

January 8 2008 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

RAS E-200

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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

**ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF ATOMIC SAFETY
AND LICENSING BOARD DECISION ADMITTING CONSOLIDATED
RIVERKEEPER EC-3/CLEARWATER EC-1**

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
William C. Dennis, Esq.

COUNSEL FOR
ENTERGY NUCLEAR OPERATIONS, INC.

January 7, 2009

TEMPLATE = SECY-037

DS 03

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	- 1 -
II. LEGAL STANDARDS	- 4 -
III. STATEMENT OF THE CASE	- 6 -
A. The IPEC License Renewal Application Assessment of Groundwater Contamination	- 6 -
B. Subsequent Investigations, Inspections, and Related Activities.....	- 8 -
C. Procedural History.....	- 10 -
IV. ARGUMENT.....	- 13 -
A. Commission Review of the Board's Decision on the Consolidated Contention is Warranted.....	- 13 -
B. The Board Decision Admitting the Consolidated Contention Contains Three Material Errors of Law	- 16 -
1. Entergy's Conclusions in the ER Regarding the Significance of the Groundwater Contamination Currently Meet All Applicable NEPA and NRC Regulations	- 17 -
2. There is No Genuine Issue Regarding the Significance of the New Information Relating to the Spent Fuel Pool Radiological Leaks	- 19 -
3. The Board Erred in Finding That There is Any Remaining Question as to Whether the Maximum Groundwater Impact Has Been Determined for the Site	- 23 -
V. CONCLUSION	- 25 -

TABLE OF AUTHORITIES

CASES	Page
<i>Advanced Med. Sys, Inc.</i> (One Factory Row Geneva, OH 44041), ALAB-929, 31 NRC 271 (1990).....	<i>Passim</i>
<i>AmerGen Energy Co., LLC</i> (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006).....	5
<i>Commonwealth Edison Co.</i> (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973).....	5, 13
<i>Conn. Yankee Atomic Power Co.</i> (Haddam Neck Plant), CLI-01-25, 54 NRC 368 (2001).....	15
<i>Curators of the Univ. of Mo.</i> , CLI-95-8, 41 NRC 386 (1995).....	17
<i>Duke Cogema Stone & Webster</i> (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).....	5
<i>Duke Energy Corp.</i> (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1 (2002).....	6
<i>Duke Energy Corp.</i> (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03- 17, 58 NRC 419 (2003).....	20
<i>Entergy Nuclear Operations, Inc.</i> (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC __, slip op. (July 31, 2008).....	<i>Passim</i>
<i>Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1 (2007).....	<i>Passim</i>
<i>Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371 (2007).....	6
<i>Fla. Power & Light Co.</i> (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509 (1990)	25
<i>Fla. Power & Light Co.</i> (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3 (2001).....	6, 18
<i>Hydro Res., Inc.</i> (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3 (1999).....	7
<i>La. Energy Servs., L.P.</i> (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)	17
<i>La. Energy Servs., L.P.</i> (Nat'l Enrichment Facility), LBP-06-8, 63 NRC 241 (2006)	17, 18
<i>La. Energy Servs., L.P.</i> (Nat'l Enrichment Facility), CLI-05-20, 62 NRC 523 (2005)	17

TABLE OF AUTHORITIES

Page

La. Energy Servs., L.P. (Nat'l Enrichment Facility), CLI-05-28, 62 NRC 721 (2005) 16

Pa'ina Hawaii, LLC (Materials License Application), CLI-08-16, 68 NRC __, slip op. (Aug. 13, 2008)..... 5

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307 (1998)..... 4, 5, 13

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000)..... 5

Sierra Club v. Froehlke, 816 F.2d 205 (5th Cir. 1987) 7

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29 (1989) 18

Wis. v. Weinberger, 745 F.2d 412 (7th Cir. 1984) 7

REGULATIONS

10 C.F.R. § 2.306 (2007) 1

10 C.F.R. § 2.309(f)(1) 2

10 C.F.R. § 2.309(f)(1)(iii) 20, 21

10 C.F.R. § 2.309(f)(1)(iv) 21

10 C.F.R. § 2.309(f)(1)(v) 22

10 C.F.R. § 2.309(f)(1)(vi) 25

10 C.F.R. § 2.316 12

10 C.F.R. § 2.341(b)(1) 1

10 C.F.R. § 2.341(b)(6) 1

10 C.F.R. § 2.341(f)(2) *Passim*

10 C.F.R. Part 50, Appendix I 8

10 C.F.R. § 50.36a(b) 8

10 C.F.R. Part 51, Subpart A, Appendix B 8, 23

10 C.F.R. § 51.45 17

TABLE OF AUTHORITIES

	Page
10 C.F.R. § 51.53(c)	21
10 C.F.R. § 51.53(c)(3)(iv).....	7, 18
40 C.F.R. § 141.1.....	22
40 C.F.R. § 141.2.....	22

FEDERAL REGISTER

Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991)	25
---	----

MISCELLANEOUS

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998)	5
--	---

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of)	Docket Nos. 50-247-LR and
ENERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	
)	January 7, 2009

**ENERGY'S PETITION FOR INTERLOCUTORY REVIEW OF ATOMIC SAFETY
AND LICENSING BOARD DECISION ADMITTING
CONSOLIDATED RIVERKEEPER EC-3/CLEARWATER EC-1**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.341(f)(2), Entergy Nuclear Operations, Inc. ("Entergy") requests that the Commission review the Atomic Safety and Licensing Board ("Board") decision admitting consolidated Riverkeeper, Inc. ("Riverkeeper") Contention EC-3 and Hudson River Sloop Clearwater Inc. ("Clearwater") Contention EC-1 ("Consolidated Contention") in the license renewal proceeding for Indian Point Nuclear Generating Units 2 and 3, also referred to as Indian Point Energy Center ("IPEC").¹ The Consolidated Contention asserts that Entergy has not adequately assessed the significance of new information concerning the potential environmental impacts of radionuclide leaks from the Units 1, 2, and 3 spent fuel pools ("SFPs") located at the IPEC site.

¹ On December 18, 2008, the Board ruled on Entergy's previously-pending motion for reconsideration and thus, the Board's decision admitting the Consolidated Contention is now ripe for interlocutory review. See 10 C.F.R. § 2.341(b)(6). Accordingly, this Petition is timely filed pursuant to 10 C.F.R. § 2.341(b)(1) and (f)(2), which allow a party to file a petition for review with the Commission within 15 days after service of a decision, and 10 C.F.R. § 2.306 (2007), which provides that "[w]henver a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by first class mail, five (5) days are added to the prescribed period."

