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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos.	50-247-LR and
)		50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)		
)		
(Indian Point Nuclear Generating Units 2 and 3))		
)	September 30, 2008	

**ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING
RIVERKEEPER'S NEW AND AMENDED CONTENTIONS REGARDING
ENVIRONMENTAL IMPACTS OF HIGH-DENSITY POOL STORAGE OF SPENT FUEL**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant"), hereby files its Answer opposing admission of the amended contention and new contentions submitted by Riverkeeper, Inc. ("Riverkeeper") on September 5, 2008.¹ Following the Nuclear Regulatory Commission's ("NRC" or "Commission") recent denial of the petitions for rulemaking submitted by the Attorney General of the Commonwealth of Massachusetts ("Massachusetts AG") and the Attorney General for the State of California ("California AG") concerning the environmental impacts of high-density spent fuel pool ("SFP") storage, Riverkeeper submitted one amended contention and two new contentions.² Amended Contention EC-2 reasserts Riverkeeper's previously-rejected claim that Entergy's severe accident mitigation alternative ("SAMA") analysis does not adequately address the probability and scope of severe accidents.³ New Proposed Contention EC-4 claims that the NRC must address spent fuel storage impacts in a

¹ Riverkeeper, Inc.'s New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (Sept. 5, 2008) ("New and Amended Contentions").

² Attorney General of Commonwealth of Massachusetts, Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008) ("Rulemaking Petition Denial").

³ New and Amended Contentions at 13-21.

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supplement to the Generic Environmental Impact Statement for license renewal.⁴ New Proposed Contention EC-5 alleges that the Commission's Rulemaking Petition Denial fails to identify the documents on which it relies.⁵

As shown below, Riverkeeper seeks inappropriately to use this proceeding as a conduit to contest the NRC's Rulemaking Petition Denial. Riverkeeper impermissibly challenges—for the second time in this proceeding—the Commission's generic findings concerning the environmental impacts of spent fuel storage.⁶ Riverkeeper similarly repeats its challenge—also rejected by this Board—to the Commission's decision in *Oyster Creek* to exclude from individual license renewal proceedings consideration of the environmental impacts of postulated terrorist attacks.⁷

As discussed further below, the New and Amended Contentions should be denied in their entirety because Riverkeeper has not satisfied the NRC's late-filed contention criteria set forth in 10 C.F.R. § 2.309(c), (f)(2), or the contention admissibility standards contained in 10 C.F.R. § 2.309(f)(1). Specifically, Riverkeeper has failed to demonstrate that the New and Amended Contentions are based on any new information that is materially different from information previously available.⁸ Moreover, as this Board explicitly recognized in refusing to hold the original Proposed Contention EC-2 in abeyance, the applicable NRC regulations remain in force.⁹ Thus, insofar as the New and Amended Contentions challenge the NRC's generic findings on spent fuel storage impacts, those contentions are barred by 10 C.F.R. § 2.335(a) as impermissible challenges to

⁴ NUREG-1437, Vol. 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996) ("GEIS" or "NUREG-1437").

⁵ New and Amended Contentions at 22-29.

⁶ These generic findings are described in the GEIS and are codified in Table B-1 of Appendix B to Subpart A of 10 C.F.R. Part 51 ("Table B-1").

⁷ See *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *pet. for judicial review pending*, No. 07-2271 (3d Cir.) ("Oyster Creek").

⁸ See 10 C.F.R. § 2.309(f)(2)(ii).

⁹ See *Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC ___, slip op. at 181 (July 31, 2008) ("In the event that the petitions are denied, the current rule will remain in force, and any attack on the validity of that rule will be impermissible in this proceeding as a matter of law.").

Commission regulations. Accordingly, the issues raised by the New and Amended Contentions are not within the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). In addition, the issues raised by Riverkeeper are not material to the NRC's required findings in this proceeding, lack factual support, and fail to establish a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

II. BACKGROUND

A. **The Board Rejected Riverkeeper's Proposed Contention EC-2**

On November 30, 2007, Riverkeeper filed a Request for Hearing and Petition to Intervene in the Indian Point Energy Center ("IPEC") Units 2 and 3 license renewal proceeding.¹⁰ The Board granted Riverkeeper's Petition to Intervene and admitted three of Riverkeeper's proposed contentions.¹¹ The Board, however, rejected other contentions proffered by Riverkeeper, including Proposed Contention EC-2, which contested the adequacy of Entergy's SAMA analyses for IPEC Units 2 and 3.¹² Original Proposed Contention EC-2 included numerous bases, two of which are directly related to Riverkeeper's New and Amended Contentions. In particular, Riverkeeper alleged that, in evaluating the costs of a severe accident, Entergy failed to consider: (1) spent-fuel pool fires at IPEC Units 2 and 3 and (2) intentional attacks on the IPEC Unit 2 or Unit 3 reactors or their respective spent fuel pools.¹³

In its July 31, 2008 decision, the Board rejected these two aspects of Proposed Contention EC-2. First, the Board held that, because the environmental impacts from spent fuel fires are addressed in the GEIS and are codified as a Category 1 issue in Table B-1, this issue is outside the

¹⁰ 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) ("Petition to Intervene").

¹¹ LBP-08-13, slip op. at 226-27.

¹² *Id.* at 180-84.

