

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

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

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

ASLBP No. 07-858-03-LR-BD01

December 18, 2008

MEMORANDUM AND ORDER

(Authorizing Interested Governmental Entities to Participate in this Proceeding)

(Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's
Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2)

(Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions
EC-4 and EC-5)

(Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper
Contention EC-3 and Clearwater Contention EC-1)

A. Introduction

This Board previously ruled on Requests for Hearing and Petitions to Intervene filed by seven Petitioners in response to a Notice of Opportunity for Hearing based on an application by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") to renew its operating license for the Indian Point Energy Center ("IPEC" or "Indian Point") for twenty years beyond the current expiration dates of September 9, 2013, for Unit 2 ("IP2") and December 12, 2015, for Unit 3 ("IP3").¹

¹ Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 67 NRC __, __ (slip op. at 227) (July 31, 2008) [hereinafter July 31 Order]. These Petitions were filed by (1) the State of New York ("NYS"), New York State Notice of Intention to

New York, Riverkeeper, and Clearwater have been admitted as parties to this proceeding pursuant to 10 C.F.R. § 2.309 and Connecticut, Westchester, Cortlandt, the Village of Buchanan, and the City of New York through the New York City Economic Development Corporation, are hereby authorized to participate in this proceeding as interested governmental bodies pursuant to 10 C.F.R § 2.315(c). Now pending before this Board are various matters which we resolve herein, and in two accompanying Orders which we also issue today.²

Participate and Petition to Intervene (Nov. 30, 2007) [hereinafter NYS Petition]; (2) the State of Connecticut ("Connecticut"), Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut, for the License Renewal Proceeding for Indian Point Nuclear Generating Unit Nos. 2 and 3, DPR-26 and DPR 64 (Nov. 30, 2007) [hereinafter Connecticut Petition]; (3) Riverkeeper, Inc. (Riverkeeper), Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant (Nov. 30, 2007) [hereinafter Riverkeeper Petition]; (4) Connecticut Residents Opposed to Relicensing Indian Point ("CRORIP"), Connecticut Residents Opposed to Relicensing of Indian Point and Its Designated Representative's Petition to Intervene and Request for Hearing (Dec. 11, 2007) [hereinafter CRORIP Petition]; (5) Hudson River Sloop Clearwater ("Clearwater"), Hudson River Sloop Clearwater Inc.'s Petition to Intervene and Request for Hearing (Dec. 10, 2007) [hereinafter Clearwater Petition]; (6) Westchester County ("Westchester"), Westchester County's Notice of Intention to Participate and Petition to Intervene (Dec. 7, 2007) [hereinafter Westchester Petition]; and (7) the Town of Cortlandt ("Cortlandt"), Town of Cortlandt Request for Hearing and Petition to Intervene (Nov. 29, 2008) [hereinafter Cortlandt Petition].

Additional Petitions to Intervene filed by the Village of Buchanan, the City of New York, the New York Affordable Reliable Electricity Alliance, and Friends United For Sustainable Energy were dismissed earlier in the proceeding. Licensing Board Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene (Dec. 5, 2007) (unpublished); Licensing Board Order (Denying the City of New York's Petition for Leave to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Denying the New York Affordable Reliable Electricity Alliance's Petition to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Granting the NRC Staff's Motion to Strike FUSE's Superceding Request for Hearing) (Feb. 1, 2008) (unpublished).

Finally, a Petition to Intervene submitted by Westchester Citizen's Awareness Network, RCCA, PHASE, the Sierra Club - Atlantic Chapter and Richard Brodsky (collectively "WestCAN") was stricken by the Board (Licensing Board Order Striking WestCAN's Request for Hearing) (July 31, 2008). An appeal of the Board's Order dismissing WestCAN from this proceeding was denied by the Commission. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-08-29,___ NRC _ (Dec. 9, 2008).