Commission review is warranted because litigating the Consolidated Contention will cause immediate and serious irreparable harm in this proceeding that cannot be alleviated through a petition for review of the Board's final decision at the end of the proceeding and affects the basic structure of this proceeding in a pervasive and unusual manner, thereby meeting the requirements of 10 C.F.R. § 2.341(f)(2)(i) and (ii) for Commission review. In particular, admission of the Consolidated Contention, contrary to 10 C.F.R. § 2.309(f)(1) and 10 C.F.R. Part 54, renders undue delay in this proceeding resulting from the need to litigate the merits of an issue that is clearly outside the scope of this proceeding (*i.e.*, historical leakage from the now empty and drained IPEC Unit 1 SFP) against a regulatory standard that does not apply. Moreover, as the Board has deferred ruling on the Intervenors' motion to impose Subpart G procedures,² there is still the potential for depositions, interrogatories, and other burdensome discovery obligations relating to the Consolidated Contention that extend beyond the scope of Part 54. Even if Subpart G procedures are not imposed, or are imposed at some later date, the Board has triggered the mandatory disclosure process which, as discussed further in Section IV.A below, requires that Entergy research and identify literally thousands of documents relevant to the expansive Consolidated Contention.

In the alternative, should the Commission find that the issues discussed below do not meet the standards for interlocutory review, Entergy requests that the Commission nonetheless review the Consolidated Contention as a matter of discretion under its inherent supervisory power over adjudications given the substantial and novel questions of law and policy directly involved here that could adversely affect numerous pending and future license renewal proceedings. Specifically, the Board's decision on the Consolidated Contention raises policy

² See Memorandum and Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) at 13 (Dec. 18, 2008) (unpublished order).

issues of wide implication relevant to the requirements of 10 C.F.R. Part 51, the scope of 10 C.F.R. Part 54, and the applicability and meaning of NRC's regulations pertaining to environmental and exposure monitoring. Similar to the Commission's recent decision in the *Vermont Yankee* license renewal proceeding, the Board's decision in this case "raise[s] significant issues of potentially broad impact and may well recur in . . . likely license renewal proceedings."³ In fact, the issues raised in this Petition are of even wider application than those raised in the *Vermont Yankee* case because groundwater contamination due to leaks from power reactors has been observed at several plants over the last ten years, most of which have not yet been issued renewed operating licenses, and several of which have the potential to reach the contention admissibility stage before the conclusion of this proceeding.⁴

As fully discussed in Section IV below, the relief requested herein should be granted because the Board's decision admitting the Consolidated Contention contains three fundamental and material legal errors. First, the Board erred in finding that it is "uncertain" whether Entergy's conclusions contained in the Environmental Report ("ER") regarding the significance of the groundwater contamination are sufficient for purposes of satisfying the National Environmental Policy Act ("NEPA") and NRC regulations.⁵ Entergy's ER satisfied both regulatory and statutory requirements. Second, the Board erred in finding that there is a genuine dispute regarding the significance of the new information relating to the SFP radiological leaks⁶

³ *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 5 (2007).

⁴ Compare NRC Status of License Renewal Applications and Industry Activities, available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html>, with Liquid Radioactive Release Lessons Learned Task Force Final Report at 3-10 (Sept. 1, 2006), available at <http://www.nrc.gov/reactors/operating/ops-experience/tritium/lr-release-lessons-learned.pdf> ("Task Force Report").

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC ___, slip op. at 188 (July 31, 2008).

⁶ *Id.*

because IPEC groundwater radionuclide concentrations unquestionably comply with applicable NRC radiological dose limits and, contrary to the naked assertions of Intervenors, EPA drinking water standards *do not apply* to IPEC groundwater. Further, the purely historical contribution of leaks from the IPEC Unit 1 (“IP1”) SFP to the groundwater contamination is *not* within the legal scope of this IP2 and IP3 license renewal proceeding. Third, the Board erred in finding that there is a question as to whether the maximum groundwater impact and the maximum dose has been determined for the site⁷ because Entergy indisputably complied with all applicable NRC regulations in determining dose to a maximally exposed individual, that dose is only a fraction of applicable NRC limits, and Intervenors provided *no legal, factual, or expert support* challenging Entergy’s compliance.

Accordingly, Entergy respectfully requests that the Commission accept this Petition for Review and reverse the Board’s decision to admit the Consolidated Contention.

II. LEGAL STANDARDS

The Commission’s authority to review interlocutory board decisions is based on two independent sources: regulation and the Commission’s own inherent supervisory authority. Under the regulatory regime, the Commission “will [grant review] if a particular ruling (1) ‘threatens the party adversely affected by it with immediate and serious irreparable impact,’ or (2) ‘[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.’”⁸ A board decision that fundamentally alters the nature of the proceeding by “mandating duplicative

⁷ *Id.* at 192.

⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998) (granting interlocutory review because decision to establish a second, separate board to consider security issues affected the basic structure of the proceeding). See 10 C.F.R. § 2.341(f)(2).

or unnecessary litigating steps,”⁹ or threatens to impose “truly exceptional delay or expense” may therefore justify interlocutory review.¹⁰

But the Commission need not be bound by these regulatory standards before accepting interlocutory review of a board decision. That is because the Commission may conclude that “interlocutory review is appropriate as an exercise of [its] inherent and ongoing supervisory authority over adjudicatory proceedings.”¹¹ This sort of review is particularly warranted when, as here, a board ruling “present[s] novel questions that could benefit from early resolution,”¹² and would have a “potentially broad impact.”¹³ Further, in a case involving a board referral, the Atomic Safety and Licensing Appeal Board emphasized that its discretionary authority to review interlocutory decisions is appropriate when, as here, the board ruling “involves solely a question of law and has not been previously addressed on appeal.”¹⁴

On the merits, the Commission will reverse a board’s ruling when there is an “error of law or abuse of discretion.”¹⁵ For example, the Commission has reversed contention admissibility decisions when a board has admitted a contention that would inappropriately expand NRC’s NEPA responsibilities.¹⁶ The Commission has also reversed licensing board

⁹ *Private Fuel Storage*, CLI-98-7, 47 NRC at 310.

¹⁰ *Commonwealth Edison Co.* (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258, 259 (1973).

¹¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) (accepting licensing board referral of interlocutory summary disposition ruling because there was a novel issue that would benefit from early Commission review).

¹² *Id.* See also Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998).

¹³ *Vermont Yankee*, CLI-07-1, 65 NRC at 5.

¹⁴ *Advanced Med. Sys, Inc.* (One Factory Row Geneva, OH 44041), ALAB-929, 31 N.R.C. 271, 279 (1990).

