

RAS E-139

August 11, 2008

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

DOCKETED
USNRC

August 12, 2008 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**RIVERKEEPER, INC.'S MOTION FOR LEAVE TO FILE
MOTION FOR CLARIFICATION
AND RECONSIDERATION OF LBP-08-13**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), Riverkeeper, Inc. ("Riverkeeper"), hereby moves the Atomic Safety and Licensing Board ("ASLB" or "Board") for leave to file the attached Motion for Clarification and Reconsideration of LBP-08-13 ("Motion"). The Motion requests the ASLB to clarify and reconsider its ruling on Sections 1(a), 2(a), 2(b), and 2(c) of Riverkeeper's Contention EC-2 in LBP-08-13, Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) (July 31, 2008). Contention EC-2 challenged the adequacy of Entergy Nuclear Operations, Inc.'s ("Entergy's") severe accident mitigation alternatives ("SAMA") analysis with respect to two different issues: (1) probability of severe accidents and (2) severe accident consequences.

As discussed in more detail in the attached Motion, the ASLB's decision does not clearly analyze or dispose of either of these issues, and confuses the two issues to the point that the decision cannot be understood. Therefore, Riverkeeper requests the ASLB to clarify its decision. To the limited extent it is understandable, the rationale for the decision is also at odds with the record, which shows that the contentions establish the existence of a genuine and material dispute between Riverkeeper and Entergy regarding the adequacy of the SAMA analysis provided in

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Entergy's Environmental Report ("ER"). Therefore, Riverkeeper also requests the ASLB to reconsider its decision.

Riverkeeper respectfully submit that its request for clarification and reconsideration meets the NRC's standard for reconsideration in 10 C.F.R. § 2.323(e). This standard provides that a motion for reconsideration of an order by the ASLB or the Commission must show:

compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

The Commission has held that a motion for reconsideration is not lightly granted, but will be considered if a party seeking reconsideration "brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004). *See also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 340 n.6 (2006), quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003) ("Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification.")¹

Here, the confusion in LBP-08-13 has resulted in the clear and material error that the ASLB has dismissed an admissible contention, without providing any understandable rationale. Riverkeeper believes the error renders LBP-08-13 invalid with respect to Contention EC-2, because if it were not for the error, the contention would have been admitted with respect to Sections 1(a), 2(a), 2(b), and 2(c).

Moreover, Riverkeeper could not have anticipated the error, and did everything it could to ensure that the contention was clear to the ASLB, including extensive briefing at the contention-filing stage, responding to questions at the March 12, 2008, oral argument, and

¹ Riverkeeper is unaware of any regulatory standard for clarification of NRC decisions.

submitting a supplemental brief regarding the source term issue in Section 2(a) of the contention. Indeed, the error is inexplicable because although the portion of the decision containing the ASLB's analysis appears to confuse the issues raised by the contention, the introduction to the Board's ruling gives a contrary indication that the Board understood the distinctions between the subparts of the contention.

In conformance with 10 C.F.R. § 2.323(b), and as discussed in the attached Certification of Counsel, counsel for Riverkeeper has contacted counsel for the NRC Staff and Entergy in a sincere attempt to resolve the issues raised by this motion. Counsel for Entergy stated that Entergy does not object to Riverkeeper's right to file this motion for leave to seek clarification and reconsideration, but that it believes Contention EC-2 is inadmissible. Counsel for the NRC Staff stated that the NRC Staff would oppose this motion.

Respectfully submitted,



Diane Curran

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500
FAX 202/328-6918
dcurran@harmoncurran.com

Phillip Musegaas
Staff Attorney
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
914-478-4501 (ext. 224)
Fax 914-478-4527
phillip@riverkeeper.org
www.riverkeeper.org

August 11, 2008

**CERTIFICATION BY COUNSEL
PURSUANT TO 10 C.F.R. § 2.323(b)**

Pursuant to 10 C.F.R. § 2.323(b), I certify that on August 11, 2008, I contacted counsel for Entergy and the NRC Staff in a sincere attempt to resolve the issues raised by this motion. Counsel for Entergy stated that Entergy would not oppose Riverkeeper's right to file a motion for clarification or reconsideration, but believes that Contention EC-2 is admissible and therefore the Board's ruling should not be clarified or reconsidered. Counsel for the NRC Staff stated that the Staff intends to oppose the motion.


