

RAS-E-140

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.)
)
(Indian Point Nuclear Generating Units 2 and 3))
_____)

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

August 11, 2008

**APPLICANT'S REQUEST FOR LEAVE TO FILE MOTION
FOR RECONSIDERATION OF THE BOARD'S DECISION TO ADMIT
CONSOLIDATED CONTENTION RIVERKEEPER EC-3/CLEARWATER EC-1**

Pursuant to 10 C.F.R. §2.323(e), Entergy Nuclear Operations, Inc. ("Entergy") hereby seeks leave of the Atomic Safety and Licensing Board ("Board") to file a motion for reconsideration of its Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP-08-13, 68 NRC __ (slip op. July 31, 2008) to the extent that the Board held that that Riverkeeper Contention EC-3 and Hudson Riverkeeper Sloop Clearwater ("Clearwater") Contention EC-1, which the Board has consolidated, met the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Both contentions allege that Entergy has not adequately assessed the significance of new information concerning the potential environmental impacts of radionuclide leaks from spent fuel pools located at the Indian Point Energy Center site. As shown in the attached Motion, there was a clear and material error in the Board's admission of Riverkeeper Contention EC-3 and Clearwater Contention EC-1 that could not have been anticipated and which renders the decisions with respect to those contentions invalid.

DOCKETED
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August 12, 2008 (8:30am)

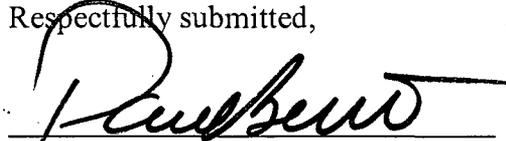
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

TEMPLATE = SECY -041

DS03

Accordingly, Entergy respectfully submits that reconsideration is warranted and necessary to avoid manifest injustice, and that Riverkeeper Contention EC-3 and Clearwater Contention EC-1 should be rejected.

Respectfully submitted,



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Dated at Washington, DC
this 11th day of August, 2008

water suppliers, not IPEC. Second, the Consolidated Contention is inadmissible as speculative, since neither Riverkeeper nor Clearwater provides any expert support for their claims, which in any event have been fully addressed by Entergy. Lastly, the two contentions, as admitted, appear to implicate IPEC Unit 1 (“IP1”) conditions that are clearly beyond the scope of this proceeding. Viewed singly, and collectively, these errors warrant reconsideration, and rejection of both contentions.

II. APPLICABLE LEGAL STANDARDS

Consistent with 10 C.F.R. 2.323(e), to avoid manifest injustice, motions for reconsideration may be filed upon leave of the presiding officer “upon a showing of 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.”⁴ While the standard is a high one, reconsideration is appropriate where a party “brings decisive new information” to the attention of the decisionmaker or “demonstrates a fundamental [] misunderstanding of a key point.”⁵ Such circumstances are present here.

III. ARGUMENT

This Motion seeks reconsideration of the Board’s threshold admissibility determination regarding the Consolidated Contention. An admissible contention must meet each of the six admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi), as described in the Board’s July 31 Order.⁶ As the Board recognized, the NRC will not “expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing.”⁷ The

⁴ See 10 C.F.R. § 2.323(e); see also Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

⁵ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

⁶ See LBP-08-13, slip op. at 5-11.

⁷ *Id.* at 6 (quoting Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2,202).

Board correctly observed that the contention admissibility rules are “strict by design,”⁸ and that a petitioner’s failure to comply with any of the criteria is grounds for contention dismissal.⁹

As set forth below, Entergy respectfully submits that the Board erred in deciding to admit the Consolidated Contention. Entergy maintains that the contention fundamentally lacks sufficient legal and factual foundations, and that the Board must reconsider its decision to avoid a manifest injustice. Additionally, absent Board reconsideration or clarification, the Consolidated Contention may be construed improperly to encompass issues related to the history of leakage from the IP1 spent fuel pool that are clearly beyond the scope of this proceeding, as defined by the Commission.