¹⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111,121 (2006) (citations omitted) (affirming denial of petition to intervene where the petitioner failed to point to an error of law or abuse of discretion).

¹⁶ See, e.g., *Pa’ina Hawaii, LLC* (Materials License Application), CLI-08-16, 68 NRC ___, slip op. (Aug. 13, 2008) (reversing decision admitting NEPA contention that challenged reliance on Food and Drug Administration findings related to health impacts associated with consuming irradiated foods); *Duke Cogema Stone & Webster*

decisions admitting NEPA contentions premised on an improper interpretation of applicable statutes and regulations.¹⁷ Finally, when the Commission undertakes review of a licensing board contention admissibility decision, it may narrow the scope of an admitted contention if it finds that certain bases are unsupported, lack specificity, or are devoid of legal merit.¹⁸

III. STATEMENT OF THE CASE

A. **The IPEC License Renewal Application Assessment of Groundwater Contamination**

On April 23, 2007, Entergy submitted an application to the NRC to renew the IPEC Units 2 and 3 operating licenses for an additional 20 years (“Application” or “LRA”).¹⁹ As required by 10 C.F.R. Part 51, Entergy’s Application included an ER that analyzed the potential environmental impacts associated with license renewal for all relevant Category 2 issues.²⁰ Section 5.1 of the ER provided Entergy’s assessment of whether groundwater radionuclide contamination identified at the IPEC site²¹ is potentially “new and significant” as it relates to

(Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002) (reversing decision admitting NEPA-terrorism contention).

¹⁷ See, e.g., *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385-89 (2007) (reversing decision admitting contention that would involve a collateral attack on 10 C.F.R. Part 51 regulations and would violate the requirements of the Clean Water Act).

¹⁸ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 12-13 (2002) (dismissing one basis of admitted severe accident mitigation alternatives contention because the basis was only supported by a conclusory statement).

¹⁹ The extension of the IP1 license is not a part of the LRA, but several IP1 systems and components that interface with and in some cases support the operation of IP2 and IP3 are included within the scope of license renewal. However, the fuel handling and chemical system building, which houses the IP1 SFP, are not within the scope of license renewal. LRA at 2.2-24 to 2.2-26, Table 2.2-4.

²⁰ Category 2 issues are those issues for which NUREG-1437, Generic Environmental Impact Statement (“GEIS”) for License Renewal of Nuclear Plants, concluded that environmental impact severity levels “might differ significantly from one plant to another,” or for which additional plant-specific mitigation measures should be considered. *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11 (2001).

²¹ Entergy confirmed the presence of tritium in site groundwater in October 2005.

license renewal.²² In order to be significant, “new information must present ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’”²³ “It is not enough that the information may be worthy of further inquiry or may be considered important research.”²⁴ Thus, consistent with NEPA case law, NRC guidance defines significant information as information “that leads to an impact finding *different from* that codified in 10 CFR Part 51.”²⁵

As a result of the then-ongoing hydrogeologic characterization of the site, Entergy identified in the ER that tritium, Strontium-90 (“Sr-90”), Cesium-137 (“Cs-137”), and Nickel-63 “have been detected in low concentrations in some onsite groundwater monitoring well samples” and that the IP1 SFP was “a confirmed source of at least some of the tritium, as well as strontium, cesium and nickel in groundwater.”²⁶ With regard to IP2, based on preliminary site monitoring data available at that time, the ER states that contamination related to the IP2 SFP was “the result of historical pool leakage in the 1990s which has since been repaired.”²⁷

A key factor in Entergy’s assessment of the significance of the identified groundwater contamination, as further explained in Sections 5.1 and 2.3 of the ER, is that the *IPEC site does not utilize groundwater* for any of its cooling water, service water, potable water needs, or for any other beneficial uses and, therefore, *EPA drinking water standards do not apply*. There also

²² An ER must include “any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.” 10 C.F.R. § 51.53(c)(3)(iv).

²³ *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Sierra Club v. Froehle*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wis. v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984).

²⁴ *Weinberger*, 745 F.2d at 420.

²⁵ 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.

²⁶ ER at 5-4, 5-5.

²⁷ *Id.* at 5-6.

is *no known drinking water pathway* associated with groundwater or the Hudson River in the region surrounding the site. Accordingly, the ER specifically states that “EPA drinking water limits are not applicable” to site area groundwater.²⁸

Further, in full compliance with 10 C.F.R. Part 50, Appendix I, Entergy estimated that total body dose to a maximally exposed individual as a result of the identified groundwater contamination represents less than 1% of applicable NRC limits.²⁹ Therefore, *no NRC dose limits have been exceeded.*³⁰ Thus, the ER concluded that while the identification of site groundwater contamination is potentially “new,” the impacts of those radionuclides would be SMALL and therefore not “significant.”³¹ Importantly, characterization of the impacts as SMALL—and therefore not significant—complies fully with 10 C.F.R. Part 51, Subpart A, Appendix B, which states that “[f]or the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission’s regulations are considered small.”

B. Subsequent Investigations, Inspections, and Related Activities

Full characterization of the impact to groundwater was ongoing when the LRA was submitted to the NRC in April 2007. Entergy subsequently completed a comprehensive, two-year site hydrogeologic investigation of the Indian Point site and submitted the detailed Investigation Report to the NRC, NY State Department of Environmental Conservation

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 5-5. Appendix I is applicable to operating reactors pursuant to 10 C.F.R. § 50.36a(b).

³⁰ ER at 5-6.

³¹ *Id.*

("NYSDEC"), and NY Public Service Commission and also included it in its Answers to Intervenor's petitions to intervene.³²

Although the Investigation Report was prepared as part of Entergy's responsibilities to ensure compliance with NRC requirements *during the current license term*, rather than to investigate for new and significant information, it nonetheless included three conclusions that are directly relevant to the Consolidated Contention and, therefore, was submitted in support of the IP2 and IP3 LRA.

- First, the IP1 SFP is the *sole source* of the strontium contamination detected in groundwater and this source of contamination would be permanently eliminated when the IP1 SFP is emptied and drained in late-2008.³³
- Second, all identified IP2 SFP leaks have been repaired.³⁴
- Third, no release was identified from IP3.³⁵

Further, the Investigation Report confirmed that EPA drinking water standards *do not apply* because there is no current or reasonably anticipated use of groundwater at IPEC and, therefore, the only exposure pathway of significance for groundwater is through consumption of fish and invertebrates in the Hudson River—and the calculated doses from this pathway are less than 1% of the federal limits.³⁶

³² Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene (Jan. 22, 2008) ("Entergy Riverkeeper Answer"), Exhibit M, Hydrogeological Site Investigation Report (Jan 11, 2008) ("Investigation Report").