¹³ Petition to Intervene at 55, 61-68.

scope of this proceeding.¹⁴ The Board also denied Riverkeeper's request to admit Proposed Contention EC-2 and hold it in abeyance subject to the Commission's disposition of two then-pending petitions for rulemaking submitted by the Massachusetts AG and California AG.¹⁵ The Massachusetts AG and California AG petitions requested that the Commission revoke its Category 1 determination in light of purported new and significant information relating to spent fuel pool fires. In rejecting this aspect of Proposed Contention EC-2, the Board stated as follows:

In the event that the petitions are denied, *the current rule will remain in force, and any attack on the validity of that rule will be impermissible in this proceeding as a matter of law.* In the event that the Commission changes the rule, petitioners will have the opportunity to file new contentions at that time.¹⁶

Second, citing its obligatory "adherence to the Commission precedent," the Board further ruled that Riverkeeper's claim regarding terrorist attacks was beyond the scope of, and not material to, this license renewal proceeding.¹⁷ Specifically, in *Oyster Creek*, the Commission held that terrorism is unrelated to the aging issues that license renewal proceedings are intended to address and, conversely, that license renewal is not related to any change in the risk of terrorist attack.¹⁸ Furthermore, the Board found "no justification" for Riverkeeper's request that the Board refer the issue to the Commission for reconsideration of its decision in *Oyster Creek*.¹⁹

¹⁴ LBP-08-13, slip op. at 180-81 (citing *Entergy Nuclear Vermont Yankee, LLC*, (Vermont Yankee Nuclear Power Station); *Entergy Nuclear Gen Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 16 (2007), *aff'd sub nom. Mass. v. NRC*, 522 F.3d 115 (1st Cir. 2008)).

¹⁵ *Id.* at 181.

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* at 181; *see also id.* at 120 (stating that the Board is "bound by the Commission's ruling in *Oyster Creek* 'that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities'").

¹⁸ *Id.* at 181.

¹⁹ *Id.* at 181-82.

B. The Commission Denied the Massachusetts AG and California AG Petitions

The purported basis for Riverkeeper's New and Amended Contentions is the Commission's denial of the Massachusetts AG and California AG petitions for rulemaking concerning the environmental impacts of high-density spent fuel pool storage.²⁰ Those rulemaking petitions requested that the Commission consider purported new and significant information showing that the GEIS mischaracterized the impacts of spent fuel storage as insignificant, and revoke the regulations that codify this conclusion so as to exclude consideration of spent fuel storage impacts in plant-specific National Environmental Policy Act ("NEPA") review documents.²¹

In rejecting the petitions for rulemaking, the Commission examined the information relied upon by the Massachusetts AG and California AG, including, *inter alia*, NUREG-1738, "Technical Study of the Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants" (Jan. 2001) ("NUREG-1738"), and a report prepared by Gordon R. Thompson, "Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants" (May 25, 2006) ("2006 Thompson Report"). The Commission found none of the information relied upon by the petitioners to be new and significant.²² Furthermore, the Commission concluded that "its findings related to the storage of spent nuclear fuel in pools, as set forth in NUREG-1437 and Table B-1 of Appendix B to Subpart A of 10 CFR Part 51, remain valid," and "[t]hus, the NRC has met and continues to meet its obligations under NEPA."²³

²⁰ See New and Amended Contentions at 1.

²¹ Rulemaking Petition Denial, 73 Fed. Reg. at 46,205.

²² *Id.* at 46,208.

²³ *Id.* at 46,211.

In rejecting the rulemaking petitions, the Commission reiterated its conclusion in the GEIS that the risk of spent fuel pool accidents is low, and noted that mitigation measures implemented since September 11, 2001, further reduce that low risk.²⁴ As the Commission explained:

Given that the SFP [spent fuel pool] risk level is less than that for a reactor accident, a SAMA that addresses SFP accidents would not be expected to have a significant impact on total risk for the site. Despite the low level of risk from fuel stored in SFPs, additional SFP mitigative measures have been implemented by licensees since September 11, 2001. These mitigative measures further reduce the risk from SFP zirconium fires, and make it even more unlikely that additional SFP safety enhancements could substantially reduce risk or be cost-beneficial.²⁵

The Commission also stated that it “remains of the view that an analysis of the environmental impacts of a hypothetical terrorist attack on an NRC-licensed facility is not required under NEPA.”²⁶

C. Riverkeeper’s New and Amended Contentions

Riverkeeper first asserts that the Commission’s Rulemaking Petition Denial “has a significant bearing” on the admissibility of original Proposed Contention EC-2 because the Commission’s reference to mitigation measures not discussed in the GEIS “*effectively* removed spent fuel storage impacts from Category 1.”²⁷ Thus, in Amended Contention EC-2, Riverkeeper simply repeats its previously-rejected arguments that Entergy’s Environmental Report (“ER”) is deficient because it does not consider the contribution to severe accident costs of a fire in either of the spent-fuel pools at IPEC Units 2 and 3 and intentional attacks on the IPEC Unit 2 or Unit 3 reactors or their respective spent fuel pools.

²⁴ See *id.* at 46,208. These measures were implemented to “enhance spent fuel coolability and the potential to recover [spent fuel pool] water level and cooling prior to a potential [spent fuel pool] zirconium fire.” *Id.*

²⁵ *Id.* at 46,212.

²⁶ *Id.* at 46,211 (citing *Oyster Creek*, CLI-07-8, 65 NRC at 128-29). The Commission further stated that, even if such an analysis were required, the impacts of a terrorist attack “would not be significant, because the probability of a successful terrorist attack (*i.e.*, one that causes an SFP zirconium fire, which results in the release of a large amount of radioactive material into the environment) is very low and therefore, within the category of remote and speculative matters.” *Id.*

²⁷ New and Amended Contentions at 2 (emphasis added).

Proposed Contentions EC-4 and EC-5 explicitly challenge the adequacy of the Rulemaking Petition Denial,²⁸ which Riverkeeper claims may be treated as “binding” and have “a significant potential effect on this proceeding.”²⁹ Specifically, Proposed Contention EC-4 asserts that the NRC must address spent fuel storage impacts in a supplement to the GEIS, because the Rulemaking Petition Denial allegedly found those impacts to be significant “in the absence of mitigative measures” implemented since September 11, 2001.³⁰ Proposed Contention EC-4 further alleges that the Commission’s Rulemaking Petition Denial is inadequate as an environmental assessment (“EA”) documenting a finding of no significant impact (“FONSI”).³¹ Proposed Contention EC-5, in turn, alleges that the Rulemaking Petition Denial fails to identify the documents on which it relies, contrary to NEPA, the Freedom of Information Act (“FOIA”), and NRC case law.³²

III. LEGAL STANDARDS GOVERNING THE ADMISSIBILITY OF NEW AND AMENDED CONTENTIONS

10 C.F.R. § 2.309(f)(2) states that a petitioner “may amend” environmental contentions or file new contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s documents.”³³ Otherwise, in the absence of such circumstances, an intervenor may file amended or new contentions “only with leave of the presiding officer” upon a showing that:

²⁸ *Id.* at 22-29. Indeed, Riverkeeper states that it “submits the following new contentions [EC-4 and EC-5] that challenge the adequacy of the NRC Rulemaking Petition Decision to comply with NEPA and NRC implementing regulations.” *Id.* at 22-23 (emphasis added).