A. The Principal Bases for the Consolidated Contention Have No Basis in Law

The Board noted that a contention must “assert[] an issue of law or fact that is ‘material to the findings the NRC must make to support the action that is involved in the proceeding.’”¹⁰ This “requires that the *petitioner* show why the alleged error or omission is of *possible significance to the result of the proceeding*.”¹¹ Relatedly, any contention that falls outside the specified scope of the proceeding must be rejected.¹² This includes contentions which advocate more strict requirements than NRC rules impose.¹³

In admitting the Consolidated Contention, the Board found that Riverkeeper and Clearwater each had raised a “material” or “genuine” dispute regarding the significance of the environmental impacts from the spent fuel pool leaks,¹⁴ noting that both parties’ contentions rest on Entergy’s alleged failure to: (1) demonstrate that only “low concentrations” of radionuclides have been detected in site groundwater, and (2) assess the potential impacts of current and future groundwater conditions on

⁸ *Id.* (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)).

⁹ *Id.* (citing 69 Fed. Reg. at 2,221; *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

¹⁰ *Id.* at 7-8 (quoting 10 C.F.R. § 2.309(f)(1)(iv)).

¹¹ *Id.* (citing *Portland Cement Ass’n. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Corp. v. Adm’r, E.P.A.*, 417 U.S. 921 (1974)) (emphasis added).

¹² See 10 C.F.R. § 2.309(f)(1)(iii).

¹³ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff’d*, CLI-01-17, 54 NRC 3 (2001).

¹⁴ *Id.* at 188, 192.

Hudson River fish and shellfish.¹⁵ Entergy respectfully submits, however, that the Board's admission of the Consolidated Contention involves a clear and material error, because it does not address key admissibility threshold arguments made by Entergy and the Staff that demonstrate fatal deficiencies in the Consolidated Contention. In particular, the Consolidated Contention relies on assertions that have no basis in law or fact. Accordingly, Board reconsideration of the Consolidated Contention is warranted.

1. Intervenors' Assertion Concerning EPA Drinking Water Standards Is Immaterial

Intervenors fail to establish how the detection of strontium-90 (Sr-90) and cesium-137 (Cs-137) in IPEC site groundwater *at concentrations exceeding EPA drinking water standards* is material to Entergy's assessment of the significance of "new" information concerning site groundwater conditions. Entergy clearly established—and Intervenors did not controvert—the facts that: (1) groundwater at the IPEC site is *not* used for drinking water, with the result that on-site concentrations, viewed in terms of the EPA drinking water standards, are immaterial; and (2) despite extensive analysis, Entergy has not identified, and there is no known, drinking water pathway in the region surrounding IPEC that has been adversely impacted by IPEC site groundwater conditions. Furthermore, samples taken in support of the NRC-required Radiological Environmental Monitoring Program ("REMP") indicate no detectable plant-related radioactivity in groundwater above safe drinking water standards beyond the site boundary.¹⁶ Intervenors have not disputed this fact, nor provided any data or expert opinion to the contrary.

Instead, Riverkeeper merely asserts that EPA drinking water standards are somehow indicative of significance in terms of on-site IPEC groundwater conditions, because they are "a recognized and highly conservative benchmark for comparison purposes."¹⁷ Clearwater asserts, without any support or citation, that federal drinking water standards apply to significance determinations of on-site IPEC

¹⁵ *Id.* at 185, 189 ("Clearwater repeats much of what was stated by Riverkeeper . . .").

¹⁶ IPEC Environmental Report ("ER") at 5-5. Samples taken include the offsite REMP sampling locations as defined in the IP2 and IP3 Offsite Dose Calculation Manual, the local municipal drinking water reservoirs, and other groundwater monitoring wells located in the immediate vicinity of the plant. *See id.*

¹⁷ "Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene" (Feb. 15, 2008) at 70.

groundwater conditions as a matter of New York law.¹⁸ Importantly, and key to this Motion, however, such statements provide no basis for the assertion that EPA drinking water standards reasonably may be held to apply to IPEC site conditions where no drinking water wells are located and no drinking water resources are implicated. As importantly, such statements provide no basis for the assertion that EPA drinking water standards are dispositive—or even material—to the IPEC-specific significance determination in the ER. Intervenor fails to explain how the EPA groundwater rule to which they refer, which, by its own terms, applies solely to public water suppliers,¹⁹ could apply to IPEC. Consequently, the mere fact that IPEC on-site concentrations in some wells may exceed that federal standard is not only *not* a measure of significance under NRC law, but is not a measure of significance under EPA rules, unless IPEC was a water supplier, which it is not. In short, the EPA drinking water standards are not reasonably applicable to IPEC. Intervenor’s “benchmarking” goals or aspirations, and sweeping claim that NEPA “requires a broader assessment” consistent with the misdirected application of federal standards to IPEC, are legally insufficient to support admission of the Consolidated Contention.