² Licensing Board Order (Scheduling Prehearing Conference and Ruling on New York State's Motion Requesting Consideration of Additional Matters) (Dec. 18, 2008); Licensing

B. Riverkeeper's Motion for Leave to File Motion for Clarification and Reconsideration of LBP-08-13 and Motion for Clarification and Reconsideration of LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2³

1. Summary

On August 11, 2008, Riverkeeper filed a Motion for Leave to File a Motion for Clarification and Reconsideration,⁴ together with a Motion for Clarification and Reconsideration.⁵ We hereby grant Riverkeeper's Motion for Leave to File and grant in part Riverkeeper's Reconsideration Motion. Upon reconsideration, we conclude that the Board's explanation for rejecting Riverkeeper Contention EC-2 was partially deficient and, accordingly, we also conclude that clarification of our July 31 Order is appropriate and necessary. However, as will be explained below, after reconsidering the Board's Ruling on the admissibility of Riverkeeper Contention EC-2, we continue to believe that this contention is inadmissible.

2. Discussion and Ruling

The Motion for Clarification and Reconsideration that is now before the Board implicates only one of the three parts of the event probability portion of Riverkeeper EC-2 and two of the three parts of the event consequence portion of that contention. We conclude that our ruling on the event probability portion of EC-2 requires clarification, but that our ruling of the event consequence portion of EC-2 does not.

In Contention EC-2, Riverkeeper alleged that Entergy's SAMA analysis was deficient

Board Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) (Dec. 18, 2008).

³ Pursuant to 10 C.F.R. § 2.323(e), a Motion for Reconsideration may not be filed except with leave of the Licensing Board "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 Riverkeeper, Inc.'s Motion for Leave to File Motion for Clarification and Reconsideration of LBP-08-13 (Aug. 11, 2008).

⁵ Riverkeeper, Inc.'s Motion for Clarification and Reconsideration of LBP-08-13 (Aug. 11, 2008) [hereinafter Riverkeeper Reconsideration Motion].

because it underestimated the probability of severe accidents involving, (1) reactor containment bypass via induced failure of steam generator tubes; (2) fires in spent-fuel pools; and (3) intentional attacks on Indian Point. As stated in our July 31 Order,⁶ issues relating to possible spent fuel pool fires and intentional attacks on the facility are outside the scope of this proceeding and, therefore, required no further analysis or discussion in our contention admissibility ruling.⁷ However, issues relating to severe accidents involving reactor containment bypass via induced failure of steam generator tubes are not inherently outside the scope of this proceeding and, upon review, we conclude that our explanation of the Board's reasoning in our July 31 Order for rejecting this portion of Riverkeeper EC-2 was deficient.

In its Petition, Riverkeeper argued that Entergy's SAMA analysis is inadequate because it "has not properly considered the contribution to severe accident costs made by severe accidents involving reactor containment bypass via induced failure of steam generator tubes."⁸ In support of this claim, Riverkeeper references, without any meaningful explanation or analysis,⁹ a 92-page

⁶ Indian Point, LBP-08-13, 67 NRC at _ (slip op. at 181-82).

⁷ While disagreeing with our decision, Riverkeeper concedes that the Board's ruling on the part of EC-2 relating to spent fuel fires and intentional attacks was clear. Accordingly, they did not challenge that portion of our ruling in their motion. Riverkeeper Reconsideration Motion at 2.

⁸ Riverkeeper Petition at 60.

⁹ A petitioner is obligated to "provide analysis and supporting evidence as to why particular . . . documents . . . provide a basis for the contention." Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003) (citations omitted).

report prepared for Riverkeeper by Dr. Gordon R. Thompson.¹⁰ This report, according to Riverkeeper, demonstrates that “Entergy has substantially underestimated the potential for containment bypass during a core-damage accident.”¹¹ The Board concludes that it does not.

In his report, Dr. Thompson describes a possible accident scenario.¹² He then suggests that: “any High/Dry sequence¹³ would involve a bypass of the containment and a substantial release of radioactive material into the atmosphere,”¹⁴ and that “such a release would be comparable to the ‘Early/High’ release category discussed in Entergy’s Environmental Report.”¹⁵ Dr. Thompson then posits that “it is reasonable to assume that High/Dry sequences account for 50 percent of CDF [core damage frequency] for the IP2 and IP3 reactors.”¹⁶ Dr. Thompson does not, however, explain why Entergy’s failure to adopt his assumptions renders its SAMA analysis inadequate.