²⁹ *Id.* at 3 (emphasis in original).

³⁰ *Id.* at 23.

³¹ *Id.* at 22-27.

³² *Id.* at 28-29.

³³ As discussed below, Riverkeeper describes this provision as authorizing filing of amended or new contentions “as of right.” New and Amended Contentions at 29-30; see also Riverkeeper, Inc.’s Conditional Motion for Leave to File New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel at 1 (Sept. 5, 2008) (“Conditional Motion”).

- (i) The information upon which the amended or new contention is based was *not previously available*;
- (ii) The information upon which the amended or new contention is based is *materially different than information previously available*; and
- (iii) The amended or new contention has been *submitted in a timely fashion* based on the availability of the subsequent information.³⁴

If an intervenor cannot satisfy the requirements of 10 C.F.R. § 2.309(f)(2), a contention is considered “nontimely,” and the intervenor must then demonstrate that it satisfies the eight-factor balancing test in 10 C.F.R. § 2.309(c)(1)(i)-(viii).³⁵ The first factor identified in that regulation, whether “good cause” exists for the failure to file on time, is entitled to the most weight.³⁶ Without good cause, a “petitioner’s demonstration on the other factors must be particularly strong.”³⁷

In addition to the late-filing criteria identified above, a proposed new or amended contention must meet the substantive admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1).³⁸ Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a proposed new or amended contention.³⁹ The Commission’s contention admissibility rule at 10 C.F.R. § 2.309(f)(1) is “strict by design,”⁴⁰ because its purpose is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴¹ The Commission has stated that it “should not have

³⁴ 10 C.F.R. § 2.309(f)(2)(i)-(iii) (*emphasis added*).

³⁵ *See id.* § 2.309(c)(2) (“The requestor/petitioner *shall* address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.”) (*emphasis added*).

³⁶ *See State of N.J.* (Department of Law and Public Safety’s Requests Dated October 8, 19993), CLI-93-25, 38 NRC 289, 296 (1993).

³⁷ *Tex. Utils Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

³⁸ These criteria are discussed in detail in the Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper Inc.’s Request for Hearing and Petition to Intervene at 9-28 (Jan. 22, 2008).

³⁹ *See Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁴⁰ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *recons. denied*, CLI-02-1, 55 NRC 1 (2002).

⁴¹ *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2202.

to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”⁴² When a contention raises issues that are beyond the scope of the proceeding, or which are not material to the findings that the NRC must make to support the subject licensing action, no hearing is warranted.⁴³

IV. ARGUMENT

A. Riverkeeper May Not File New or Amended Contentions “As of Right”

Riverkeeper contends that 10 C.F.R. § 2.309(f)(2) provides it with the “right” to submit its New and Amended Contentions because the Rulemaking Petition Denial is a “binding” NEPA document, “equivalent” to an EA, which the NRC may rely upon in this case.⁴⁴ Section 2.309(f)(2), however, provides no such right to Riverkeeper. As noted above, the portion of Section 2.309(f)(2) upon which Riverkeeper relies states that a “petitioner may amend [NEPA-related] contentions or file new contentions if there are data or conclusions *in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto*, that differ significantly from the data or conclusions in the applicant’s documents.”⁴⁵ Thus, Section 2.309(f)(2), as cited by Riverkeeper, does not apply here. The NRC has not issued its draft supplemental environmental impact statement (“SEIS”) or any other NEPA documents in this proceeding. As explained herein (see Section IV.C.2.a. *infra*, at 17-19), the Rulemaking Petition Denial is *not* an EA and did *not* supplement the GEIS. Riverkeeper, therefore, may not rely on 10 C.F.R. § 2.309(f)(2) as a basis for submitting New and Amended Contentions.⁴⁶

⁴² *Id.*

⁴³ See 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi).

⁴⁴ New and Amended Contentions at 3-4, 30.

⁴⁵ 10 C.F.R. § 2.309(f)(2) (emphasis added).

⁴⁶ Furthermore, even if the Rulemaking Petition Denial could be considered a NEPA document for purposes of 10 C.F.R. § 2.309(f)(2), it still does not contain “data or conclusions” that “differ significantly” from information in the GEIS. As discussed in Section IV.C.2.a *infra*, the information addressed in the Rulemaking Petition Denial would not lead to an impact finding different than the finding set forth in the GEIS and codified in NRC regulations.

B. Riverkeeper Has Not Met the Late-Filing Standards Set Forth in 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c)(1)

In view of the above, Riverkeeper may file its New and Amended Contentions only with leave of the Board, upon a showing that it has met the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii). As shown below, Riverkeeper clearly has not met these requirements. Accordingly, Riverkeeper's "Conditional Motion" should be rejected, and its New and Amended Contentions should be denied.

Significantly, the only purportedly "new" information that Riverkeeper points to is the Rulemaking Petition Denial.⁴⁷ The information and conclusions discussed in the Rulemaking Petition Denial, however, plainly are not "*materially* different than information previously available."⁴⁸ As when Riverkeeper submitted its original Petition to Intervene, spent fuel pool storage impacts *still* are a Category 1 issue and *still* are outside the scope of this proceeding. The Commission's affirmation of its prior generic findings cannot reasonably be considered "new" information that is "materially different" from information previously available.⁴⁹ Indeed, Riverkeeper's argument is completely at odds with the plain language of the Commission's Rulemaking Petition Denial.⁵⁰

Because Riverkeeper has not satisfied the criteria in 10 C.F.R. § 2.309(f)(2), it must satisfy the test set forth in 10 C.F.R. § 2.309(c)(1). Riverkeeper, however, has not addressed *any* of the Section 2.309(c)(1) criteria, including good cause for late-filing.⁵¹ This omission alone renders the

Therefore, the conclusions in the Rulemaking Petition Denial do not "differ *significantly*" from the conclusions in the GEIS. 10 C.F.R. § 2.309(f)(2) (emphasis added).