Critically, the Board did not address Entergy and Staff arguments establishing the immateriality of EPA drinking water standards to the “significance” evaluation presented in Section 5.0 of the IPEC ER.²⁰ The *material* inquiry is whether groundwater radionuclide concentrations comply with applicable NRC radiological dose limits.²¹ As Staff counsel explained at oral argument, as long as doses are within NRC limits, the GEIS finding of “small” impact still applies.²² And it remains valid even if the source of the dose is “from a spent fuel pool leak or some other sort of an accidental condition or unintended

¹⁸ See “Hudson River Sloop Clearwater’s Petition to Intervene and Request for Hearing” (Dec. 10, 2007) at 21-23.

¹⁹ See, e.g., 40 C.F.R. §§ 141.1, 141.2 (indicating that federal drinking regulations apply to public water systems).

²⁰ See, e.g., “Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene” (Jan. 22, 2008) (“Entergy Riverkeeper Answer”) at 146-47, 149; “NRC Staff’s Response to Petition[] for Leave to Intervene Filed By [Riverkeeper]” (Jan. 22, 2008) at 113-14.

²¹ See also GEIS, § 4.6 at 4-84 (“For purposes of assessing radiological impacts, the Commission has concluded that impacts are of *small significance* if doses and releases *do not exceed permissible levels in the Commissions’ regulations.*”) (emphasis added).

²² Tr. at 434-36, 448.

condition.”²³ This limitation is all the more sensible here, since the federal drinking water standard does not, on its face or by implication, apply to IPEC.

Although the Board acknowledges that Entergy has determined that “the total body dose caused by the groundwater contamination is well below the NRC limit”—a fact not disputed by Intervenors—it states that “there is still the question as to whether the maximum groundwater impact (and, in turn, the maximum dose) has been determined for the site.”²⁴ The Board makes this statement without further explanation or citation to applicable law. Entergy is unaware of any legal or regulatory provision requiring it to determine the “maximum groundwater impact,” beyond what it already has done in accordance with NRC regulations. This is a compelling circumstance that justifies reconsideration of the Board’s threshold admissibility ruling, and also reconsideration of the Board’s intent and expectations regarding the postulated assessment of “maximum groundwater impact.”

2. *Intervenors’ Asserted Need for Further Evaluation of Impacts to Fish and Shellfish Lacks Any Basis in Law*

Intervenors provide no valid legal basis for their assertion that Entergy is required to sample and analyze Hudson River aquatic life beyond the extent currently required by NRC regulations, with which Entergy indisputably complies. Riverkeeper and Clearwater—and now the Board—overlook the fact that Entergy, in full compliance with applicable NRC regulations in 10 C.F.R. Part 50, Appendix I, and in accordance with Regulatory Guide 1.109,²⁵ has evaluated potential offsite exposure pathways due to groundwater contamination, including aquatic foods. Based on those analyses, Entergy has concluded that the only exposure pathway of significance for the identified groundwater contamination is through consumption of fish and invertebrates in the Hudson River, and determined that *the calculated doses from this pathway are less than 1/100 of federal limits.*²⁶ This calculation was performed using the methodology documented in Entergy’s Offsite Dose Calculation Manual. The results of these

²³ Tr. at 434.

²⁴ LBP-08-13, slip op. at 192.

²⁵ Regulatory Guide 1.109, “Calculation of Annual Doses to Man from Routine Releases of Reactor Effluents for the Purpose of Evaluating Compliance with 10 CFR Part 50, Appendix I,” Revision 1 (Oct. 1977).