¹⁰ Risk-Related Impacts from Continued Operation of the Indian Point Nuclear Power Plants, Gordon R. Thompson (Nov. 28, 2007) [hereinafter Thompson Report].

¹¹ Riverkeeper Petition at 60.

¹² Dr. Thompson postulates a core damage accident at the reactor developing as follows: (1) one or more steam generator tubes fail while the Reactor Coolant System (RCS) is at or near design pressure (2,485 psig) (according to Dr. Thompson this tube failure could either be the initiating event of the core-damage accident or a result of a core-damage accident); (2) contaminated fluid from the RCS enters the secondary side via the failed tube(s); (3) the fluid released through the rupture from the RCS flashes to steam; (4) a pulse of pressure occurs because the secondary system has a significantly lower design pressure (1,085 psig) than the RCS; (5) safety valves open due to the pressure increase on the secondary side; (6) one or more of the safety valves sticks open and remains open for the duration of the incident, thereby creating a pathway that connects the RCS to the external environment; and (7) the release of radioactive material through this bypass of containment would be substantial. Thompson Report at 15-17.

¹³ The High/Dry sequence described by Dr. Thompson is one in which the secondary side dries out due to the unavailability of feedwater, and the RCS pressure remains high while primary reactor coolant is lost and the reactor core is uncovered. Thompson Report at 15.

¹⁴ Id. at 17. Early/High describes an incident in which release occurs within 12 hours of the initiating incident and the magnitude of release is greater than 10% of the core inventory of the radionuclide cesium iodide (Csl). Indian Point Environmental Report, Attach. E at E.1-68.

¹⁵ Thompson Report at 17.

¹⁶ Id.

Dr. Thompson acknowledges that in NUREG-1150 the NRC adopted the position that the likelihood of the postulated event (containment bypass due to induced failure of steam generator tubes) is low, but notes that subsequent studies by the Idaho National Engineering Laboratory and by the NRC Staff “showed the complexity of this issue and the need for further research.”¹⁷ This information, however, does not raise, nor come anywhere close to raising, a genuine issue regarding the adequacy of Entergy’s SAMA analyses.¹⁸

Dr. Thompson represents that it “has [been] shown that Entergy has substantially underestimated . . . the present value cost risks for 20 years of extended operation of the IP2 and IP3 reactors [because it has not properly considered] the potential for containment bypass via induced failure of steam generator tubes.”¹⁹ That has not been shown to the satisfaction of this Board.

Recognizing that we are at the contention admissibility stage, and are not ruling on the merits,²⁰ we nevertheless cannot base the admission of this contention on Dr. Thompson’s jump from “the need for further research,”²¹ to a conclusion that the SAMA analysis is inadequate.

¹⁷ Id. at 16 (citing P.G. ELLISON, ET AL., STEAM GENERATOR TUBE RUPTURE INDUCED FROM OPERATIONAL TRANSIENTS, DESIGN BASES ACCIDENTS, AND SEVERE ACCIDENTS, Idaho National Engineering Laboratory, INEL-95/0641 (Aug. 1996); NUREG-1570, “Risk Assessment of Severe Accident-Induced Steam Generator Tube Rupture,” (Mar. 1998).

¹⁸ “[N]either mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention.” Southern Nuclear Operating Co., (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007) (citing Fansteel, CLI-03-13, 58 NRC at 203).

¹⁹ Thompson Report at 18.

²⁰ While deciding the issue of contention admissibility is not a hearing on the merits and a petitioner need not prove its contention at this stage, a petitioner must provide more than bare assertions and speculation. A petitioner should supply substantive affidavits and tangible information. Should a petitioner fail to provide enough support for its contentions, the Board will not make assumptions of fact that favor the petitioner or supply the missing information. See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 554-556 (2004).

²¹ Thompson Report at 16.