⁴⁷ New and Amended Contentions at 30-31; Conditional Motion at 2.

⁴⁸ 10 C.F.R. § 2.309(f)(2)(ii) (emphasis added).

⁴⁹ In addition, NUREG-1738, the 2006 Thompson Report, and Entergy's July 11, 2007, license amendments incorporating the mitigation measures required by NRC Order EA-02-026 (Exh. 1 to New and Amended Contentions) were previously available when Riverkeeper submitted its Petition to Intervene. Therefore, Riverkeeper also has not satisfied 10 C.F.R. § 2.309(f)(2)(i).

⁵⁰ See Rulemaking Petition Denial, 73 Fed. Reg. at 46,206 ("[T]he NRC has determined that its findings in NUREG-1437 and in Table B-1 remain valid, both for SFP accidents and for potential terrorist attacks that could result in an SFP zirconium fire.").

⁵¹ See New and Amended Contentions at 31; Conditional Motion at 1-2.

contention fatally defective, in that Riverkeeper has the burden to affirmatively demonstrate that the 10 C.F.R. § 2.309(c)(1) factors weigh in favor of admitting the New and Amended Contentions.⁵²

Riverkeeper clearly has not met its burden under 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1).

Accordingly, the New and Amended Contentions must be rejected.

C. Riverkeeper Has Not Demonstrated That Its New and Amended Contentions Meet the Admissibility Criteria Set Forth in 10 C.F.R. § 2.309(f)(1)

As shown below, because Riverkeeper's New and Amended Contentions do not meet each of the admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1), they must be rejected, irrespective of their non-timeliness. As a threshold matter, the New and Amended Contentions rest on a patently erroneous and unsupportable premise. Specifically, Riverkeeper claims that, because the Rulemaking Petition Denial discusses the implementation of mitigation measures that were not discussed in the GEIS, spent fuel pool impacts are now "disqualified" as a Category 1 issue.⁵³ In so doing, Riverkeeper challenges 10 C.F.R. § 51.95(c), which provides that an SEIS prepared for a license renewal "need not discuss . . . any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b)."⁵⁴ Riverkeeper wrongly posits that this regulation no longer applies to this proceeding because the post-September 11 mitigation measures discussed by the Commission are not within the scope of the generic determination in 10 C.F.R. § 51.23(a).⁵⁵ Based upon this erroneous assumption, Riverkeeper incorrectly asserts that "the NRC no longer has any lawful basis to refuse to consider the environmental impacts of high-density pool storage of spent fuel in this proceeding."⁵⁶

⁵² See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & 347 n.9 (1998).

⁵³ New and Amended Contentions at 11-13.

⁵⁴ 10 C.F.R. § 51.95(c)(2).

⁵⁵ New and Amended Contentions at 12-13 (citing 10 C.F.R. §§ 51.23(a), 51.95(a), (b)).

⁵⁶ *Id.* at 13.

Contrary to its claim, the regulations that Riverkeeper contends are “disqualified” and “inapplicable” undeniably remain in effect and controlling here.⁵⁷ Riverkeeper has not pointed to any action by the Commission, related to the Rulemaking Petition Denial or otherwise, that even remotely suggests that these regulations have been amended or rescinded. Indeed, in ruling on the Massachusetts AG and the California AG requests for rulemaking, the Commission was specifically presented with the option of revoking 10 C.F.R. § 51.23(a) and (b), 10 C.F.R. § 51.95(c), and Table B-1, but expressly declined to do so.⁵⁸ Faced with this unambiguous conclusion, Riverkeeper contorts the contents of the Commission’s Rulemaking Petition Denial beyond all recognition, in a strained attempt to muster support for its claim that these regulations are no longer applicable. Riverkeeper’s suggestion that the Commission has “effectively” revoked these regulations is utterly without merit and belied by the express language of the Rulemaking Petition Denial that “[the NRC’s] findings in NUREG-1437 and in Table B-1 remain valid.”⁵⁹

Moreover, as this Board unambiguously explained in LBP-08-13, if the Massachusetts AG and California AG “petitions are denied, the current rule will remain in force, and any attack on the validity of that rule will be impermissible in this proceeding as a matter of law.”⁶⁰ The exact scenario described by the Board has come to pass. Specifically, because the Commission denied the rulemaking petitions, issues related to spent fuel storage continue to be addressed on a generic basis in Table B-1, and, under 10 C.F.R. § 2.335(a), those issues continue to be excluded from further consideration in plant-specific license renewal proceedings.

For these reasons, the New and Amended Contentions, which Entergy further addresses on a contention-specific basis below, should be rejected because they raise issues that are outside the

⁵⁷ *Id.* at 11-12.

⁵⁸ See Rulemaking Petition Denial, 73 Fed. Reg. at 46,205.

⁵⁹ *Id.* at 46,206 (emphasis added).

⁶⁰ LBP-08-13, slip op. at 181.

scope of this proceeding. Proposed Contention EC-4 also clearly speculates about what the NRC's SEIS will or will not address based on conclusions in the Rulemaking Petition Denial. However, as this Board explained in rejecting a proposed contention that focused on yet-to-be produced NRC Staff documents, "it is impossible for the Board to judge what NRC may or may not do in its [SEIS] for the Indian Point LRA proceedings – a document that is months away from publication."⁶¹ Proposed Contention EC-5, in turn, challenges the adequacy of the Rulemaking Petition Denial—a Commission decision clearly not subject to challenge in this license renewal proceeding.