Diane Curran

August 11, 2008

clarify and reconsider its decision to reject the above-referenced Sections of Contention EC-2.

As discussed below in Section III.B, this motion meets the NRC's standard for reconsideration in 10 C.F.R. § 2.323(e).

II. STATEMENT OF FACTS

A. Contention EC-2

1. The contention

Riverkeeper's Contention EC-2 charged that Entergy's analysis of severe accident mitigation alternatives ("SAMAs") fails to satisfy NEPA, 42 U.S.C. § 4321-4370f, "because its analysis of the baseline of severe accidents is incomplete, inaccurate, nonconservative, and lacking in the scientific rigor required by NEPA." Hearing Request at 54. In two separate sections, the contention then set forth the particular inadequacies of Entergy's SAMA analysis.

2. Section 1- Probability of Severe Accidents

In the first section, which was supported by the expert declaration of Dr. Gordon R. Thompson (Exhibit 1 to Contention EC-2), Riverkeeper asserted that Entergy had made an "[i]nadequate analysis of probability and scope of severe accidents." Hearing Request at 54. Riverkeeper then listed three separate respects in which Entergy's analysis of the probability and scope of severe accidents as inadequate: (a) failure to properly consider the contribution to severe accidents from severe accidents involving reactor containment bypass via induced failure of steam generator tubes, (b) failure to consider the contribution to severe accident costs by a fire in either of the spent-fuel pools at Indian Point Units 2 and 3, and (c) failure to consider the contribution to severe accident costs by intentional attacks on the Indian Point Unit 2 or Unit 3 reactors or respective spent fuel pools. Hearing Request at 54-55.

With respect to sub-issue (a), containment bypass, Riverkeeper asserted that:

Entergy has not properly considered the contribution to severe accident costs made by severe accidents involving reactor containment bypass via induced failure of steam generator tubes. As discussed in Section 5 of the Thompson Report, Entergy has substantially underestimated the potential for containment bypass during a core-damage accident. In light of current knowledge about severe reactor accidents, it is prudent to

assume that (i) any High/Dry accident sequence (*i.e.*, accident in which the secondary side dries out due to unavailability of feedwater and the reactor coolant system (“RCS”) pressure remains high while primary coolant (*i.e.*, water) is lost and the core is uncovered) would involve induced failure of steam generator tubes, and (ii) one or more of the secondary side safety valves downstream of the affected steam generator(s) would remain open after tube failure. Thompson Report at 15-16. Taking these prudent assumptions into account, Entergy’s estimates of the conditional probabilities of atmospheric release categories (in the event of core damage) increase significantly: the conditional probability of an Early High release rises from 3.6 percent to 51.8 percent for the IP2 reactor, and from 8.2 percent to 54.1 percent for the IP3 reactor. *Id.* at 18. Correspondingly, the present value of cost risk associated with atmospheric releases increases by a factor of 5.42 for IP2 and a factor of 3.18 for IP3. *Id.*

As a result, Entergy has underestimated the potential value of relevant SAMAs by \$47.3 million for IP2 and \$23.4 million for IP3. Thompson Report at 50. If the economic benefit of averted containment bypass accidents were appropriately considered, a number of SAMAs rejected by Entergy as too costly would be cost-effective. *Id.*

Hearing Request at 60-61.

2. Section 2- Consequence Analysis

In the second section of Contention EC-2, which was supported by the expert Declaration of Dr. Edwin S. Lyman (Exhibit 2 to Contention EC-2), Riverkeeper asserted that Entergy had made an “[i]nadequate consequence analysis for severe accidents.” Hearing Request at 55.

Section 2 then listed three separate respects in which Entergy’s consequence analysis is inadequate: (a) it uses a source term that results in unusually low mean off-site accident consequences in comparison to results obtained with source terms vetted by independent experts and recommended for use by the NRC, (b) it fails to adequately consider the uncertainties in its consequence calculations resulting from meteorological variations, and (c) it inappropriately uses the \$2,000/person-rem dose conversion factor. *Id.* at 55.

