

August 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. 50-247/286-LR  
 )  
(Indian Point Nuclear Generating )  
Units 2 and 3) )

NRC STAFF'S RESPONSE IN SUPPORT OF ENTERGY'S MOTION  
FOR RECONSIDERATION OF THE BOARD'S DECISION TO ADMIT  
CONSOLIDATED CONTENTION RIVERKEEPER EC-3/ CLEARWATER EC-1

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission ("Staff") herewith responds to the motion ("Motion") filed by Entergy Nuclear Operations, Inc. ("Entergy") seeking reconsideration by the Atomic Safety and Licensing Board of its July 31, 2008, decision in LBP-08-13<sup>1</sup> to admit a consolidated contention, comprised of Riverkeeper, Inc.'s ("Riverkeeper") Contention EC-3 ("EC-3") and Hudson River Sloop Clearwater ("Clearwater") Contention EC-1 ("EC-1") (hereinafter, "Consolidated Contention").<sup>2</sup>

BACKGROUND

Riverkeeper EC-3 addresses the following issue:

Failure to adequately analyze impacts of spent fuel pools.  
Entergy's ER fails to satisfy the requirements of NEPA, 42 U.S.C.

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<sup>1</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC \_\_\_\_ (July 31, 2008) (slip. op.).

<sup>2</sup> The Board directed that the Riverkeeper and Clearwater propose a consolidated version of this contention, by August 21, 2008. LBP-08-13, slip op. at 228. The Staff is treating their contentions as a single contention, although Riverkeeper and Clearwater have not yet submitted the consolidated version.

§ 4332 et seq., and NRC regulations implementing NEPA, including 10 C.F.R. § 51.45(c) and (e). Because the ER does not adequately assess new and significant information regarding the environmental impacts of the radioactive water leaks from the Indian Point 1 and Indian Point 2 spent fuel pools on the groundwater and the Hudson River ecosystem.

LBP-08-13, slip op. at 184 (citing Riverkeeper Petition at 74). The Staff opposed the admission of Riverkeeper EC-3 because the contention raised issues beyond the scope of this proceeding, constituted an impermissible challenge to Commission regulations, lacked basis, was unsupported by facts, and did not demonstrate the existence of a genuine issue for adjudication in this proceeding.<sup>3</sup>

For its part, Clearwater EC-1 addresses the following issue:

Failure of ER to adequately address the impacts of known & unknown leaks.

LBP-08-13, slip op. at 188 (citing Clearwater Petition at 18). The Staff opposed the admission of Clearwater EC-1 because the contention raised issues beyond the scope of this proceeding, constituted an impermissible challenge to Commission regulations, lacked basis, was unsupported, and did not demonstrate the existence of a genuine issue for adjudication in this proceeding. See NRC Answer at 92.

In its motion for reconsideration, Entergy asserts that admission of the Consolidated Contention involves multiple, overlapping errors of law and fact, including 1) there is no reasonable basis for grounding admission of the Consolidated Contention on the basis of an inapplicable federal drinking water standard that relates solely to public water suppliers; 2) the Consolidated Contention is inadmissible as speculative, since neither Riverkeeper nor

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<sup>3</sup> "NRC Staff's Response To Petitions For Leave To Intervene Filed By (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed To Relicensing Of Indian Point, And Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) The State Of New York, (5) Riverkeeper, Inc., (6) The Town Of Cortlandt, And (7) Westchester County" at 114-115 (January 22, 2008) ("NRC Answer").

Clearwater provided any expert support for their claims, which in any event have been fully addressed by Entergy; and 3) the Consolidated Contention, as admitted, appears to implicate Unit 1 conditions that are clearly beyond the scope of this proceeding. Motion at 1-2.

## DISCUSSION

### I. APPLICABLE LEGAL STANDARDS

The Commission's regulations state in pertinent part as follows:

Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, 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.

10 C.F.R. § 2.323(e); see *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI 07-13, 65 NRC 211, 214 (2007). Reconsideration may not be used as an opportunity to reargue facts and rationales which were or should have been discussed earlier. Statement of Consideration, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). The standards of 10 C.F.R. § 2.323(e) are strictly applied, and motions for reconsideration should not be granted lightly. See *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-401 (2006).<sup>4</sup>

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<sup>4</sup> As the Commission stated in *Diablo Canyon*, CLI-06-27, 62 NRC at 400 n.5 (2006), "the new rules "simply codify our practice" (referring to its discussion, in n. 6 of its decision, of *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) (fundamental misunderstanding of a key point) and *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003) (overlooked controlling decision or principle of law, or factual clarification). *But cf.* Statement of Consideration, 69 Fed. Reg. at 2207 (Jan. 14, 2004) (the standard of compelling circumstances "is a higher standard than the existing case law," and "is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.") As summarized by the Commission in the 2004 rulemaking, under prior case law, motions for reconsideration were permitted where a movant showed that evidence "may have been misunderstood or overlooked, or to clarify a ruling on a matter." *Id.*

The Staff respectfully submits that Entergy's Motion satisfies the applicable standards for reconsideration. Accordingly, the Staff supports Entergy's Motion and recommends that it be granted.

II. RECONSIDERATION IS APPROPRIATE.

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

In its Motion, Entergy submits that admission of the Consolidated Contention involves a clear and material error, because, as demonstrated by Entergy and Staff in their responses to contentions, the Consolidated Contention relies on assertions that have no basis in law or fact. Motion at 4.