1. Amended Contention EC-2 Remains Inadmissible

As Riverkeeper itself acknowledges, Amended Contention EC-2 is a verbatim resubmission of Proposed Contention EC-2—denied by this Board in LBP-08-13—only this time Riverkeeper excludes those bases unrelated to spent fuel storage impacts.⁶² Thus, like the original proposed contention, Amended Contention EC-2 asserts that Entergy's SAMA analyses do not adequately address the probability and scope of severe accidents because Entergy allegedly has failed to consider the contribution to severe accident costs of: (1) a fire in either of the spent fuel pools at IPEC Units 2 and 3 and (2) intentional attacks on the IPEC Unit 2 or Unit 3 reactors or respective spent fuel pools.⁶³ In addition, Amended Contention EC-2 references the *same* declaration and report by Dr. Gordon Thompson, the *same* discussion of NRC regulations, and the *same* discussion of Entergy's SAMA analyses as was provided in the original Proposed Contention EC-2.⁶⁴

As demonstrated below, the Board's rationale for rejecting original Proposed Contention EC-2 remains valid and applies equally to Amended Contention EC-2—particularly in this, now, late-filed context. In short, the environmental impacts from spent fuel fires are addressed in the GEIS and

⁶¹ LBP-08-13, slip op. at 124.

⁶² New and Amended Contentions at 13.

⁶³ *Id.* at 13-14.

⁶⁴ *Id.* at 14-21.

are codified as a Category 1 issue in Table B-1. Riverkeeper is not permitted to attack this determination in an adjudicatory proceeding, absent a waiver of the applicable Part 51 regulations.⁶⁵ Therefore, the potential impacts from a spent fuel pool fire are beyond the scope of this proceeding.⁶⁶

In addition, the Commission's *Oyster Creek* decision is binding precedent which prohibits consideration of the environmental impacts of postulated terrorist attacks in license renewal proceedings.⁶⁷ Riverkeeper provides the Board no valid reason to reconsider its previous determination that this issue is outside the scope of, and immaterial to, this proceeding. As the Board previously explained in rejecting a similar proposed contention, it is "bound by the Commission's ruling in *Oyster Creek* 'that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.'"⁶⁸ Accordingly, the environmental impacts from a spent fuel pool fire caused by a terrorist attack "are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding."⁶⁹

For the foregoing reasons, Amended Contention EC-2 is outside the scope of the proceeding. Furthermore, Riverkeeper fails to establish a genuine dispute with the Applicant on a material issue of law or fact, because it raises issues that are not material to the NRC's required findings in this proceeding. Therefore, the Board again should reject this proposed contention.

⁶⁵ 10 C.F.R. § 2.335(a)-(b). Although Riverkeeper indicated it might seek a waiver (Petition to Intervene at 63), it has not sought such a waiver, perhaps because it concedes, as the Massachusetts AG did, that spent fuel pool issues are generic issues. See *Mass. v. NRC*, 522 F.3d at 123-24 (noting that Massachusetts acknowledged that a "contention regarding pool fires was not specific to either of the [Vermont Yankee or Pilgrim] plants, but was a safety issue common to all plants").

⁶⁶ LBP-08-13, slip op. at 180-81 (citing *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 16). As discussed in Entergy's answer to the original Proposed Contention EC-2, raising onsite spent fuel pool storage issues as part of a "SAMA contention" does not render those issues litigable in a plant-specific adjudicatory proceeding. See Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper Inc.'s Request for Hearing and Petition to Intervene at 117-18 (Jan. 22, 2008). The Commission has stated unambiguously that "Part 51's reference to 'severe accident mitigation alternatives' applies to nuclear reactor accidents, not spent fuel storage accidents." *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21 (2001) (emphasis in original).

⁶⁷ See LBP-08-13, slip op. at 181-82 (citing *Oyster Creek*, CLI-07-8, 65 NRC at 128-30).

⁶⁸ *Id.* at 120 (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 129).

⁶⁹ *Id.* at 119 (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 129).

2. New Proposed Contention EC-4 is Inadmissible

In Proposed Contention EC-4, Riverkeeper asserts that, in view of the Rulemaking Petition Denial, the NRC must prepare a supplement to the GEIS that addresses the impacts from spent fuel storage at Indian Point.⁷⁰ Riverkeeper argues that, at a minimum, the proposed supplement should include the discussion of spent fuel pool impacts contained in the Rulemaking Petition Denial.⁷¹ In this regard, Riverkeeper contends that the Rulemaking Petition Denial supports its claims that “partial drainage of a spent fuel pool is a more serious condition than complete drainage, aged fuel can burn, and spent fuel fires will propagate.”⁷² Riverkeeper further asserts that the Commission found that “environmental impacts of spent fuel are significant unless they are mitigated.”⁷³ Finally, Riverkeeper maintains that, even if an SEIS is not required, the Rulemaking Petition Denial is not sufficient to satisfy the NEPA standard set forth in federal case law for mitigation measures discussed in an EA or FONSI.⁷⁴

a. Proposed Contention EC-4 Impermissibly Challenges NRC Regulations, Contrary to 10 C.F.R. § 2.309(f)(1)(iii), (iv)

As discussed above, the NRC’s designation of spent fuel storage impacts as a Category I issue in Table B-1 remains fully in effect.⁷⁵ As the Board recognized in rejecting original Proposed Contention EC-2, any contention raising issues related to spent fuel storage impacts is barred by 10 C.F.R. § 2.335(a) and, thus, is outside the scope of this proceeding and not material to the NRC Staff’s findings in this proceeding.⁷⁶ Riverkeeper’s references to 10 C.F.R. § 51.92(a)(2) and allegations regarding new and significant information do not cure this fatal defect in Proposed

⁷⁰ New and Amended Contentions at 23.

⁷¹ *Id.* at 25.

⁷² *Id.* at 24.

⁷³ *Id.*

⁷⁴ *Id.* at 25-28.

⁷⁵ See 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1.

⁷⁶ See LBP-08-13, slip op. at 180-81; *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 16.