³³ Investigation Report at 102-03, 135. As discussed below, the IP1 SFP was subsequently emptied and drained in November 2008. See Applicant's Board Notification Concerning Completion of Indian Point Unit 1 Spent Fuel Pool Remediation Activities (Nov. 17, 2008) ("Entergy Notification").

³⁴ Investigation Report at 92. While additional active leaks cannot be completely ruled out, if they exist, the data indicate that they are very small and of little impact to the groundwater. *Id.*

³⁵ *Id.* at 11, 89. The absence of Unit 3 sources is attributed to the design upgrades incorporated in the more recently constructed IP3-SFP.

³⁶ *Id.* Recently, NYSDEC and the NY State Department of Health ("NYSDOH") confirmed the main conclusions in Entergy's Investigation Report. See NYSDEC, Community Fact Sheet, available at <http://www.dec.ny.gov/permits/44014.html> ("NYSDEC Fact Sheet").

The NRC Staff performed an extensive inspection and evaluation of Entergy's actions in response to the groundwater contamination and issued an Inspection Report confirming:

- There are no drinking water sources that can be impacted by the contaminated groundwater conditions;³⁷
- the only exposure pathway to humans that could be impacted by the contaminated groundwater is the consumption of aquatic foods from the Hudson River, and an analysis of the most recent fish samples shows no radioactivity distinguishable from background,³⁸ and
- the additional dose impact to the public was "negligible" and Entergy continues to comply with all applicable NRC radiation protection regulations.³⁹

On November 5, 2008, Entergy notified the NRC that it had completed the draining and de-sludging of the IP1 SFP, which *permanently* ceased the introduction of radiological contaminants to underlying groundwater from the IP1 SFP.⁴⁰

C. Procedural History

On November 30, 2007, Riverkeeper submitted Contention EC-3, alleging that "the ER does not adequately assess new and significant information regarding the environmental impacts of the radioactive water leaks from the Indian Point 1 and Indian Point 2 spent fuel pools on the groundwater and the Hudson River ecosystem."⁴¹ Clearwater submitted Contention EC-1 on December 10, 2007, alleging that the ER "fails to adequately assess 'new and significant' information concerning environmental impacts of radioactive substances that are leaking from spent fuels pools and contaminating the ground water, the Hudson River and the local

³⁷ Letter from Marsha K. Gamberoni, NRC, to Joseph Pollock, Entergy, EA-08-088, at vii (May 13, 2008), available at ADAMS Accession No. ML081340425 ("Inspection Report").

³⁸ *Id.*

³⁹ *Id.* at 1-2.

⁴⁰ Entergy Notification.

⁴¹ Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant at 74-86 (Nov. 30, 2007) ("Riverkeeper Petition").

ecosystem.”⁴² Both Intervenors alleged that Entergy’s claim that only low concentrations of certain radionuclides have been detected in onsite groundwater samples is incorrect because sampling results are “*above the EPA drinking water limits*” as a result of IP1 SFP leakage. . . .⁴³

Entergy opposed admission of Riverkeeper Contention EC-3 and Clearwater Contention EC-1 on three principal grounds.⁴⁴ First, and of fundamental significance, NRC standards—not EPA drinking water standards—apply to IPEC site groundwater contamination, and Intervenors provided *no* legal or expert support for their assertion that the EPA standards somehow apply.⁴⁵ Second, the IP1 SFP leak, the only identified source of Sr-90 contamination to site groundwater, is *not* within the legal scope of the IP2 and IP3 license renewal proceeding.⁴⁶ Third, Intervenors *do not dispute* that doses due to groundwater contamination meet and are only a small fraction of federal limits.⁴⁷ The NRC Staff opposed admission of Riverkeeper Contention EC-3 and Clearwater Contention EC-1 for substantially the same reasons as Entergy.⁴⁸

On July 31, 2008, the Board issued a decision admitting Riverkeeper Contention EC-3 and Clearwater Contention EC-1 and consolidating the contentions pursuant to 10 C.F.R.

⁴² Hudson River Sloop Clearwater, Inc.’s Petition to Intervene and Request for Hearing at 18-24 (Dec. 10, 2007) (“Clearwater Petition”).

⁴³ Consolidated Contention of Petitioners Riverkeeper, Inc. (EC-3) and Hudson River Sloop Clearwater, Inc. (EC-1) Spent Fuel Pool Leaks at 10-13 (Aug. 21, 2008) (“Consolidated Contention”) (emphasis added).

⁴⁴ Entergy Riverkeeper Answer at 139-51; Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc.’s Petition to Intervene and Request for Hearing, at 32-49 (Jan. 22, 2008) (“Entergy Clearwater Answer”).

⁴⁵ Entergy Clearwater Answer at 43-44.

⁴⁶ Entergy Clearwater Answer at 42-43. As noted in Section II.B above, the IP1 SFP was emptied and drained in November 2008.

⁴⁷ *Id.* at 44-49.

⁴⁸ NRC Staff’s Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County, at 90-92, 112-15 (Jan. 22, 2008) (“NRC Staff Answer”).

§ 2.316.⁴⁹ The Board, however, did not directly address Entergy's three principal arguments and, as a result, Entergy sought reconsideration or clarification of the Board's decision.⁵⁰ The NRC Staff supported Entergy's motion for reconsideration while the Intervenors opposed the motion.⁵¹ While the motion for reconsideration was pending, Entergy notified the Board that draining and de-sludging of the IPI SFP had been completed.⁵² Significantly, in response to this notification, Intervenors' again argued "*that IPI is generally within the scope of the instant licensing proceeding since, if not for Entergy's renewal application, IPI would be fully decommissioned and the site remediated.*"⁵³

The Board denied Entergy's motion for reconsideration or clarification, once again without addressing the merits of Entergy's arguments, stating only that Entergy "essentially repeated the arguments it presented" prior to the Board's earlier decision, and ordered that Consolidated Contention, as submitted by the Intervenors on August 21, 2008, admitted.⁵⁴

⁴⁹ LBP-08-13, slip op. at 187-88, 191-92, 228.

⁵⁰ Applicant's Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 (Aug. 11, 2008) ("Entergy Motion for Reconsideration"). As an alternative to reconsideration, Entergy sought clarification regarding the Board's reference to the "maximum groundwater impact" and whether the history of leakage from the IPI SFP is within the scope of the Consolidated Contention. *Id.* at 10. The Board did not respond to Entergy's alternate request for clarification.

⁵¹ NRC Staff's Response in Support of Entergy's Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/ Clearwater EC-1 (Aug. 21, 2008); Riverkeeper, Inc. Response to Applicant's Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 (Aug. 21, 2008).