Riverkeeper also argues, in its Reconsideration Motion, that our decision on the admissibility of Contention EC-2 did not adequately address the accident consequences section of the contention²² in which Riverkeeper had claimed, inter alia, that Entergy's severe accident analysis was inadequate because (1) it used an inappropriate source term; (2) it did not adequately consider uncertainties resulting from meteorological variations; and (3) it inappropriately used a \$2,000 per person-rem dose conversion factor.²³ Riverkeeper charges that the Board's decision with regard to this issue is "quite unclear and internally inconsistent."²⁴ We disagree.

The Board rejected these aspects of Riverkeeper EC-2 in our July 31 Order on the ground that they failed to demonstrate a genuine dispute with the Applicant on a material issue of law or fact.²⁵ We also noted that Riverkeeper failed to make the minimal demonstration (as required by contention admissibility rules, 10 C.F.R. § 2.309(f)(1)) that Entergy's Environmental Report ("ER") analysis failed to meet a statutory or regulatory requirement.²⁶ We found that the mere presentation of an alternative analysis is insufficient to support a contention alleging that the original analysis failed to meet applicable requirements.²⁷ We then noted that the same argument applies equally to Riverkeeper's arguments related to the use of an allegedly inappropriate source term, the inadequate consideration of uncertainties resulting from meteorological variations, and the alleged use of an inappropriate dose conversion factor.²⁸ This explanation was adequate, and we see no reason to reconsider our ruling on this aspect of Contention EC-2. We also note that

²² Riverkeeper Reconsideration Motion at 4-5.

²³ Riverkeeper Petition at 55.

²⁴ Riverkeeper Reconsideration Motion at 4-5.

²⁵ Indian Point, LBP-08-13, 67 NRC at ___ (slip op. at 183).

²⁶ Id.

²⁷ Id.

²⁸ Id. at 183-84.

Riverkeeper did not provide any cost/benefit analysis in support of the admissibility of any aspect of the accident consequence portion of this contention.

C. Riverkeeper's Amended Contention EC-2 and New Contentions EC-4 and EC-5

1. Background

Pending before the Licensing Board for resolution is a motion submitted by Riverkeeper seeking the admission of new and amended contentions.²⁹ Amended Contention EC-2 seeks to re-litigate portions of Riverkeeper's original Contention EC-2 relating to the potential environmental impacts of spent fuel pool fires and terrorist attacks that were rejected by the Board in our July 31 Order as being outside the scope of this proceeding.³⁰ New Contention EC-4 claims that Entergy must address potential spent fuel storage impacts at Indian Point in a Supplemental GEIS,³¹ and New Contention EC-5 claims that a NRC Rulemaking Petition Decision "violates NEPA and NRC case law because it does not identify all of the documents on which the NRC relies for its finding."³² Both Entergy and the NRC Staff filed responses objecting to the admission of these contentions.³³

Upon review of the pleadings, we conclude that although these new and amended contentions were timely filed, they are, in essence, an attack on the Commission's Regulations and, therefore, outside the scope of this proceeding.

²⁹ Riverkeeper, Inc.'s New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (Sept. 5, 2008) [hereinafter Riverkeeper's New and Amended Contentions].

³⁰ Id. at 13.

³¹ Id. at 23.

³² Id. at 28.

³³ NRC Staff's Answer to Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel (Sept. 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 (Sept. 30, 2008).

In an instance, such as this one, in which a petitioner that has submitted a timely hearing petition later seeks admission of a new environmental contention before the NRC Staff's draft or final environmental impact statement (EIS) has been issued, the new contention must comply with the timeliness standards of 10 C.F.R. § 2.309(f)(2) which requires that, for a new contention to be admissible it must be shown that:

- (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.

Riverkeeper has satisfied those Section 2.309(f)(2) precepts, as their motion demonstrates that: (1) the information in the Commission's Denial of Rulemaking Petitions on August 8, 2008, was not previously publicly available; (2) the information in the Commission Decision was materially different from previously available information, and (3) the period between the date this newly available information became available – August 27, 2008 – and the time the new contention was filed – September 5, 2008 – was within thirty days of the availability of the new information upon which they are based.