In detailing the deficiencies of Entergy’s SAMA analysis with respect to consequences, section 2(a) of Contention EC-2 criticized the source term used by Entergy “to estimate the consequences of the most severe accidents with early containment failure.” *Id.* at 68.

Riverkeeper asserted that Entergy had used an industry source term, which had not been validated by the NRC, to yield “significantly lower consequences” than would be yielded by using the NRC’s publicly available source term. *Id.* at 69-70. Riverkeeper asserted that the source term

used by Entergy results in lower consequences than would be obtained from release fractions and release durations estimated in NUREG-1465, *Accident Source Terms for Light-Water Nuclear Power Plants* (1995). *Id.* at 69. Both Entergy and the NRC Staff opposed admission of the contention.

3. Oral argument

At oral argument held the week of March 10, 2008, Riverkeeper responded to ASLB questions regarding Contention EC-2. The ASLB posed several questions to Riverkeeper's counsel with respect to Section 1(b) (spent fuel pool accidents), 1(c) (intentional attacks), and 2(a) (source term), but did not pose any questions regarding Section 1(a) (Entergy's underestimate of the potential for a severe containment bypass accident), 2(b) (meteorological risk analysis) or 2(c) (dose conversion factor). Tr. at 610-638.

The Chairman of the ASLB expressed "confusion" about Section 2(a)'s criticism of Entergy's source term, especially Riverkeeper's reliance on NUREG-1465, and requested additional briefing from Riverkeeper. On April 7, 2008, Riverkeeper submitted its Response to Atomic Safety and Licensing Board's Questions Regarding Contention EC-2 ("Response to Questions"), in which it explained the reasons why Riverkeeper's assumption of a 100% radiation release from the containment to the environment during a severe containment breach accident was supported by and not contradicted by NUREG-1465.

4. LBP-08-13

In LBP-08-13, the ASLB rejected Contention EC-2 in its entirety. *Id.*, slip op. at 175-84. The decision on Contention EC-2 was broken into two sections: section (i), entitled "Background," described the contention and the responses by Entergy and the NRC Staff. Section (ii), entitled "'Board Decision – Riverkeeper EC-2,'" gave the ASLB's ruling and an explanation. While parts of the decision are clear, in other respects it is quite unclear and internally inconsistent.

In the first paragraph of Section (i) of the ASLB's ruling on Contention EC-2, the ASLB

correctly recognizes that Contention EC-2 is divided into two sections; that the first section raises issues regarding the likelihood of containment bypass accidents, spent fuel pool accidents, and accidents caused by intentional attacks; and that the second section raises issues related to the underestimate of consequences flowing from an inadequate source term, inadequate meteorological monitoring and the use of an inappropriate dose-conversion factor. LBP-08-13, slip op. at 176. In the introductory paragraph of Section (ii), however, the ASLB appears to confine its decision to only the first section of Contention EC-2, by claiming to address the contention “in three parts: spent fuel fires, terrorist attacks, and issues related to containment bypass accidents.” *Id.*, slip op. at 180. This introductory paragraph does not mention the consequence-related issues of Section 2.

In the next three paragraphs, on pages 181-82, the ASLB addresses the portions of Section (1) that relate to spent fuel pool fires and intentional attacks. While Riverkeeper does not agree with these rulings, they are clearly stated and therefore Riverkeeper does not seek clarification or reconsideration. Beginning with the first full paragraph on page 182, however, LBP-08-11 begins to confuse the two sections of the contention:

Finally, we turn to the question of accidents involving containment bypass via induced failure of steam generator tubes. Entergy notes, correctly, that this aspect of Riverkeeper EC-2 is not categorically outside the scope of a license renewal proceeding. In its Petition, Riverkeeper alleged that Entergy’s estimate of accident consequences were (sic) too low by a factor of three or more, primarily because Entergy (1) used an unusually low source term; (2) failed to consider uncertainties due to meteorologic variation; and (3) used an inappropriate dose conversion factor that resulted in an underestimate of costs. At Oral Argument, the Board requested additional briefing of the first of these issues.