⁵² Entergy Notification.

⁵³ Riverkeeper, Inc. Response to Applicant's Board Notification of Indian Point Unit 1 Spent Fuel Pool Remediation Activities at 2-3 (Nov. 25, 2008) ("Riverkeeper Notification Response") (emphasis added).

⁵⁴ Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) at 16 (Dec. 18, 2008) (unpublished).

IV. ARGUMENT

A. **Commission Review of the Board's Decision on the Consolidated Contention is Warranted**

Interlocutory review is appropriate under both the Commission's regulatory and inherent authority. It is appropriate under the regulations because the Board's decision threatens Entergy with "immediate and serious irreparable harm." That is because the Board's decision admitting the Consolidated Contention—if left unreviewed—would impose "truly exceptional delay or expense."⁵⁵ To be clear: this is not a complaint about run-of-the-mill litigation burdens. It instead involves a Board ruling that ratifies a sprawling and freewheeling inquiry into historical (and now-irrelevant) leakage from the IP1 SFP. Not only will this inquiry radically and impermissibly expand the scope of this proceeding, but its boundless construction may require Entergy and NRC Staff to waste scarce resources—economic and otherwise—combing through literally thousands of data and sampling points addressed in the Investigation Report. Because the Consolidated Contention is improper as a matter of law—a point we demonstrate below—the Commission should grant interlocutory review now to avoid this tremendous burden.

But the reasons for supporting interlocutory review are stronger still. That is because the Consolidated Contention—by importing novel issues that are whole latitudes removed from the narrow focus of this license renewal proceeding—will fundamentally "affect[] the basic structure of the proceeding, by arguably mandating duplicative or unnecessary litigating steps."⁵⁶ For example, because the Board has deferred ruling on the Intervenors' motion to impose Subpart G procedures,⁵⁷ its decision below threatens to saddle this proceeding (and the parties and NRC

⁵⁵ See *Zion Station*, ALAB-116, 6 AEC at 259.

⁵⁶ *Private Fuel Storage*, CLI-98-7, 47 NRC at 310.

⁵⁷ See Memorandum and Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) at 13 (Dec. 18, 2008) (unpublished order).

Staff) with burdensome depositions, interrogatories, and countless other discovery obligations involving the Consolidated Contention. And even if Subpart G procedures are not imposed—or are imposed at some later date—the Board’s action will necessarily trigger the mandatory disclosure process which, at substantial cost, will require Entergy to research, identify, and disclose literally thousands of documents relevant to the Consolidated Contention.⁵⁸

Should the Commission determine that Entergy has failed to meet the standards set forth in 10 C.F.R. § 2.341(f)(2), it should nonetheless accept review of the Consolidated Contention because there is an entirely independent basis for review: the Commission’s inherent supervisory power over NRC adjudications. This expansive authority notably does not depend on any showing of irreparable harm or proof that the ruling will affect the basic structure of the proceeding. To the contrary, in *Advanced Medical*, the Appeal Board indicated discretionary interlocutory review of a board referral is appropriate when the ruling below “involves a question of law, has generic implications, and has not been previously addressed on appeal.”⁵⁹

That is precisely the case here. First, the overarching question presented in this petition is purely one of law: How should historical groundwater contamination, including contamination from a unit not within the scope of the license renewal application, be treated by a licensing board in a license renewal proceeding? Second, that question is not unique to Entergy but instead an important question with potentially broad applicability to numerous proceedings. As noted in the NRC’s Liquid Radioactive Release Lessons Learned Task Force Report, groundwater contamination due to leaks from power reactors has been observed at several plants

⁵⁸ As evidence of the potential “immediate and serious irreparable impact” posed by the Consolidated Contention, Entergy estimates that this contention alone requires mandatory disclosure of at least three times as many documents as any other admitted contention.

⁵⁹ *Advanced Med. Sys.*, ALAB-929, 31 NRC at 279 (discussing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982)).

over the last ten years, several of which have not yet been issued renewed operating licenses.⁶⁰ And finally, this important question has not been previously addressed on appeal.

The Commission has granted interlocutory review under its inherent supervisory authority in a number of closely analogous situations. For example, in the *Vermont Yankee* license renewal proceeding,⁶¹ the Commission reaffirmed that it “may also accept discretionary interlocutory review at the request of a party in the exercise of its inherent supervisory authority,” even if the standards set forth in 10 C.F.R. § 2.341(f)(2) are not satisfied.⁶² There, the Commission emphasized that the issues raised in the disputed contention involved the proper interpretation of the NRC’s regulations implementing NEPA. Because those issues presented pure questions of law that might have a “potentially broad impact” in other license renewal proceedings, the Commission granted review.⁶³

Likewise, in *Advanced Medical*, the Appeal Board accepted interlocutory review of a board referral to address an issue of broad application: whether legal fees could be awarded to certain prevailing parties in certain enforcement actions under the Equal Access to Justice Act.⁶⁴ The Appeal Board granted review because that board decision, like the one at issue here, “involve[d] solely a question of law and has not been previously addressed on appeal.”⁶⁵ Moreover, the Appeal Board recognized that “there are a number of similar enforcement adjudications now pending in which the same attorneys’ fees issue *could potentially arise*.”⁶⁶

⁶⁰ Liquid Radioactive Release Lessons Learned Task Force Final Report at 3-10 (Sept. 1, 2006), available at <http://www.nrc.gov/reactors/operating/ops-experience/tritium/lr-release-lessons-learned.pdf>.

⁶¹ See *Vermont Yankee*, CLI-07-1, 65 NRC at 4-5.

⁶² *Conn. Yankee Atomic Power Co. (Haddam Neck Plant)*, CLI-01-25, 54 NRC 368, 374 (2001).

⁶³ *Vermont Yankee*, CLI-07-1, 65 NRC at 5.

⁶⁴ *Advanced Med. Sys.*, ALAB-929, 31 NRC at 277-78.

⁶⁵ *Id.* at 279.

⁶⁶ *Id.* (emphasis added).

So too here. The legal question in this appeal “could potentially arise” in numerous future proceedings. As we demonstrated before, NRC itself has identified a number of plants with groundwater contamination, several of which have not yet been issued renewed operating licenses. It should not matter that there may not be any currently pending cases raising this issue; in *Advanced Medical* it was enough that those issues “could potentially arise.”

