag.state.ny.us

JANICE A. DEAN
Assistant Attorney General
Office of the Attorney General
120 Broadway
New York, NY
(212) 416-8459
janice.dean@oag.state.ny.us

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CERTIFICATE OF SERVICE

I certify that on April 7, 2008, copies of the foregoing State of New York's Request for Admission of Supplemental Contention 26-A, the Declaration of Richard T. Lahey, Jr., in support of Supplemental Contention 26-A, New York's response to NRC Staff's Change in Position on New York's Contentions 30 and 31, and a letter to the ASLB Panel regarding New York's receipt of WestCAN's filing, all dated April 7, 2008, were served on the following persons by regular first class mail and e-mail:

Lawrence G. McDade, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Lawrence.McDade@nrc.gov

Kaye D. Lathrop
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
190 Cedar Lane E.
Ridgway, CO 81432
Kaye.Lathrop@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Richard.Wardwell@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Zachary S. Kahn, Esq.
Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Zachary.Kahn@nrc.gov

Marcia Carpentier, Law Clerk
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop 3 E2B
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Marcia.Carpentier@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
ocaamail@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
hearingdocket@nrc.gov

Sherwin E. Turk, Esq.
David E. Roth, Esq.
Lloyd B. Subin, Esq.
Beth N. Mizuno, Esq.
Christopher C. Chandler, Esq.
Kimberly A. Sexton, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mailstop 15 D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
set@nrc.gov
der@nrc.gov
lbs3@nrc.gov
bnm1@nrc.gov
Christopher.Chandler@nrc.gov
Kimberly.Sexton@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
Mauri T. Lemoncelli, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ksutton@morganlewis.com
pbessette@morganlewis.com
martin.o'neill@morganlewis.com
mlemoncelli@morganlewis.com

Elise N. Zoli, Esq.
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
ezoli@goodwinprocter.com

Nancy Burton
147 Cross Highway
Redding Ridge, CT 06876
NancyBurtonCT@aol.com

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
wdennis@entergy.com

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
robert.snook@po.state.ct.us

Justin D. Pruyn, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
jdp3@westchestergov.com

Daniel Riesel, Esq.
Thomas F. Wood, Esq.
Jessica Steinberg, J.D.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driese@sprlaw.com
jsteinberg@sprlaw.com

Manna Jo Greene, Director
Hudson River Sloop Clearwater, Inc.
112 Little Market St.
Poughkeepsie, NY 12601
Mannajo@clearwater.org

Stephen C. Filler, Esq.
Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway
Suite 222
Tarrytown, NY 10591
sfiller@nylawline.com

Susan H. Shapiro, Esq.
Westchester Citizen's Awareness Network
(WestCan), Citizens Awareness Network (CAN), etc.
21 Perlman Drive
Spring Valley, NY 10977
mbs@ourrocklandoffice.com

Richard L. Brodsky, Esq.
Assemblyman
5 West Main Street, Suite 205
Elmsford, NY 10523
richardbrodsky@msn.com

Sarah L. Wagner, Esq.
Room 422
Legislative Office Building
Albany, NY 12248
sarahwagneresq@gmail.com

Diane Curran, Esq.
Harmon, Curran, Speilberg & Eisenberg, LLP
Suite 600
1726 M Street, NW
Washington, DC 20036
dcurran@harmoncurran.com

Phillip Musegaas, Esq.
Victor Tafur, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
phillip@riverkeeper.org
vtafur@riverkeeper.org

Daniel E. O'Neill, Mayor
James Seirmarcho, M.S.
Village of Buchanan
Municipal Bldg.
236 Tate Avenue
Buchanan, NY 10511-1298
vob@bestweb.net

Michael J. Delaney, Esq.
Vice President - Energy Department
New York City Economic Development Corporation
(NYCEDC)
110 William Street
New York, NY 10038
mdelaney@nycedc.com

Arthur J. Kremer, Chairman
New York Affordable Reliable Electricity Alliance
(AREA)
347 Fifth Avenue, Suite 508
New York, NY 10016
kremer@area-alliance.org

John LeKay
FUSE USA
351 Dyckman Street
Peekskill, NY 10566
fuse_usa@yahoo.com

John J. Sipos, Esq.
Assistant Attorney General
Office of the Attorney General of the State of NY
The Capitol
Albany, NY 12224

Janice A. Dean, Esq.
Assistant Attorney General
Office of the Attorney General of the State of NY
26th Floor
120 Broadway
New York, NY 10271

Mylan L. Denerstein
Executive Deputy Attorney General, Social Justice
Office of the Attorney General of the State of NY
25th Floor
120 Broadway
New York, NY 10271

John Louis Parker, Esq.
Regional Attorney, Office of General Counsel, R3
NYS Department of Environmental Conservation
21 South Putt Corners Road
New Paltz, NY 12561-1620



John Leary Matthews