LBP-08-13, slip op. at 182 (footnotes omitted). The first sentence of the above paragraph indicates that (a) the ASLB intends to discuss the containment bypass issue and (b) that it considers that to be the only remaining issue after having disposed of Sections 1(b) and 1(c) of the contention. In fact, however, the ASLB had yet to address Sections 1(a), 2(a), 2(b), and 2(c).

Additional confusion is raised by the second and third sentences of the above paragraph, as well as two paragraphs that follow them, which relate to the source term issue raised in Section

2(a) rather than the containment bypass issue that was identified as the intended subject of the discussion. *Id.*, slip op. at 18-83. This unexplained transition from one topic to the other suggests to Riverkeeper that the Board has confused the containment bypass issue raised in Section 1 with the source term issue raised in Section 2.

The apparent confusion is amplified in the ASLB's ruling on pages 183-84:

In light of this additional briefing related to the source term, and considering the contention pleading rules of 10 C.F.R. § 2.309(f)(1), the Board *rejects* this aspect of Riverkeeper EC-2 on the ground that it fails to demonstrate a genuine dispute with the applicant on a material issue of law or fact. We take no position on Entergy's allegation that this aspect of the contention is a request that Entergy be required to consider "worst-case" scenarios. It is sufficient that Riverkeeper has failed to make the minimal demonstration, as required by contention admissibility rules, that Entergy's ER analysis fails to meet a statutory or regulatory requirement. Presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements. The same argument applies to Riverkeeper's arguments related to meteorologic variation and the dose conversion factor.

Id., slip op. at 183-84 (emphasis in original, footnotes omitted). As discussed in more detail in Section III.B.2 below, it is not clear to what the Board is referring when it says it rejects "this aspect" of Contention EC-2.

Finally, the ASLB dismisses Sections 2(b) and 2(c) of the contention in a brief sentence that invokes its previous unclear ruling: "The same argument applies to Riverkeeper's argument related to meteorologic variation and the dose conversion factor." *Id.*, slip op. at 184.

III. REQUEST FOR CLARIFICATION AND RECONSIDERATION OF LPB-08-13

A. Standard for Reconsideration

NRC regulation 10 C.F.R. § 2.323(e) requires that a motion for reconsideration of an order by the ASLB or the Commission must show:

compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

The Commission has held that a motion for reconsideration is not lightly granted, but will be considered if a party seeking reconsideration "brings decisive new information to our attention or

demonstrates a fundamental Commission misunderstanding of a key point.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).¹

B. Request for Clarification and Reconsideration of LBP-08-13

Riverkeeper respectfully requests the ASLB to clarify and reconsider its ruling on Sections 1(a), 2(a), 2(b), and 2(c) of Riverkeeper’s contention EC-2 for several reasons. First, it is not clear that the ASLB considered and ruled upon all aspects of Contention EC-2. While the ASLB clearly ruled on Sections 1(b) and 1(c) of the contention, its decision does not show that it was applying the law to the facts of Section 1(a), 2(a), 2(b) or 2(c). The Board’s rationale in dismissing the contention is based on a description of the content of the contention that is at odds with the actual contention, indicating that the ASLB may have misunderstood the contention.

Second, the decision is not consistent with the “well accepted principle of administrative law that ‘the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.’” *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-104, 6 AEC 179, n.2 (1973), quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Riverkeeper is entitled to a clear and cogent explanation for the ASLB’s rejection of Contention EC-2.

Third, Riverkeeper believes that clarification and reconsideration will lead to the materially different result that Sections 1(a), 2(a), 2(b) and 2(c) of the contention will be admitted because the Board’s characterization of Contention EC-2 does not comport with the content of the contention as submitted. 10 C.F.R. § 2.323(e).