Moreover, as in *Vermont Yankee*, this case “also involves the proper interpretation of NRC’s regulations implementing NEPA that could broadly impact other license renewal proceedings. If anything, the issues raised in this Petition cast an even wider shadow than those raised in the *Vermont Yankee* case because several of the plants with groundwater contamination due to leaks from power reactors have the potential to reach the contention admissibility stage before the conclusion of this proceeding.⁶⁷ The Commission should therefore grant review now to provide much-needed guidance concerning a point of law that “raise[s] significant issues of potentially broad impact and may well recur in [other] likely license renewal proceedings.”⁶⁸

B. The Board Decision Admitting the Consolidated Contention Contains Three Material Errors of Law

In its decision, the Board cites three principal bases for admitting the Consolidated Contention.

- Based on factual statements presented by Riverkeeper, it is “uncertain” whether Entergy’s conclusions contained in ER regarding the significance of the groundwater contamination are sufficient for purposes of satisfying NEPA and NRC regulations or sufficient to aid the Commission in preparation of the EIS.⁶⁹

⁶⁷ Compare NRC Status of License Renewal Applications and Industry Activities, available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html>, with Liquid Radioactive Release Lessons Learned Task Force Final Report at 3-10 (Sept. 1, 2006), available at <http://www.nrc.gov/reactors/operating/ops-experience/tritium/lr-release-lessons-learned.pdf> (“Task Force Report”).

⁶⁸ *Vermont Yankee*, CLI-07-1, 65 NRC at 5.

⁶⁹ LBP-08-13, slip op. at 188.

- There is a genuine issue regarding the significance of the new information, including the recently submitted hydrogeologic report relating to the SFP radiological leaks.⁷⁰
- There is still a question as to whether the maximum groundwater impact (and, in turn, the maximum dose) has been determined for the site.⁷¹

As described more fully below, each of these findings rest on material errors of law.

1. Entergy's Conclusions in the ER Regarding the Significance of the Groundwater Contamination Currently Meet All Applicable NEPA and NRC Regulations

The Commission has explicitly stated that “[t]he purpose of an environmental report is to inform the Staff’s preparation of an Environmental Assessment (“EA”) and, where appropriate, an [EIS].”⁷² Specifically, 10 C.F.R. § 51.45, which outlines the general requirements for an environmental report, states that “[t]he environmental report *should* contain sufficient data to aid the Commission in its development of an independent analysis.”⁷³ As explained below, Entergy has met this burden.

NEPA imposes procedural restraints on agencies, requiring them to take a “hard look” at the environmental impacts of a proposed action and reasonable alternatives to that action.⁷⁴ This “hard look” is subject to a “rule of reason.”⁷⁵ This means that “an agency’s environmental review, rather than addressing every impact that could possibly result, need only account for those that have some likelihood of occurring or are reasonably foreseeable.”⁷⁶ Consideration of

⁷⁰ *Id.*

⁷¹ *Id.* at 192.

⁷² *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 396 (1995) (emphasis added).

⁷³ 10 C.F.R. § 51.45(c) (emphasis added).

⁷⁴ *See La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

⁷⁵ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (citation omitted).

⁷⁶ *La. Energy Servs. L.P.* (Nat’l Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973)).

“remote and speculative” or “inconsequentially small” impacts is not required.⁷⁷ As the Commission has explained, “NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.”⁷⁸

The nature and extent of both the NRC Staff’s and an applicant’s obligations under NEPA and Part 51 is narrowly defined in license renewal proceedings. For those issues listed in Appendix B to Part 51 as Category 1 issues, the Commission resolved by rulemaking the issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding. An applicant must include, however, “any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.”⁷⁹

The ultimate determination as to the “significance” of that information, however, rests with the NRC Staff. In short, “NEPA and the corresponding agency regulations require a *license [renewal] applicant to describe and the Staff to consider* the potential environmental effects of the proposed agency action (*i.e.*, issuance of a license).”⁸⁰

The Board, however, admitted Riverkeeper Contention EC-3, in part, on the ground that unidentified “factual statements presented by Riverkeeper” suggest that “it is uncertain whether Entergy’s conclusions contained in the ER regarding the significance of the groundwater contamination are sufficient for purposes of satisfying *NEPA* and NRC regulations.”⁸¹ The Board further stated that Riverkeeper had raised a genuine issue within the scope of the proceeding “as to whether Entergy’s ER contains sufficient information to aid the Commission

⁷⁷ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989) (citing *Limerick Ecology Action*, 869 F.2d at 739).

⁷⁸ *La. Energy Servs. L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

⁷⁹ 10 C.F.R. § 51.53(c)(3)(iv); see also *Turkey Point*, CLI-01-17, 54 NRC at 11; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 290 (2002).

⁸⁰ *NEF*, LBP-06-8, 63 NRC at 258 (emphasis added).

⁸¹ LBP-08-13, slip op. at 188.

in preparation of its EIS.”⁸² Entergy respectfully submits that, in ruling on this basis, the Board erred as a matter of law.

As demonstrated above, established law holds that the purpose of an applicant’s environmental report, as required by *NRC regulations*, is to “inform” or “aid” the Staff’s preparation of an EIS. The extent of Entergy’s legal obligations under Part 51, therefore, is to provide the types of “environmental information” described in the regulations, including any potentially “new and significant information” concerning the environmental impacts of license renewal *of which it is aware*. Entergy has clearly done so here. As fully described above, Section 5.1 of the ER contains a full characterization of the impact to groundwater that was ongoing when the LRA was submitted to the NRC in April 2007. Moreover, Entergy submitted to the NRC Staff and other cognizant agencies (and to Intervenors and the Board as part of its Answers to the petitions to intervene) the aforementioned Investigation Report detailing its comprehensive site hydrogeologic investigation. Clearly, the ER contains “sufficient information” to aid the Staff in discharging its NEPA obligations and Entergy has more than satisfied its legal obligations under NEPA and NRC regulations.

2. There is No Genuine Issue Regarding the Significance of the New Information Relating to the Spent Fuel Pool Radiological Leaks

a. *The Board Erred in Deferring Intervenors’ Burden to Demonstrate That IPI Issues Are Within the Scope of This Proceeding Until the Evidentiary Hearing, Rather Than Before Admitting the Contention*

By admitting the Consolidated Contention, the Board expanded the scope of this license renewal proceeding beyond the legal bounds of the Commission’s carefully crafted license renewal regulations, which of itself, is a material error of law with both case-specific and generic

⁸² *Id.*

implications, as explained above.⁸³ In this regard, 10 C.F.R. § 2.309(f)(1)(iii) requires that a petitioner “demonstrate” that the issue raised in its contention is “within the scope of the proceeding.” Intervenors have clearly not met their burden here.