Contention EC-4. As the Commission explained in its *Vermont Yankee/Pilgrim* decision, “[a]djudicating Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”⁷⁷ In accordance with this precedent and the Board’s previous decision addressing this same issue, Proposed Contention EC-4 must be rejected as outside the scope of this proceeding.⁷⁸

Notwithstanding this impermissible challenge to NRC regulations, Riverkeeper’s definition of “significant” new information is inconsistent with NEPA case law. Riverkeeper essentially avers that all new information is significant if that information was not specifically addressed in the GEIS.⁷⁹ For example, in his supporting declaration, Gordon Thompson—the author of the 2006 Thompson Report described by the Commission in the Rulemaking Petition Denial as both “overly conservative” and “entirely speculative”⁸⁰—claims that certain information in the Rulemaking Petition Denial “is significant because it demonstrates that the nuclear industry and the NRC both have a level of concern about the risk of a pool fire such that they have adopted risk-reducing options that were not addressed in [the GEIS].”⁸¹

Riverkeeper’s claims are both specious and unsupported by controlling legal principles. Neither NEPA nor NRC case law recognizes Riverkeeper’s definition of “significance.” In order to be significant, “new information must present ‘a seriously different picture of the environmental

⁷⁷ *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 21. The U.S. Court of Appeals for the First Circuit recently upheld the Commission’s decision in the *Vermont Yankee* and *Pilgrim* proceedings, finding that “the NRC acted reasonably when it invoked a well-established agency rule to reject the [petitioner’s] requests to participate as a party in individual re-licensing proceedings to raise generic safety concerns and required that the [petitioner] present its concerns in a rulemaking petition.” *Mass. v. NRC*, 522 F.3d at 129-30.

⁷⁸ In addition, this proposed contention is outside the scope of the proceeding because it focuses on the adequacy of the Commission’s Rulemaking Petition Denial rather than the adequacy of Entergy’s license renewal application. See New and Amended Contentions at 22-28 (challenging the adequacy of the Rulemaking Petition Denial).

⁷⁹ See New and Amended Contentions at 24 (citing Exh. 2, Decl. of Dr. Gordon R. Thompson In Support of Riverkeeper’s Contentions EC-4 and EC-5 ¶¶ IV.6-IV.8 (Sept. 5, 2008)).

⁸⁰ Rulemaking Petition Denial, 73 Fed. Reg. at 46,209.

⁸¹ New and Amended Contentions, Exh. 2, Decl. of Dr. Gordon R. Thompson In Support of Riverkeeper’s Contentions EC-4 and EC-5 ¶ IV.8 (Sept. 5, 2008).

impact of the proposed project from what was previously envisioned.”⁸² “It is not enough that the information may be worthy of further inquiry or may be considered important research.”⁸³ Thus, consistent with this case law, NRC guidance defines significant information as information “that leads to an impact finding *different from* that codified in 10 CFR Part 51.”⁸⁴

The Rulemaking Petition Denial does not support a different impact finding than that codified in Table B-1. In fact, it makes clear that the overall risk from spent fuel pool storage is low even without the more recent mitigation measures, but that the recent spent fuel pool mitigation measures further reduce the already-low overall risk of a spent fuel pool accident.⁸⁵ As these mitigation measures further lower the potential for adverse environmental consequences, such actions do not present a different picture of the environmental impacts than the GEIS, do not lead to an impact finding different from that codified in Part 51, and thus, do not constitute “significant” new information for NEPA purposes.⁸⁶ “A requirement that a supplemental EIS be prepared each time such improvements were instituted would surely serve as a practical deterrent to just such desirable efforts.”⁸⁷ Proposed Contention EC-4 seeks to impose precisely such a requirement.⁸⁸

⁸² *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wis. v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

⁸³ *Weinberger*, 745 F.2d at 420.

⁸⁴ Regulatory Guide 4.2, Supp. 1, Preparation of Supplemental Environmental Reports for Application to Renew Nuclear Power Plant Operating Licenses at 4.2-S-4 (Sept. 2000) (emphasis added), *available at* ADAMS Accession No. ML003710495.

⁸⁵ Rulemaking Petition Denial, 73 Fed. Reg. at 46,212 (“These mitigative measures *further reduce* the risk from SFP zirconium fires, and *make it even more unlikely* that additional SFP safety enhancements could substantially reduce risk or be cost-beneficial.”) (emphasis added).

⁸⁶ *See Concerned Citizens on I-190 v. Sec’y of Transp.*, 641 F.2d 1, 6 (1st Cir. 1981) (finding that an EIS need not be supplemented based on additional mitigation measures because the new measures further reduce adverse impacts); *New England Coal. on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (finding that an EIS was adequate because subsequent changes to the plant’s cooling water intake tunnel location would result in a smaller environmental impact).

⁸⁷ *Springfield v. Lewis*, 702 F.2d 426, 438 (3rd Cir. 1983) (finding that changes to an interstate highway project that mitigate environmental impacts are not substantial enough to require revision and recirculation of a draft EIS).

⁸⁸ Because the mitigation measures discussed in the Rulemaking Petition Denial are not new and significant information, Riverkeeper’s reliance on 10 C.F.R. §§ 51.29 and 51.92 is misplaced because there is no need to supplement the GEIS to address information that is not significant (*i.e.*, information that does not present “a seriously

Riverkeeper further claims that more recent spent fuel storage mitigation measures need to be addressed in a NEPA document because the Rulemaking Petition Denial is a deficient EA or mitigation FONSI.⁸⁹ That assertion is incorrect as a matter of law. The Rulemaking Petition Denial did not claim or purport to be an EA or a FONSI. Riverkeeper tacitly concedes this fact, stating that “the Rulemaking Petition [Denial] *effectively* constitutes an EA that supplements the License Renewal GEIS by making a finding of no significant impact.”⁹⁰ Nor is there any provision in NEPA or NRC regulations that requires that the NRC generate an EA, a FONSI, or any other NEPA-document as part of its evaluation of whether information is significant for purposes of supplementing an EIS.⁹¹ NRC regulations require the agency to prepare an SEIS only to address “*significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁹² As such, there was no need for the NRC to prepare an EA or any other NEPA document for purposes of denying the petitions for rulemaking.⁹³ “To require more would task the agencies with the sisyphian feat of forever starting over in their environmental

different picture of the environmental impact of the proposed project from what was previously envisioned”). See *Hydro Resources*, CLI-99-22, 50 NRC at 14 (quoting *Sierra Club*, 816 F.2d at 210).