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

In its Motion, Entergy asserts that Riverkeeper and Clearwater used inapplicable EPA drinking water standards to support the Consolidated Contention, and the Board did not address the arguments made by Entergy and NRC Staff that the EPA's standards were not material. *Id.* at 5. In this regard, Entergy pointed out that the NRC Staff had argued that the NRC's standards, not the EPA's, were the correct standards to use for determination of the environmental impacts. *Id.* at 5. In addition, as documented in the Environmental Report, the existing Radiological Environmental Monitoring Report showed no radiation levels in groundwater at the site boundary above safe drinking water limits. *Id.* at 4 (citing ER at 5-5). Riverkeeper and Clearwater did not dispute the findings. *Id.* at 4.

In LBP-08-13, the Board acknowledged Entergy's argument (slip op. at 190, citing Entergy Clearwater Answer at 37), but did not state that it was excluding reliance on the EPA drinking water limits in admitting the contention. Accordingly, the Staff supports Entergy's request for reconsideration of the board's ruling, in that it appears that the Board may have relied upon immaterial EPA drinking water standards in admitting the contention.

Entergy also seeks reconsideration based on the Board's statement 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." Motion at 6, quoting LBP-08-13 at 192. Entergy points out that it has already determined the dose, and the Riverkeeper and Clearwater did not challenge this determination. *Id.* 6. Entergy observes that the Board provided no legal or regulatory authority to support a requirement for Entergy to perform some additional "maximum groundwater impact" review. *See Id.* at 6. The Staff supports Entergy's request for reconsideration of this "maximum dose" issue, inasmuch as a contention of omission requires, among other things, that the intervenor provide the relevant legal requirement which would require the omitted information. 10 C.F.R. § 2.309(f)(1)(vi). No such requirement had been cited in support of the Consolidated Contention.

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

In its Motion, Entergy further asserts that neither Riverkeeper, Clearwater nor the Board identified any legal requirement for additional sampling of fish and shellfish. Motion at 7. Entergy further points out that it had evaluated how groundwater contamination could be an exposure pathway through food (i.e., fish and shellfish), and that it had calculated and reported the resulting dose. *Id.* at 6-7.

The Staff, in its response to contentions, opposed the need for an additional evaluation of fish and shellfish, in part because the need for such an evaluation was predicated on the unsupported assertion that high levels of contamination from the spent fuel pools existed, and Riverkeeper had presented no facts to contradict the results of NRC inspections finding that (a) there were "no detectable plant-related radioactivity in groundwater beyond the site boundary." and (b) "the current radioactive releases and associated public doses are below the NRC radioactivity release and public dose limits." *See* NRC Answer at 114 and n.78-80. In sum, Riverkeeper's contention was based on nothing more than its unsupported speculation that Indian Point releases might be having an adverse impact on Hudson River fish and

shellfish. *Id.* Accordingly, the Staff supports Entergy's motion for reconsideration of the Board's ruling admitting this contention.

B. The Consolidated Contention Lacks Adequate Factual or Expert Support

The Staff join Entergy's concerns about inadequate factual support as the basis for the Board's Order regarding this contention of omission.

Regarding Clearwater, Entergy states its view that there is no support for the Board's finding that Clearwater presented "sufficient information *and expert opinion*" to support its contention, inasmuch as there was no expert proffered by Clearwater. *See Id.* at 8, *citing* LBP-08-13, at 192. Entergy asserts that it was clear error for the Board to conclude that Clearwater had provided expert opinion in support of its contention. *Id.* at 9. The Staff shares Entergy's view that no expert opinion was submitted in support of the contention, as stated in the Staff's answer to Clearwater's contention. *See* NRC Staff Answer at 90. Inasmuch as Clearwater failed to provide the requisite support for its contention, reconsideration of the admission of this contention is appropriate. *See* Motion at 7, quoting LBP-08-13 at 9.

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 Indian Point Unit 1 ("IP1") spent fuel pool. Motion at 9. Entergy further reiterates that the Unit 1 fuel pool will be drained by the end of the year prior to any renewed license operations (Motion at 7), a fact that was not disputed by Riverkeeper.<sup>5</sup>

In admitting this contention, the Board stated that information on radiological leaks from the spent fuel pools is undisputedly within the scope of the LRA proceedings. Order at 188. Entergy disputes this, stating that Indian Point Unit 1 is not within the scope of license renewal,

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<sup>5</sup> See "Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene" ("Riverkeeper Reply"), dated February 15, 2008, at 64 n. 109.

and seeks reconsideration on this ground. Motion at 9. Alternatively, Entergy seeks clarification of the Board's ruling on this matter. *Id.* at 9-10. The Staff does not oppose Entergy's request for reconsideration or clarification, in that the Intervenor's have not shown that impacts on fish and shellfish is related to the Units 2 and 3 spent fuel pools, nor have they disputed the findings of Entergy's Investigative Report showing the contribution of the Unit 1 spent fuel pool to site contamination. See Applicant's Answer at 146; Riverkeeper Reply at 64-65, n.109.<sup>6</sup> As stated in Entergy's Motion, "the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking. Motion at 7, *quoting* LBP-08-13 at 9.

III. CONCLUSION

For the reasons set forth above, the Staff respectfully submits that Entergy's Motion should be granted.

Respectfully submitted,



David E. Roth  
Counsel for NRC Staff

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

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<sup>6</sup> As noted in the Applicant's Answer to Riverkeeper's Contention EC3, the Environmental Report discussed the spent fuel pool leaks, including those associated with IP1. See Applicant's Answer of January 22, 2008, at 147-151; Environmental Report at 5-4 – 5-6.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN SUPPORT OF ENTERGY'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION TO ADMIT CONSOLIDATED CONTENTION RIVERKEEPER EC-3/ CLEARWATER EC-1," dated August 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 August, 2008:

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