Additionally, given the contention was filed after the date for submitting hearing petitions had passed, we look to see if it is consistent with the provisions of 10 C.F.R. § 2.309(c)(1) governing nontimely filed submissions. Riverkeeper has demonstrated that the new and amended contentions satisfy the balancing test of Section 2.309(c)(1).³⁴ In pertinent part, the

³⁴ Other Licensing Boards have held that new or amended contentions based on "breaking developments" need not meet the requirements for the submission of non-timely contentions set out in Section 2.309(c)(1). See Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 & n.95 (Oct. 31, 2007); AmerGen Energy Co. (Oyster Creek Nuclear Generation Station), LBP-06-11, 63 NRC 391, 395-96 & n.3 (2006); and Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005). While we agree with the reasoning expressed in these decisions, we need not rest on that legal conclusion here because Riverkeeper meets the Section 2.309(c)(1) standards.

provision sets forth eight factors to be weighed in determining the admission of a new contention subsequent to the time the filing party's hearing petition is granted:

(i) Good cause, if any, for the failure to file on time;

* * * * *

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i), (iv)-(viii).³⁵

In their motion to admit New Contentions EC-4 and EC-5 Riverkeeper did not discuss the applicable factors under section 2.309(c)(1).³⁶ However, looking to whether Riverkeeper satisfied the first and most important factor – good cause for their late-filing – we find that the showing they have made relative to the Section 2.309(f)(2) factors establishes the requisite good cause and places this item on the admissibility side of the timeliness balance. So too, given there are no other means or parties to protect their interests on this issue, these factors come to rest on the admissibility side of the scale. The factor regarding issue broadening and delay does provide some weight on the inadmissibility side of the balance. However, very little weight is given to this factor since this proceeding has just started and is not likely to go to hearing on admitted issues anytime soon as we await the issuance of the NRC Staff's final EIS and Safety Evaluation Report ("SER").

Finally, Riverkeeper's ability to assist in sound record development is a neutral factor given the essentially legal nature of these contentions. In the end, an assessment of all the

³⁵ The other three standards in section 2.309(c)(1) – nature of requestor's right to be a party, nature and extent of requestor's interest in the proceeding, and possible effect of the proceeding on the requestor's interest – are matters that go to the standing of a petitioner. Compare 10 C.F.R. § 2.309(c)(1)(ii)-(iv) with 10 C.F.R. § 2.309(d)(1)(ii)-(iv). In this instance, the Board already has determined that Riverkeeper has standing in this proceeding. Indian Point, LBP-08-13, 67 NRC at ___ (slip op. at 5).

³⁶ See Riverkeeper's New and Amended Contentions.

applicable Section 2.309(c)(1) factors based on Riverkeeper's showing in their submission establishes that the resulting balance supports a finding in favor of the timeliness of their new contention admission request.

In addition to showing that the Sections 2.309(c)(1) and (f)(2) factors support the admission of the contention as timely submitted, Riverkeeper must show that its new contention meets the substantive contention admissibility requirements of Section 2.309(f)(1)(i)-(vi).³⁷ We detailed the six requirements that must be met for a new contention (or any other contention) to be deemed admissible in our hearing petition determination,³⁸ and will not repeat that discussion here.

We find these contentions to be inadmissible in that they raise matters that are not within the scope of this proceeding and fail to present a genuine dispute regarding a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

2. Discussion and Ruling

Riverkeeper's Motion seeks to reintroduce portions of Riverkeeper's original Contention EC-2 that we had previously rejected and to admit New Contentions EC-4 and EC-5. These requests arise from the Commission's denial on August 1, 2008, of Rulemaking Petitions that were submitted by the Commonwealth of Massachusetts and the State of California which presented nearly identical requests for rulemaking concerning the potential environmental impacts of the storage of spent nuclear fuel in large water pools known as spent fuel pools ("SFP"s).³⁹

³⁷ See Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993).

³⁸ Indian Point, LBP-08-13, 67 NRC at __ (slip op. at 5-11).