As proffered by the Intervenors and as admitted by the Board, the majority of claims in the Consolidated Contention relate to the significance of potential impacts caused by Sr-90 *which indisputably originates only from the IP1 SFP*.⁸⁴ However, the IP1 SFP—or any historical leakage from that pool—is not within the legal scope of this proceeding or in any way related to the renewed operation of IP2 or IP3; contrary to 10 C.F.R. § 2.309(f)(1)(iii). The Intervenors only basis for asserting that the IP1 SFP is within the scope of this proceeding is that, but for license renewal, Intervenors believe (or hope) that IP1 would be decommissioned and the site remediated.⁸⁵ It is well-established that the contention admissibility rules “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’”⁸⁶ The Consolidated Contention presents *nothing more* than Intervenors’ “generalized suspicions” that historical IP1 SFP leakage may somehow be relevant to the future operations of IP2 and IP3. In fact, the Board decision appears to acknowledge that the Intervenors have failed to meet their burden because the Board indicated that the question of whether these issues are within the scope of the proceeding must “be resolved through an evidentiary hearing.”⁸⁷

By deferring the burden of the Intervenors to demonstrate that IP1 issues are within the scope of this proceeding until *after* the evidentiary hearing, rather than *before* admitting the

⁸³ See Entergy Clearwater Answer at 42-43; Entergy Motion for Reconsideration at 9-10.

⁸⁴ See, e.g., Consolidated Contention at 10-14.

⁸⁵ Riverkeeper Notification Response at 2-3.

⁸⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 337-39 (1999)).

⁸⁷ LBP-08-13, slip op. at 192.

contention, as required by Section 2.309(f)(1)(iii), the Board not only improperly allowed the Intervenor to circumvent the Commission's contention admissibility rules and broaden the scope of the licensee renewal regulations beyond the requirements in 10 C.F.R. § 51.53(c), but also has imposed the enormous burden on Entergy of litigating the Consolidated Contention. This result has clearly placed NRC's rules of contention admissibility on their head – *i.e.*, requiring an evidentiary hearing to determine if issues are within the scope of the proceeding. It is clear under the contention admissibility rules that Intervenor has the burden to articulate an admissible contention before a contention is admitted, and the Board may not admit a contention unless the Intervenor has met this burden.⁸⁸ On this basis alone, the Board's decision to admit this contention should be overturned.

b. *The Board Erred in Finding that EPA Drinking Water Standards Are Material to the Significance of the New Information Regarding On-Site Groundwater Contamination*

The standards defining the environmental findings that the NRC must make to support the renewed operating licenses in this proceeding are set forth in NRC's regulations, including 10 C.F.R. §§ 51.53(c), 51.71(d), and 51.95(c). EPA drinking water standards are wholly inapplicable. Therefore, the *material* inquiry is whether groundwater radionuclide concentrations comply with applicable NRC radiological dose limits—and they unquestionably do.⁸⁹ By admitting the Consolidated Contention, however, the Board failed to require that the Intervenor demonstrate that EPA drinking water standards are in any way material to the findings the NRC must make in this proceeding. This outcome is contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv), which requires that a petitioner “[d]emonstrate that the issue raised

⁸⁸ See 10 C.F.R. § 2.309(f)(1)(iii).

⁸⁹ See also NUREG-1437, Vol. 1, at 4-84 (“For purposes of assessing radiological impacts, the Commission has concluded that impacts are of *small significance* if doses and releases *do not exceed permissible levels in the Commission's regulations.*”) (emphasis added).

in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.”

Furthermore, Intervenor failed to provide any factual, legal, or expert support, contrary to 10 C.F.R. § 2.309(f)(1)(v), that EPA drinking water standards are in any way material to Entergy’s assessment of the significance of “new” information. Further, Intervenor failed to explain how the EPA groundwater rule to which they refer, which, by its own terms, applies solely to public water suppliers,⁹⁰ could apply to IPEC. Consequently, the mere fact that IPEC groundwater concentrations in some wells may exceed that federal standard is not only *not* a measure of significance under NRC law, but is not a measure of significance under EPA rules, unless IPEC is a public water supplier—which it is clearly not.⁹¹ Instead, Riverkeeper merely asserts that EPA drinking water standards somehow apply because they are “a recognized, and highly conservative, benchmark for comparison purposes.”⁹² Intervenor’s “benchmarking” goals or aspirations are legally insufficient to support admission of the Consolidated Contention.

Critically, the Board did not acknowledge, much less address, Entergy and NRC Staff arguments establishing the immateriality of EPA drinking water standards to the “significance” evaluation presented in Section 5.0 of the IPEC ER.⁹³ Accordingly, the Board’s decision constitutes a material error of law.

c. *The History of Leaks from the IP1 SFP Are Beyond the Scope of This Proceeding*

The Board’s reliance upon the Intervenor’s IP1-related claims in admitting the Consolidated Contention constitutes a material error of law. It is undisputed that (1) the IP1 SFP

⁹⁰ See, e.g., 40 C.F.R. §§ 141.1, 141.2 (indicating that federal drinking regulations apply to public water systems).

⁹¹ See Entergy Riverkeeper Answer at 142 (citing ER at 5-6).

⁹² Riverkeeper Reply at 70.

⁹³ See, e.g., Entergy Riverkeeper Answer at 146-47, 149; NRC Staff Answer at 113-14.

is not within the legal scope of IP2 and IP3 license renewal;⁹⁴ (2) leakage from the IP1 SFP is the sole source of Sr-90 in site groundwater; and (3) the IP1 SFP is now empty and drained and *cannot* contribute to any further groundwater contamination. There is no legal nexus between extended operation of IP2 and IP3—the *sole* focus of this proceeding—and now purely historical groundwater contamination caused by the IP1 SFP.

Likewise, there is no legal support for admitting this contention based on Intervenor's assertion that, but for license renewal of IP2 and IP3, "IP1 would be fully decommissioned and the site remediated."⁹⁵ Issues regarding the decommissioning and post-decommissioning remediation of IP1, a site for which relicensing is not being sought, are beyond the scope of this proceeding—and the authority of the Board.⁹⁶

3. The Board Erred in Finding That There is Any Remaining Question as to Whether the Maximum Groundwater Impact Has Been Determined for the Site

Riverkeeper and Clearwater—and now the Board—ignore or overlook the fact that Entergy, in full compliance with applicable NRC regulations, has evaluated potential offsite exposure pathways due to groundwater contamination. Based on those analyses, Entergy has concluded—and NRC and NYSDEC have recently confirmed—that the only exposure pathway of significance for the identified groundwater contamination is through consumption of fish and invertebrates in the Hudson River, and determined that the calculated doses from this pathway

⁹⁴ See LRA at 2.2-25, Table 2.2-4 (listing the IP1 fuel handling and chemical system building, which contains the IP1 SFP, as not within the scope of license renewal). Intervenor's have not challenged these designations.