²⁶ See Entergy Riverkeeper Answer at 147.

evaluations are reported in Entergy's Annual Radiological Effluent Release Report.²⁷ Importantly, Intervenor do not challenge any of these results—a critical fact that does not receive due consideration from the Board in its admissibility ruling.

Accordingly, there is no legal basis for Intervenor's assertion that Entergy has not complied with its obligations, under NEPA, to assess the significance of new information concerning groundwater contamination. Entergy's approach is consistent with that contemplated in the GEIS.²⁸ More fundamentally, aside from arguing generally that NEPA requires a "broader assessment," Intervenor do not (nor does the Board) identify *any* legal requirement that Entergy perform additional sampling and analysis of fish and shellfish in the Hudson River for purposes of license renewal.

B. The Consolidated Contention Lacks Adequate Factual or Expert Support

Entergy also asks the Board to reconsider the adequacy of the factual basis for the Consolidated Contention. As the Board stated, "[a]ny supporting material provided by a petitioner . . . is subject to Board scrutiny."²⁹ As the Board further noted, "if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking."³⁰ Here, the Board did not address Entergy's arguments that Intervenor failed to proffer any facts or expert witness opinion establishing a genuine *material* dispute.

The Board stated that "factual statements" presented by Riverkeeper sufficiently challenged the basis for conclusions contained in the ER regarding the significance of groundwater contamination at IPEC.³¹ It is unclear from the Board's July 31 Order, however, what "factual statements" the Board relied upon to reach this conclusion. It appears that the Board may have relied on Riverkeeper's assertion that Sr-90 and Cs-137 have been detected in the IPEC on-site groundwater at concentrations

²⁷ Entergy submitted the most recent annual report to the NRC on April 23, 2008. See Letter from Robert Walpole, Entergy, to NRC Document Control Desk, "2007 Annual Radioactive Effluent Release Report," NL-08-068 (Apr. 23, 2008) (ADAMS Accession No. ML081280744).

²⁸ See NUREG-1437, Vol. 1 at 4-86.

²⁹ LBP-08-13, slip op. at 9 (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)).

³⁰ *Id.* (citations omitted).

³¹ *Id.* at 188.

exceeding the maximum contaminant levels in the EPA in drinking water regulations (as they apply to community water operations, not to IPEC). This simple statement, however, does not support the admission of the contention because, as explained above, EPA drinking water standards indisputably *do not apply* to IPEC site groundwater or to IPEC as a matter of law.

Similarly, Intervenors proffered no factual information or expert opinion to controvert information presented by Entergy regarding the potential for leakage from the spent fuel pools. Entergy has documented that there are no known leaks from the IP3 spent fuel pool; that the known sources of leaks from the IP2 pool have been identified and repaired; and that the source of leaks from the IP1 pool will be permanently terminated by the end of 2008, well before the period of extended operation.³²

Finally, the only *purported* adverse impact on aquatic life cited by Riverkeeper is the detection of “slightly elevated levels” or “detectable levels” of Sr-90 in four fish samples.³³ As Entergy noted in response, however, three-way split sampling and analysis of additional Hudson River fish samples conducted by Entergy, NYDEC and NRC in 2007 identified no detectable levels of Sr-90 in the sampled fish greater than natural background.³⁴ Thus, the factual basis for Riverkeeper’s contention also is lacking in this respect.

The Board, citing Clearwater’s “similar arguments,” found that Clearwater presented “sufficient information and *expert opinion*” to question Entergy’s conclusions in the ER.³⁵ The Board, however, cites no particular Clearwater statements or references in support of its conclusion. Indeed, in discussing Clearwater Contention EC-1, the Board only alludes to certain “statements attributed [by Clearwater] to NYSDEC personnel.”³⁶ As the Board itself notes, Clearwater designated none of the

³² See Entergy Riverkeeper Answer at 146-151.

³³ “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) at 85.

³⁴ See Entergy Riverkeeper Answer at 143 n. 612.

³⁵ LBP-08-13, slip op. at 192 (emphasis added).