³⁹ 73 Fed. Reg. 46,204 (2008). In these Petitions, Massachusetts and California asserted that an accident or malicious act could result in a spent fuel pool being drained of its cooling water, which could cause the spent fuel to heat up and ignite, thereby releasing a substantial amount of radioactive material into the environment. Based on that assertion, the Petitioners asked the NRC to revoke any NRC regulation that implies, finds, or determines that the potential environmental effects of high-density pool storage of spent nuclear fuel are not significant for purposes of NEPA analysis; issue a generic finding that the environmental impacts of high-density pool storage of spent fuel are significant; and require that any NRC

These Petitions were denied by the Commission which concluded that the NRC's "findings related to the storage of spent nuclear fuel in pools, as set forth in NUREG-1437 and in Table B-1, of Appendix B to Subpart A of 10 C.F.R. Part 51, remain valid."⁴⁰ As such, spent fuel storage impacts remain Category 1 issues, outside the scope of license renewal proceedings.

Accordingly, the regulations that were operative when Riverkeeper submitted its Petition and when the Board issued its July 31 Order remain operative. The standards by which the admissibility of Contention EC-2 must be evaluated remain unchanged and the material facts to which those standards are to be applied remain unchanged. Thus our decision that Contention EC-2 is inadmissible remains unchanged. Additionally, New Contention 4 deals with spent fuel storage impacts that the Commission has stated is a Category 1 issue, outside the scope of our proceeding. New Contention 5 essentially asks the Board to review the rulemaking decision of the Commission. The Board does not have the authority or the inclination to do so and that issue is outside the scope of this license renewal proceeding.

In summary, Riverkeeper's request to amend Contention EC-2 and admit New Contentions EC-4 and EC-5 are, in essence, an attack on the Commission's rulemaking, without merit in this proceeding, and are denied. Since this Board has no authority to review the propriety of Commission rulemaking,⁴¹ Amended Contention EC-2 and New Contentions EC-4 and EC-5 are outside the scope of this proceeding and are therefore inadmissible.

D. Entergy's Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3 and Clearwater EC-1

licensing decision that approves high-density pool storage of spent fuel be accompanied by a plant specific EIS that addresses the environmental impacts of this fuel storage practice and includes a reasonable array of alternatives to avoid or mitigate those impacts. See id. at 46,204-05.

⁴⁰ Id. at 46,212.

⁴¹ See 10 C.F.R. § 2.335(a). See e.g. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383 (2007); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 133 (2007).

1. Background

Riverkeeper Contention EC-3 and Clearwater Contention EC-1 both claimed that Entergy had failed to satisfy NEPA requirements and NRC Regulations, 10 C.F.R. Part 51, because its ER did not adequately assess new and significant information regarding the environmental impacts of radionuclide leaks from the spent fuel pools into the groundwater and Hudson River ecosystem.⁴² Specifically, Riverkeeper and Clearwater challenged Entergy's conclusion that the impacts of radionuclide leaks from the spent fuel pools were small and therefore not significant for purposes of NEPA.⁴³

Riverkeeper's assertions were based, inter alia, on a description of the factors presented in the Council on Environmental Quality ("CEQ") Regulations implementing NEPA.⁴⁴ According to Riverkeeper, because Entergy failed to consider these criteria, Entergy's ER was inadequate in several respects including: (1) the claim that the IP2 spent fuel pool is no longer leaking; (2) the conclusion that only low concentrations of radionuclides have been detected in the groundwater; and (3) the current and future impacts of the groundwater contamination on the Hudson River fish and shellfish.⁴⁵

In addition, while not designating them as expert witnesses, Clearwater included statements attributed to NYSDEC personnel which discussed potential groundwater flow paths for leaks, the types and concentrations of radionuclides detected in the groundwater, and the fish sampling performed to date.⁴⁶ Clearwater claimed that groundwater leaks have far exceeded anything that the NRC reviewed in 1996 during the development of the GEIS, and that the extent of leaks, number of radionuclides released, uniqueness of the site, and pathway to the Hudson

⁴² Riverkeeper Petition at 74; Clearwater Petition at 18.

⁴³ Riverkeeper Petition at 76; Clearwater Petition at 19-20.