Finally, Riverkeeper could not have reasonably anticipated the errors made by the ASLB in LBP-08-13. Indeed, the Board’s characterization of the contention, provided in the first two paragraphs of Section i of the Board’s decision on Contention EC-2, indicate that the Board

¹ See also *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 340 n.6 (2006), quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

understood the contention and its various sub-parts.

1. Request for clarification of the subject of the decision

At page 183, LBP-08-13 contains a ruling on either Section 1(a) or Section 2(a) of the contention, but it is not clear which one. The Board stated that it rejected “this” aspect of the contention but did not indicate which section, Section 1(a) or Section 2(a), it rejected.

Certain of the Board’s statements would indicate that the Board intended its ruling to apply to Section 1(a) of the contention regarding Riverkeeper’s assertion that Entergy underestimated the likelihood of a containment bypass accident. See *Id.*, slip op. at 182, in which the ASLB had previously stated that as a final matter, it was turning to “the question of accidents involving containment bypass via induced failure of steam generator tubes;” see also *id.*, slip op. at 178, where the ASLB refers to Entergy’s argument that Riverkeeper seeks a “worst-case” analysis, which the ASLB had previously referred to in connection with Section 1(a).

However, other contrary statements indicate that the Board intended its ruling to apply to Section 2(a) regarding Riverkeeper’s assertion that Entergy used an inappropriately low source term. See *id.*, slip op. at 183, where the ASLB claims to make its ruling “[i]n light of the additional briefing related to the source term.” Unlike the source term issue raised by Section 2(a), to which the ASLB devotes two paragraphs directly preceding its ruling (*see pp.* 182-83), LBP-08-13 contains no analysis whatsoever of the substantive claims made by Riverkeeper with respect to the likelihood of a containment bypass accident and its effect on Entergy’s SAMA analysis. See Hearing Request at 54-55, 60-61.

Without clarification from the ASLB, therefore, it is impossible to determine what “aspect” of Contention EC-2 is the subject of the ASLB’s ruling in LBP-08-13 at page 183.

2. Request for clarification and reconsideration of the nature of the ruling

It is also impossible to discern a coherent rationale for the ASLB’s decision to dismiss either Section 1(a), Section 2(a), Section 2(b) or Section 2(c) of Contention EC-2. For instance,

the asserted basis for the decision is that:

... Riverkeeper has failed to make the minimal demonstration, as required by contention admissibility rules, that Entergy's ER analysis fails to meet a statutory or regulatory requirement. Presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements.

LBP-08-13, slip op. at 183. The ASLB applied the same rationale to Sections 2(b) and 2(c) of the contention. *Id.*, slip op. at 183-84. In no case – not Section 1(a), Section 1(a), Section 2(b), or Section 2(c) – does the ASLB's characterization of Contention EC-2 match up with the contention itself. Contrary to the ASLB's implication, for instance, Riverkeeper explicitly cited the statutory and regulatory requirements for a reasoned SAMA analysis. *See* Hearing Request at 54-59. Riverkeeper did not merely present an alternative analysis and argue that it should be substituted for Entergy's analysis simply by virtue of the fact that it could be done; instead, in each instance, Riverkeeper provided evidence that Entergy's analysis was inadequate, and Riverkeeper showed, through its own analysis, that if the deficiency was corrected, it would make a significant difference with respect to the outcome of the SAMA analysis.

With respect to Section 1(a), for example, Riverkeeper asserted that Entergy had "substantially underestimated the potential for containment bypass during a core-damage accident," providing an expert report and evidence from documents prepared by Entergy and the NRC showing that Entergy had ignored "current knowledge about severe accidents" which call for a re-evaluation of Entergy's estimates regarding the conditional probability of an atmospheric release. Hearing Request at 60-61, citing Thompson, Gordon R., *Risk-Related Impacts from Continued Operation at the Indian Point Nuclear Power Plants*, Section 5 (November 28, 2007) ("Thompson Report"). Riverkeeper also showed, through its own expert's analysis, that as a result, Entergy had underestimated the potential value of relevant SAMAS by tens of millions of dollars and had rejected a number of cost-effective SAMAs. Hearing Request at 61, citing Thompson Report, Section 5. Riverkeeper thereby raised a genuine and material dispute with respect to the adequacy of Entergy's SAMA analysis to identify cost-effective SAMAs. Thus, the

rationale for LBP-08-13 is, on its face, inapplicable to Section 1(a).