⁸⁹ New and Amended Contentions at 22-27.

⁹⁰ *Id.* at 30 (emphasis added).

⁹¹ See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 379 (1989) (upholding an agency’s decision not to supplement an EIS based on the agency’s supplemental information report); *Hodge v. Abraham*, 300 F.3d 432, 446 (4th Cir. 2002) (holding that an agency is entitled to conduct a preliminary inquiry to determine whether changed circumstances are significant); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (finding that an agency may use “non-NEPA environmental evaluation procedures” to determine whether supplementation of an EA or an EIS is necessary). See generally DANIEL R. MANDELKER, NEPA LAW AND LITIGATION, § 10:49 at 10-171 (2008) (“An agency does not have to prepare an environmental assessment as the basis for deciding to prepare a supplemental impact statement. It may instead rely on a ‘non-NEPA’ document, such as a supplementary report or a reevaluation, as the basis for making this decision.”).

⁹² 10 C.F.R. § 51.72(a)(2) (emphasis added).

⁹³ In this vein, the Commission emphasized that any prospective plans to update the GEIS or make attendant rule changes relate to “a future undertaking which itself had no genesis in the petitioners’ requests.” Rulemaking Petition Denial, 73 Fed. Reg. at 46,213. The Commission also noted that, while the analyses performed to respond to the rulemaking petitions will inform NRC staff proposals regarding the next update of the GEIS, the Commission does not yet have such proposals before it. *Id.* Moreover, “[a]ny final Commission decisions on an updated GEIS would be preceded by proposed changes, solicitation of public comment, and evaluation of all pertinent information and public comments.” *Id.*

evaluation, regardless of the usefulness of such efforts.”⁹⁴ Again, Proposed Contention EC-4 seeks to impose such a counterproductive requirement on the NRC.

Given that it was unnecessary for the Commission to address spent fuel pool storage in an SEIS, EA, or FONSI in ruling on the Massachusetts AG and California AG petitions for rulemaking, the “mitigation FONSI” cases cited by Riverkeeper are simply inapposite to the facts at hand.⁹⁵ Those cases involved situations where an agency had not prepared an EIS and had no plans to prepare an EIS before the proposed action was taken.⁹⁶ Here, however, the NRC already has prepared the GEIS and, prior to the issuance of the renewed IPEC operating licenses, must prepare an SEIS. Therefore, the standard for an adequate “mitigation FONSI” is irrelevant.

b. Proposed Contention EC-4 Lacks Adequate Factual Support

Proposed Contention EC-4 also is inadmissible because it lacks factual support. There simply is no factual basis for Riverkeeper’s claim that the Rulemaking Petition Denial “confirmed” the conclusions in NUREG-1738 indicating that: (1) partial drainage of a spent fuel pool is a more serious condition than complete drainage; (2) aged fuel can burn, and (3) spent fuel fires will propagate.⁹⁷ As the Commission explained, NUREG-1738 “conservatively assumed that if the water level in the SFP dropped below the top of the spent fuel, an SFP zirconium fire involving all of the spent fuel would occur, and thereby bounded those conditions associated with air cooling of the fuel (including partial-draindown scenarios) and fire propagation.”⁹⁸ On this basis, the Commission,

⁹⁴ *Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997).

⁹⁵ New and Amended Contentions at 26-27 (citing *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682-83 (D.C. Cir. 1982), and *Nat’l Audubon Society v. Hoffman*, 132 F.3d 7, 17-18 (2nd Cir. 1997)).

⁹⁶ See *Cabinet Mountains*, 685 F.2d at 683 (upholding an agency decision not to prepare an EIS based on mitigation measures); *Nat’l Audubon Society*, 132 F.3d at 17 (finding an agency determination that an EIS was unnecessary was arbitrary and capricious because the agency had no assurance of the effectiveness of relied-upon mitigation measures because it did not study or plan to monitor the mitigation measures).

⁹⁷ New and Amended Contentions at 24.

⁹⁸ Rulemaking Petition Denial, 73 Fed. Reg. at 46,207.

“[e]ven with the numerous conservatisms in the NUREG-1738 study,” “was able to conclude that the risk from spent fuel storage is low, and is substantially lower than reactor risk.”⁹⁹

Similarly, there is no factual basis for Riverkeeper’s assertion that the Rulemaking Petition Denial “conceded” “that older fuel is vulnerable to ignition”¹⁰⁰ The Commission clearly stated that it “disagrees with the [Rulemaking] Petitioners’ assertion that fuel will burn regardless of age.”¹⁰¹ Furthermore, Riverkeeper’s claim that the Commission concluded that “environmental impacts of spent fuel are significant unless they are mitigated” is a blatant mischaracterization of the Rulemaking Petition Denial.¹⁰² As explained above, the Commission made clear that the overall risk from spent fuel pool storage was low even before the post-September 11 mitigation measures.

In summary, by improperly challenging the generic findings of the GEIS, as codified in 10 C.F.R. Part 51, Proposed Contention EC-4 raises issues that are beyond the scope of this proceeding and immaterial to the Staff’s review of the IPEC license renewal application. In addition, because Proposed Contention EC-4 is based on a gross misrepresentation of the Commission’s Rulemaking Petition Denial, it lacks a basis in fact.

3. New Proposed Contention EC-5 is Inadmissible

Proposed Contention EC-5 alleges that the Rulemaking Petition Denial violates NEPA and NRC case law because it fails to identify the documents on which the NRC relied in making its fictitious “FONSI” determination.¹⁰³ This new contention further asserts that the Rulemaking Petition Denial does not disclose those portions of the documents that are releasable under FOIA.¹⁰⁴ In particular, it claims that the Rulemaking Petition Denial: (1) refers to studies by Sandia National

⁹⁹ *Id.* at 46,209.