⁴⁴ Riverkeeper Petition at 77-79.

⁴⁵ Id. at 80-86.

⁴⁶ Clearwater Petition at 22-23.

River mean that the impacts are significant and reviewable under NEPA in this proceeding.⁴⁷

Clearwater stated its belief that the leaks “are symptomatic of an aging facility whose components are subject to and showing increasing signs of aging.”⁴⁸ Further, in support of its claim that Entergy must address the impacts of the contamination on the Hudson River, Clearwater noted that four municipalities currently take drinking water from the Hudson River and that there is a plan in development to build a large water intake facility to serve Rockland County.⁴⁹ As a result of these deficiencies, Riverkeeper and Clearwater both contended that Entergy’s assessment of new and significant information was not accurate and complete enough to enable the Commission to determine whether the impacts of the proposed action would be of such magnitude that license renewal would be unreasonable.⁵⁰

In its Answer, Entergy opposed the admission of Riverkeeper EC-3 and Clearwater EC-1 because, in its view, they (1) raised issues outside the scope of license renewal by suggesting stricter requirements than imposed by the regulations, (2) failed to provide adequate factual or expert support, and (3) failed to establish a genuine dispute on a material fact or law.⁵¹ Entergy claimed that its ER appropriately characterized the impacts due to spent fuel pool leaks as new but not significant, even though the characterization of the groundwater impacts was ongoing when the ER was submitted.⁵² Entergy further represented that the hydrogeological investigation

⁴⁷ Id. at 23.

⁴⁸ Hudson River Sloop Clearwater Inc’s Reply to Entergy and the [NRC] Responses to Clearwater Petition to Intervene and Request for Hearing (Feb. 8, 2008) at 4 [hereinafter Clearwater Reply].

⁴⁹ Id. at 4-5.

⁵⁰ Riverkeeper Petition at 79; Clearwater Petition at 18.

⁵¹ Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene (Jan. 22, 2008) at 140 [hereinafter Entergy Riverkeeper Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc’s Petition to Intervene and Request for Hearing (Jan. 22, 2008) at 34.

⁵² Entergy Riverkeeper Answer at 140-44.

of the Indian Point site had been completed after the preparation of the ER,⁵³ which confirmed the conclusions in the ER, and included an assessment of the dose exposure to fish and invertebrates in the Hudson River.⁵⁴

The Board admitted Riverkeeper EC-3 and Clearwater EC-1 as they related to the environmental impacts from the spent fuel pool leaks. Entergy conceded that the evidence of leaks from the spent fuel pools constituted new information, but asserted it was not significant because the radiological concentrations were small and the resulting dose exposures to the public are minimal.⁵⁵ However, based on factual statements presented by Riverkeeper and Clearwater,⁵⁶ the Board concluded that there was a genuine issue regarding the significance of the new information, including the data and conclusions presented in the recently submitted hydrogeologic report relating to the radiological leaks from the spent fuel pools that was within the scope of the LRA proceedings.⁵⁷ Accordingly, the Board admitted Riverkeeper EC-3 and Clearwater EC-1 in order to allow those parties to litigate whether Entergy's ER contains sufficient information to aid the Commission in preparation of its EIS.

2. Discussion and Ruling

As noted above,⁵⁸ a motion for reconsideration may not be filed except with leave of the Licensing Board, "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."⁵⁹ When the Commission revised its hearing procedures in 2004, it

⁵³ Id. at 145 n.618 and accompanying text.

⁵⁴ Id. at 147.

⁵⁵ Id. at 144.

⁵⁶ Riverkeeper Petition at 74-75; Clearwater Petition at 18-23.

⁵⁷ Indian Point, LBP-08-13, 67 NRC at _ (slip op. at 186-87, 191).

⁵⁸ See supra note 2.