By the same token, it is not apparent how the rationale for the ASLB's decision could be applicable to Section 2(a) of Contention EC-2, in which Riverkeeper challenged the reasonableness of the non-publicly derived (*i.e.*, generated by a proprietary computer code) source term used by Entergy for a severe containment breach accident. Riverkeeper did not just offer an alternative source term, but showed that the source term used by Entergy (a) had been noted by NRC to be anomalously low in comparison to NRC source terms and (b) had not been vetted or approved by the NRC. Hearing Request at 68-69, citing Lyman, Edwin S., *A Critique of the Radiological Consequence Assessment Conducted in Support of the Indian Point Severe Accident Mitigation Alternatives Analysis* at 2-4 (November 2007) ("Lyman Report"). Again, Riverkeeper did not merely present an alternative analysis, but used Dr. Lyman's alternative analysis to show that Entergy's analysis was deficient to a degree significant enough to affect the outcome of the SAMA analysis, and therefore its adequacy under NEPA.

In sections 2(b) and 2(c) of the contention, Riverkeeper took the same approach of criticizing specific deficiencies in Entergy's SAMA analysis and providing an alternative analysis by Dr. Lyman which showed that if Entergy's analysis were corrected it would make a significant difference to the outcome of the SAMA analysis. Hearing Request at 70-74. Thus, it appears that the ASLB mischaracterized the contention as simply a presentation of an alternative SAMA analysis, when in fact the contention showed significant and material deficiencies in Entergy's SAMA analysis.

IV. CONCLUSION

For the foregoing reasons, the ASLB should grant Riverkeeper's motion for reconsideration and clarification of LBP-08-13.

Respectfully submitted,



Diane Curran

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

202/328-3500

FAX 202/328-6918

dcurran@harmoncurran.com



Phillip Musegaas

Staff Attorney

Riverkeeper, Inc.

828 South Broadway

Tarrytown, NY 10591

914-478-4501 (ext. 224)

Fax 914-478-4527

phillip@riverkeeper.org

www.riverkeeper.org

August 11, 2008

CERTIFICATE OF SERVICE

I certify that on August 11, 2008, copies of the foregoing Riverkeeper, Inc.'s Motion for Leave to File Motion for Clarification and Reconsideration of LBP-08-13 and Riverkeeper, Inc.'s Motion for Clarification and Reconsideration of LBP-08-13 were served on the following by e-mail and first-class mail:

<p>Lawrence G. McDade, Chair Atomic Safety and Licensing Board Panel Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Washington, D.C. 20555 Also by e-mail: Lawrence.McDade@nrc.gov</p>	<p>Robert D. Snook, Esq. Assistant Attorney General 55 Elm Street, P.O. Box 120 Hartford, CT 06141-0120 By e-mail: Robert.Snook@po.state.ct.us</p>
<p>Richard E. Wardwell Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Washington, D.C. 20555 Also by e-mail: Richard.Wardwell@nrc.gov</p>	<p>Michael J. Delaney, V.P. – Energy New York City Econ. Development Corp. 110 William Street New York, NY 10038 Also by e-mail: mdelaney@nycedc.com</p>
<p>John LeKay Heather Ellsworth Burns-DeMelo Remy Chevalier Bill Thomas Belinda J. Jaques FUSE USA 351 Dyckman Street Peekskill, NY 10566 Also by e-mail: fuse_usa@yahoo.com</p>	<p>Martin J. O'Neill, Esq. Kathryn M. Sutton, Esq. Paul M. Bessette, Esq. Mauri T. Lemoncelli, Esq. Morgan, Lewis & Bockius, LLP 1111 Pennsylvania Ave. N.W. Washington, D.C. 20004 martin.oneill@morganlewis.com pbessette@morganlewis.com ksutton@morganlewis.com</p>
<p>Susan H. Shapiro, Esq. 21 Perlman Drive Spring Valley, NY 10977 Also by e-mail: mbs@ourrocklandoffice.com</p>	<p>Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, D.C. 20555 Also by e-mail: OCAAMAIL@nrc.gov</p>
<p>John J. Sipos, Esq. Assistant Attorney General Office of the New York Attorney General for the State of New York The Capitol Albany, New York 12224 Also by e-mail: John.Sipos@oag.state.ny.us;</p>	<p>Sherwin E. Turk, Esq., Lloyd B. Subin, Esq. Beth N. Mizuno, Esq., David E. Roth, Esq. Jessica Bielecki, Esq., Marcia J. Simon, Esq. Office of General Counsel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 sbt@nrc.gov; Marcia.simon@nrc.gov; Jessica.bielecki@nrc.gov; bnm2@nrc.gov; der@nrc.gov; david.roth@nrc.gov</p>