¹⁰⁰ New and Amended Contentions at 8.

¹⁰¹ Rulemaking Petition Denial, 73 Fed. Reg. at 46,209.

¹⁰² New and Amended Contentions at 24.

¹⁰³ *Id.* at 28. Although elsewhere in its pleadings Riverkeeper refers to this proposed contention as Contention EC-5, Entergy assumes that the heading for this proposed contention is mislabeled as “Contention EC-4.” *Id.*

¹⁰⁴ *Id.*

Laboratories, but identifies only two sample studies; (2) refers to license amendments and a safety evaluation for all nuclear power plants, but identifies no specific studies; and (3) refers to a National Academy of Sciences study, but does not clarify whether the Commission intends to refer to the public version or the classified version of the study.¹⁰⁵

Proposed Contention EC-5 should be dismissed because it is outside the scope of this proceeding, raises issues that are not material to the NRC's required findings in this proceeding, and does not establish a genuine material dispute with the Applicant.¹⁰⁶ Riverkeeper does not specifically challenge Entergy's license renewal application, as it is required to do to meet the NRC's contention-admissibility standards.¹⁰⁷ Instead, Riverkeeper seeks to litigate the basis for the Commission's Rulemaking Petition Denial, particularly the identity of the documents reviewed by the Commission in reaching its decision. The adequacy of the Commission's Rulemaking Petition Denial, however, is clearly not an issue within the scope of this license renewal proceeding.

Nor is this individual adjudicatory proceeding the proper forum for challenging the Commission's Rulemaking Petition Denial.¹⁰⁸ Should Riverkeeper—or any member of the public for that matter—desire information regarding the Commission's Rulemaking Petition Denial, NRC regulations implementing FOIA allow Riverkeeper to submit a request for access to such records.¹⁰⁹ If access to the information is denied, then the NRC will state the reasoning behind the denial, list the FOIA exemptions that prohibit disclosure, and indicate that the decision may be appealed to an NRC official identified in its initial determination,¹¹⁰ and then, if necessary, to a United States district

¹⁰⁵ *Id.*

¹⁰⁶ See 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

¹⁰⁷ See 10 C.F.R. § 2.309(f)(1)(vi).

¹⁰⁸ Although Riverkeeper submitted comments on the Massachusetts AG and California AG petitions for rulemaking, it was not a petitioner in that rulemaking proceeding. Moreover, irrespective of Riverkeeper's apparent lack of standing to challenge the Rulemaking Petition Denial, the proper forum for such a challenge is federal court, not this license renewal proceeding.

¹⁰⁹ See, e.g., 10 C.F.R. § 9.15.

¹¹⁰ 10 C.F.R. § 9.29.

court.¹¹¹ Neither FOIA nor NRC regulations, however, permit Riverkeeper to seek such documents in an unrelated adjudicatory proceeding before a Licensing Board.¹¹²

In summary, the purported failure of the Rulemaking Petition Denial to identify documents with Riverkeeper's desired specificity is beyond the scope of this proceeding, is not material to the NRC Staff's license renewal findings, and fails to establish a genuine dispute with the Applicant on a material issue of law or fact. Accordingly, the Board should reject Proposed Contention EC-5.

D. The Board Should Not Refer Its Rejection of Riverkeeper's New and Amended Contentions to the Commission

The Board also should reject Riverkeeper's request to refer the Board's decision denying admission of the New and Amended Contentions to the Commission. Under 10 C.F.R. § 2.323(f), the Board may refer a ruling to the Commission if a decision involves a "novel issue." Clearly, the spent fuel pool storage issues raised in the New and Amended Contentions do not present novel issues. In fact, the Commission addressed these very issues in the Rulemaking Petition Denial and in its *Vermont Yankee/Pilgrim* decision.¹¹³ Similarly, the NEPA-terrorism issue already has been addressed by the Commission in numerous prior proceedings, and by the Board in this proceeding.¹¹⁴ Riverkeeper's wishes to revisit certain issues—decided by the Commission in proceedings to which

¹¹¹ 5 U.S.C. § 552(a)(4)(B).

¹¹² Riverkeeper's argument concerning the relationship between FOIA and NEPA, particularly its reliance on *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant), CLI-08-1, 67 NRC 1, 15-16 (2008), is misplaced. The *Diablo Canyon* case cited by Riverkeeper involved a challenge—within the context of an individual adjudicatory proceeding—to the adequacy of the final EA prepared by the NRC Staff in connection with a specific NRC licensing action. Specifically, the Commission admitted a contention alleging that the Staff had failed to provide source documents or information underlying its plant-specific EA and to identify appropriate FOIA exemptions for its withholding decisions. CLI-08-1, 67 NRC at 17. In contrast, the Rulemaking Petition Denial that Riverkeeper seeks to contest here is not a plant-specific SEIS, EA, or FONSI subject to challenge in this proceeding.

¹¹³ Rulemaking Petition Denial, 73 Fed. Reg. at 46,208-12; *Vermont Yankee/Pilgrim*, *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20-22.

¹¹⁴ See *Oyster Creek*, CLI-07-8, 65 NRC at 128-29; *Nuclear Mgmt. Co., L.L.C.* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139 (2007); *Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144 (2007); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002); *Dominion Nuclear Ct., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).

Riverkeeper was not a party—are not sufficient to warrant this Board's referral of an issue to the Commission.

V. CONCLUSION

For the reasons set forth above, Riverkeeper's New and Amended Contentions fail to meet the requirements of 10 C.F.R. § 2.309(c), (f)(1), and (f)(2). Therefore, the New and Amended Contentions should be denied and the Conditional Motion should be rejected.

Respectfully submitted,



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Dated at Washington, DC
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**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
ENERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	September 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel," dated September 30, 2008, were served this 30th day of September, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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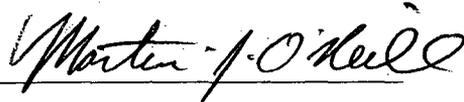
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