⁵⁹ 10 C.F.R. § 2.323(e).

strengthened the standard for reconsideration motions, stating:

This standard, which is a higher standard than the existing case law, 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. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.⁶⁰

In its Motion for Reconsideration Entergy essentially repeated the arguments it presented prior to the Board's July 31 Order. Accordingly, based on 10 C.F.R. § 2.323(e) we deny Entergy's Motion. The Consolidated Contention as submitted by Riverkeeper and Clearwater on August 21, 2008, is admitted.⁶¹

⁶⁰ Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

⁶¹ Consolidated Contention of Petitioners Riverkeeper, Inc. (EC-3) and Hudson River Sloop Clearwater, Inc. (EC-1)-Spent Fuel Pool Leaks (August 21, 2008) at 2.

Pursuant to 10 C.F.R. § 2.311 an appeal of this Order may be filed with the Commission within ten (10) days after issuance, that is, on or before December 26, 2008.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁶²

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
December 18, 2008

⁶² Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (Authorizing Interested Governmental Entities to Participate in this Proceeding); (Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2); (Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions EC-4 and EC-5); (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Administrative Judge
Lawrence G. McDade, Chair

Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Jessica A. Bielecki, Esq.
Marcia J. Simon, Esq.
Karl Farrar, Esq.
Brian Newell, Paralegal

Administrative Judge
Richard E. Wardwell

Administrative Judge
Kaye D. Lathrop
190 Cedar Lane E.
Ridgway, CO 81432

Zachary S. Kahn, Law Clerk

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

LB MEMORANDUM AND ORDER (Authorizing Interested Governmental Entities to Participate in this Proceeding); (Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2); (Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions EC-4 and EC-5); (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1)

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601

Andrew M. Cuomo, Attorney General
John J. Sipos, Assistant Attorney General
Mylan L. Denerstein
Deputy Assistant Attorney General
Division of Social Justice
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
State Street
Albany, New York 12224

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
Mauri T. Lemoncelli, Esq.
Counsel for Entergy Nuclear Operation, Inc.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Joan Leary Matthews, Esq.
Senior Attorney for Special Projects
New York State Department
of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

Michael J. Delaney
Vice President, Energy Department
New York City Economic Development
Corporation (NYCEDC)
110 William Street
New York, NY 10038

Robert D. Snook, Esq.
Office of The Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Arthur J. Kremer, Chairman
New York Affordable Reliable Electricity
Alliance (AREA)
347 Fifth Avenue, Suite 508
New York, NY 10016

Stephen C. Filler, Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway, Suite 222
Tarrytown, NY 10591

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

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Daniel E O'Neill, Mayor
James Siermarco, M.S.
Liaison to Indian Point
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298

Manna Jo Greene, Environmental Director
Hudson River Sloop Clearwater
112 Little Markey Street
Poughkeepsie, NY 12601

Thomas F. Wood, Esq.
Town of Cortlandt
Daniel Riesel, Esq.
Jessica Steinberg, J.D.
Counsel for the Town of Cortlandt
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022

Nancy Burton, Esq.
Connecticut Residents Opposed
to Relicensing of Indian Point (CRORIP)
147 Cross Highway
Redding Ridge, CT 06876

Elise N. Zoli, Esq.
Goodwin Proctor, LLP
Exchange Place
53 State Street
Boston, MA 02109

Justin D. Pruyne
Assistant County Attorney, Litigation Bureau
Of Counsel to Charlene M. Indelicato, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601

FUSE USA
John LeKay
Heather Ellsworth Burns-DeMelo
Remy Chevalier
Bill Thomas
Belinda J. Jaques
351 Dyckman Street
Peekskill, New York 10566

Westchester Citizens' Awareness Network
(WestCan), Citizens Awareness Network, (CAN),
etc.

Susan H. Shapiro, Esq.
21 Pearlman Drive
Spring Valley, NY 10977

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

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Victor M. Tafur, Senior Attorney
Philip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591

Richard L. Brodsky
Assemblyman
5 West Main Street
Suite 205
Elmsford, NY 10523

Diane Curran, Esq.
Counsel for Riverkeeper, Inc.
Harmon, Curran, Spielberg,
& Eisenberg, LLP
1726 M. Street NW, Suite 600
Washington, DC 20036

Sarah L. Wagner, Esq.
Legislative Office Building, Room 422
Albany, NY 12248

[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of December, 2008