<p>Office of the Secretary Rulemakings and Adjudications Staff U.S. Nuclear Regulatory Commission Washington, D.C. 20555 Also by e-mail: HEARINGDOCKET@nrc.gov</p>	<p>William C. Dennis, Esq. Entergy Nuclear Operations, Inc. 440 Hamilton Avenue White Plains, NY 10601 Also by e-mail: wdennis@entergy.com</p>
<p>Stephen C. Filler, Board Member Hudson River Sloop Clearwater, Inc. 303 South Broadway, Suite 222 Tarrytown, NY 10591 Also by e-mail: sfiller@nylawline.com</p>	<p>Manna Jo Greene Hudson River Sloop Clearwater, Inc. 112 Little Market Street Poughkeepsie, NY 12601 Also by e-mail: Mannajo@clearwater.org</p>
<p>Justin D. Pruyne, Esq. Assistant County Attorney, Litigation Bureau Of Counsel to Charlene M. Indelicato, Esq. Westchester County Attorney 148 Martine Avenue, 6th Floor White Plains, NY 10601 Also by e-mail: jdp3@westchestergov.com</p>	<p>Joan Leary Matthews, Esq. Senior Attorney for Special Projects New York State Department of Environmental Conservation 625 Broadway, 14th floor Albany, New York 12233-5500 By e-mail: jlmattews@gw.dec.state.ny.us</p>
<p>Zackary S. Kahn, Esq., Law Clerk Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 Also by e-mail: Zachary.Kahn@nrc.gov</p>	<p>Thomas F. Wood, Esq. Daniel Riesel, Esq. Sive, Paget and Riesel, P.C. 460 Park Avenue New York, NY 10022 Also by e-mail: driesel@sprlaw.com</p>
<p>Judge Kaye D. Lathrop 190 Cedar Lane East Ridgeway, CO 81432 Also by e-mail: Kaye.Lathrop@nrc.gov</p>	<p>Nancy Burton 147 Cross Highway Redding Ridge, CT 06878 Also by e-mail: NancyBurtonCT@aol.com</p>
<p>Elise N. Zoli, Esq. Goodwin Procter, LLP 53 State Street Boston, MA 02109 Also by e-mail: ezoli@goodwinprocter.com</p>	<p>Phillip Musegaas, Esq. Victor Tafur, Esq. Riverkeeper, Inc. 828 South Broadway Tarrytown, NY 10591</p>
<p>Marcia Carpentier, Esq., Law Clerk Atomic Safety and Licensing Board Mail Stop: T-3 E2B U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 Marcia.Carpentier@nrc.gov</p>	<p>Janice A. Dean, Esq. Assistant Attorney General Office of the Attorney General 120 Broadway, 26th Floor New York, NY 10271 Also by e-mail: Janice.dean@oag.state.ny.us</p>

Mylan L. Denerstein, Esq.
Executive Deputy Attorney General
120 Broadway, 25th Floor
New York, NY 10271
Also by e-mail:
mylan.denerstein@oag.state.ny.us

John L. Parker, Esq.
Regional Attorney, Region 3
New York State Department of
Environmental Conservation
21 South Putt Corners
New Paltz, NY 12561
Also by e-mail: jlparker@gw.dec.state.ny.us


Diane Curran