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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

In the Matter of

Entergy Nuclear Operations, Inc.
(Indian Point Nuclear Generating
Station Units 2 and 3)

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

**RIVERKEEPER, INC.'S REPLY TO ENTERGY AND NRC STAFF
OPPOSITIONS TO NEW AND AMENDED CONTENTIONS
REGARDING ENVIRONMENTAL IMPACTS OF
HIGH-DENSITY POOL STORAGE OF SPENT FUEL**

Pursuant to 10 C.F.R. § 2.309(h)(2), Riverkeeper, Inc. ("Riverkeeper") hereby replies to Entergy Nuclear Operations, Inc.'s ("Entergy's") and the U.S. Nuclear Regulatory ("NRC") Staff's responses to Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (September 5, 2008) ("Riverkeeper's New and Amended Contentions").¹

The NRC Staff contends that Riverkeeper's New and Amended Contentions constitute an impermissible challenge to the NRC's decision rejecting rulemaking petitions by the Commonwealth of Massachusetts and the State of California. NRC Staff Response at 10 and 15, citing *The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking*, 73 Fed. Reg.

¹ Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (September 20, 2008) ("Entergy's Answer"); NRC Staff's Answer to Riverkeeper, Inc.'s New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (September 30, 2008) ("NRC Staff's Answer").

46,204 (August 8, 2008) (“Rulemaking Petition Decision”). The Staff’s assertion is incorrect. Riverkeeper’s New and Amended Contentions do not challenge the Rulemaking Petition Decision *per se*. Instead, they challenge the NRC’s conclusion, announced for the first time in the Rulemaking Petition Decision, that it is not necessary to prepare an Environmental Impact Statement (“EIS”) for continued spent fuel storage at Indian Point (or any other individual nuclear power plant), based on site-specific mitigative measures imposed through an amendment to the Indian Point operating license. As stated in Riverkeeper’s New and Amended Contentions, the NRC’s reliance on those plant-specific mitigative measures to avoid preparation of an EIS is inconsistent with the requirements of NEPA.

Both Entergy and the NRC Staff attempt to minimize the significance of the NRC’s reliance on mitigation measures taken at Indian Point to reduce the environmental impacts of a spent fuel pool accident to an acceptable level. Entergy Answer at 17, NRC Staff Answer at 12. The Rulemaking Petition Decision speaks for itself, however. As made clear by the language quoted by the NRC at page 4-5 of its Answer, the NRC has made a major change to its analysis of the environmental impacts of spent fuel storage at nuclear power plants. While the NRC previously found that the impacts of spent fuel storage were insignificant without the need for any mitigation measures, it now relies on specific mitigation measures employed at each individual nuclear power plant for its conclusion that the environmental impacts of spent fuel storage are insignificant:

Given the physical robustness of SFPs [spent fuel pools], the physical security measures, and *SFP mitigation measures*, and *based upon NRC site evaluations of every SFP in the United States*, the NRC has determined that the risk of an SFP zirconium fire, whether caused by an accident or a terrorist attack, is very low.

73 Fed. Reg. at 46,208 (emphasis added).

Moreover, neither Entergy nor the NRC Staff effectively disputes Riverkeeper's legal assertion that the NRC's reliance on the Indian Point site-specific mitigative measures has the effect of removing the issue of spent fuel storage impacts at Indian Point from "Category 1" of Table B-1 of Appendix B to 10 C.F.R. Part 51. See Riverkeeper's New and Amended Contentions at 11-13, citing footnote 2 of Table B-1 (An issue may be classified as Category 1 only where "[m]itigation of adverse impacts associated with the issue has been considered in the analysis, and it has been determined that additional plant-specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation.") While the NRC Staff asserts that the mitigative measures are generic because they were imposed on all nuclear plants in the United States (NRC Staff Answer at 11), the Staff fatally undermines its own argument by conceding in a footnote that the mitigative measures are "by necessity, plant-specific." NRC Staff Answer at 11 n.14.

Nevertheless, as the Staff points out, the Rulemaking Petition Decision affirms the inclusion of spent fuel storage impacts in Category 1 of Table B-1 of Appendix B to 10 C.F.R. Part 51. NRC Staff Answer at 4-5, citing 73 Fed. Reg. at 46,208. Yet the Staff is unable to explain why, if the NRC relies on site-specific mitigation measures at Indian Point to reduce the impacts of spent fuel storage to an assertedly low level, it should not be precluded by footnote 2 of Table B-1 from continuing to classify those impacts as Category 1 impacts. Riverkeeper respectfully submits that only the Commission can address this conundrum, and therefore the Atomic Safety and Licensing Board ("ASLB") should refer the issue to the Commission for resolution.²

² The NRC Staff argues that Riverkeeper should have brought its concerns

The NRC Staff also criticizes Riverkeeper for not following through on a statement to the ASLB that if the Commonwealth of Massachusetts' rulemaking petition were denied, Riverkeeper would file a waiver petition. NRC Staff Answer at 5. At the time it made that statement, Riverkeeper reasonably presumed that the NRC would either grant or deny the rulemaking petition, based on the record presented to it by the Commonwealth of Massachusetts and the State of California. Riverkeeper did not anticipate, nor could it have anticipated, that the Commission would deny the rulemaking petition based on the imposition of plant-specific mitigation measures – including measures taken at Indian Point -- that were never previously identified by the Commission in the course of the proceeding for consideration of the rulemaking petitions. The remedy chosen by Riverkeeper addresses those unforeseen and unforeseeable circumstances.³

Finally, both Entergy and the Staff argue that the Rulemaking Petition Decision does not constitute a NEPA decision in this license renewal proceeding that is subject to 10 C.F.R. § 2.309(f)(2). Entergy Answer at 9, NRC Staff Answer at 13. Riverkeeper respectfully submits that the legal status of the Rulemaking Petition Decision is

straight to the Commission. NRC Staff's Response at 2. In making this argument, the Staff overlooks the fact that the Commission has delegated authority to the ASLB to preside over the Indian Point license renewal proceeding. *See* 72 Fed. Reg. 60,394 (October 24, 2007). Therefore, Riverkeeper was required to submit its New and Amended Contentions to the ASLB in the first instance, and to request referral of the issues to the Commission.

³ Similarly, Riverkeeper respectfully submits that when the ASLB announced that if the rulemaking petitions were 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" (*see* Entergy Answer at 4 and NRC Staff Answer at 10-11, quoting LBP-08-13, slip op. at 181), the ASLB could not have anticipated that the Commission would rely on previously-undisclosed plant-specific mitigation measures, including mitigation measures taken at Indian Point.

somewhat ambiguous. Because the Decision refers to plant-specific mitigation measures taken at each individual plant – including Indian Point – Riverkeeper reasonably concluded that the Rulemaking Petition Decision does constitute a NEPA decision in this case. If, in fact, the Rulemaking Petition Decision does not constitute any kind of NEPA decision that is subject to 10 C.F.R. § 2.309(f)(2), then Riverkeeper seeks a ruling from the ASLB to that effect, in order to protect Riverkeeper from being penalized for failing to raise its concerns at the earliest possible juncture. Riverkeeper respectfully submits that given the strict timeliness requirements of 10 C.F.R. § 2.309(f), Riverkeeper had no choice but to submit its New and Amended Contentions as soon as it became aware of a potentially applicable NEPA document containing information that could affect either current or future NEPA based contentions in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 7, 2008 copies of the foregoing Riverkeeper, Inc.'s Reply to Entergy and NRC Staff Oppositions to New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel were served on the following by e-mail and first-class mail:

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