³⁶ *Id.* at 189. The statements relied upon by Clearwater, and to which the Board presumptively alludes, were made during a March 2, 2007 “Technical Briefing and Roundtable discussion,” sponsored by the Indian Point Safe Energy Coalition and Pace Academy for the Environment, concerning groundwater conditions at IPEC. Clearwater cites statements made by

Technical Briefing participants (whose qualifications are presumably unknown to the Board) as “expert witnesses.” In addition, both Entergy and the Staff specifically addressed each of the statements cited by Clearwater, demonstrating that they lack sufficient foundation, relevance, or materiality to support admission of Clearwater EC-1.³⁷ Entergy believes that the Board overlooked these key facts, and accordingly requests that the Board revisit the basis for its conclusion that Clearwater has provided sufficient “expert opinion” to support the admission of its contention. Entergy does not believe that the adjudicatory record supports that conclusion, and that this is tantamount to a clear and material error.

C. Historical Leakage from the IP1 Spent Fuel Pool is Beyond the Scope of This Proceeding

Entergy also seeks reconsideration of the Consolidated Contention to the extent it relates to the history of leakage from the IP1 spent fuel pool. The vast majority of Intervenors’ claims relate to the significance of potential impacts caused by Sr-90 contamination in groundwater. It is undisputed, however, that: (i) leakage from the IP1 spent fuel pool is the sole source of Sr-90, as confirmed by Entergy’s detailed, two-year hydrogeologic investigation; (ii) the IP1 spent fuel pool is not within the scope of IP2 and IP3 license renewal; and (iii) the IP1 pool will be emptied and drained by the end of 2008, and thus cease to be a source of leakage well before the period of extended operation.³⁸ As such, there clearly is no legal nexus between aging management for IP2/IP3—the focus of this proceeding—and purely historical leakage events occurring at the IP1 spent fuel pool. The Board’s July 31 Order does not address these key facts and related Entergy arguments. Entergy requests that the Board also reconsider admission of the Consolidated Contention on this additional ground.

Alternatively, Entergy asks that the Board, at a minimum, clarify the proper scope of the Consolidated Contention relative to historical radionuclide leakage from the IP1 spent fuel pool. Insofar

Barbara Youngberg and Ward Stone of the New York DEC, David Lochbaum of the Union of Concerned Scientists, Riverkeeper counsel Phillip Musegaas, and Sergio Smiriglio of Tim Miller and Associates).

³⁷ See “Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc’s Petition to Intervene and Request for Hearing” (Jan. 22, 2008) at 45-47; “NRC Staff’s Response to Petition[] for Leave to Intervene Filed By [Hudson River Sloop Clearwater]” (Jan. 22, 2008) at 90-91.

³⁸ Entergy’s commitment to drain the IP1 spent fuel pool, while previously conveyed to the Board and other parties, has since been memorialized in a docketed submittal to the NRC. See Letter from J.E. Pollock, Entergy, to NRC Document Control Desk, “Remediation and Long-Term Monitoring of Site Groundwater,” NL-08-079 (May 15, 2008) (ADAMS Accession No. ML081490332).

as the Board might wish to entertain testimony and evidence regarding existing strontium contamination in groundwater, it should focus on Entergy's "significance" evaluation of pertinent groundwater monitoring data, not on the history of leakage of Sr-90 from the IP1 spent fuel pool.

IV. CONCLUSION

Herein, Entergy has identified key legal and factual points that the Board overlooked and did not adequately consider in admitting the Consolidated Contention. Entergy respectfully submits that reconsideration is warranted and necessary to avoid manifest injustice and undue burden on Entergy. Moreover, upon reconsideration, the Board should deny admission of the Consolidated Contention. If the Board does not do so, Entergy nonetheless seeks clarification of the contention. Entergy asks that the Board explain its reference to "maximum groundwater impact" and indicate whether the history of leakage from the IP1 spent fuel pool, per se, is within the scope of the Consolidated Contention.

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Dated at Washington, DC
this 11th day of August, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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.)	ASLBP No. 07-858-03-LR-BD01
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	August 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Request for Leave to File Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1" and "Applicant's Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1," both dated August 11, 2008, were served this 11th day of August, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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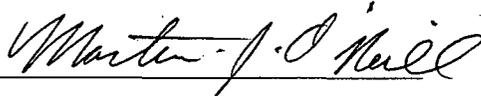
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DB1/62047072.1