⁹⁵ Despite the Intervenor's unsupported assertions to the contrary, decommissioning and remediation would not immediately begin if not for the license renewal proceeding because Entergy has incorporated and NRC and NY State have approved monitored natural attenuation as part of its long-term groundwater monitoring program. See Letter from Mel Gray, NRC, to Joseph E. Pollock, Entergy, (Nov. 6, 2008), Enclosure, Inspection Report No. 05000247/2008004, at 27, available at ML083110566; NYSDEC Fact Sheet.

⁹⁶ See 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (listing all issues related to decommissioning as generic Category 1 issues with "SMALL" impacts).

are less than 1/100 of federal limits.⁹⁷ This calculation was performed using the methodology documented in Entergy's Offsite Dose Calculation Manual, and the results of these evaluations are reported in Entergy's Annual Radiological Effluent Release Report.⁹⁸ Intervenors do not challenge these dose results—a critical fact that the Board did not address.

The Board nevertheless stated—without further explanation or citation to the record or applicable law—that “there is still the question as to whether the maximum groundwater impact (and, in turn, the maximum dose) has been determined for the site.”⁹⁹ Entergy is unaware of any legal or regulatory provision requiring it to determine the “maximum groundwater impact,” beyond what it already has done in accordance with NRC regulations.

Because Entergy has demonstrated that doses are well below federal limits, there is no legal basis for Intervenors' assertion that Entergy has not complied with its obligations, under NEPA, to assess the significance of new information concerning groundwater contamination. Entergy's approach is consistent with that contemplated in the GEIS¹⁰⁰ and is not a valid basis for the Board to accept this contention. More fundamentally, aside from arguing generally that NEPA requires a “broader assessment,” Intervenors do not (nor does the Board) identify *any* legal requirement that Entergy perform additional sampling and analysis for purposes of license renewal.¹⁰¹

⁹⁷ See Entergy Riverkeeper Answer at 147.

⁹⁸ Entergy submitted the most recent annual report to the NRC on April 23, 2008. See Letter from Robert Walpole, Entergy, to NRC Document Control Desk, “2007 Annual Radioactive Effluent Release Report,” NL-08-068 (Apr. 23, 2008), available at ADAMS Accession No. ML081280744.

⁹⁹ LBP-08-13, slip op. at 192.

¹⁰⁰ See NUREG-1437, Vol. 1, at 4-84 (“For the purposes of assessing radiological impacts, the Commission has concluded that impacts are of small significance if doses and releases do not exceed permissible levels in the Commission's regulations. This definition of “small” applies to occupational doses as well as to doses to individual members of the public.”).

¹⁰¹ While further sampling may take place, such sampling would be part of the on-going regulatory process for the operation of IP2 and IP3, which is outside the scope of this proceeding.

10 C.F.R. § 2.309(f)(1)(vi) requires that, “if the petitioner believes that the application fails to contain information on a relevant matter as required by law,” the petitioner must identify “each failure and the supporting reasons for the petitioner’s belief.” An allegation such as this that some aspect of a license application is “inadequate” or “unacceptable” does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.¹⁰² Intervenors have not done so here.¹⁰³

Accordingly, the Board materially erred by admitting the Consolidated Contention.

V. CONCLUSION

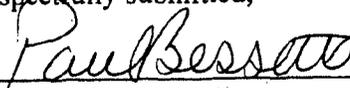
For the reasons set forth above, the Commission should review the Board’s ruling on the Consolidated Contention and reverse the decision admitting that contention.

¹⁰² See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990).

¹⁰³ Further, ongoing IPEC groundwater and environmental monitoring will be reviewed and evaluated by NRC’s ongoing regulatory oversight, and is therefore beyond the scope of this proceeding. See Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991) (noting that license renewal reviews are not intended to “duplicate the Commission’s ongoing review of operating reactors.”).

William C. Dennis, Esq.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3202
Fax: (914) 272-3205
E-mail: wdennis@entergy.com

Respectfully submitted,



Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5738
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: martin.o'neill@morganlewis.com

COUNSEL FOR
ENTERGY NUCLEAR OPERATIONS, INC.

Dated in Washington, D.C.
this 7th day of January 2009

DB1/62460704

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	
	January 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Entergy's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Consolidated Riverkeeper EC-3/Clearwater EC-1," dated January 7, 2009, were served this 7th day of January, 2009 upon the persons listed below, by first class mail and, except where indicated by an asterisk, by e-mail as shown below.

Hon. Dale E. Klein*
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Hon. Peter B. Lyons*
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Hon. Gregory B. Jaczko*
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Hon. Kristine L. Svinicki*
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
(E-mail: ocaamail@nrc.gov)

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm1@nrc.gov)

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: rew@nrc.gov)

Administrative Judge
Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
190 Cedar Lane E.
Ridgway, CO 81432
(E-mail: kdl2@nrc.gov)

Office of the Secretary **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hearingdocket@nrc.gov)

Zachary S. Kahn
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: zxk1@nrc.gov)

Manna Jo Greene
Environmental Director
Hudson River Sloop Clearwater, Inc.
112 Little Market Street
Poughkeepsie, NY 12601
(E-mail: mannajo@clearwater.org)

Stephen C. Filler, Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway, Suite 222
Tarrytown, NY 10591
(E-mail: sfiller@nylawline.com)

Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Jessica A. Bielecki, Esq.
Marcia J. Simon, Esq.
Office of the General Counsel
Mail Stop: O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: set@nrc.gov)
(E-mail: bnm1@nrc.gov)
(E-mail: david.roth@nrc.gov)
(E-mail: jessica.bielecki@nrc.gov)
(E-mail: marcia.simon@nrc.gov)

Justin D. Pruyne, Esq.
Assistant County Attorney, Litigation Bureau
of Counsel to Charlene M. Indelicato, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(E-mail: jdp3@westchestergov.com)

Diane Curran, Esq.
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

Thomas F. Wood, Esq.
Daniel Riesel, Esq.
Ms. Jessica Steinberg, J.D.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
(E-mail: driesel@sprlaw.com)
(E-mail: jsteinberg@sprlaw.com)

Phillip Musegaas, Esq.
Victor M. Tafur, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
(E-mail: phillip@riverkeeper.org)
(E-mail: vtafur@riverkeeper.org)
(E-mail: dbrancato@riverkeeper.org)

Robert D. Snook, Esq.
Office of the Attorney General
State of Connecticut
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(E-mail: Robert.Snook@po.state.ct.us)

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
John J. Sipos, Esq.
Charlie Donaldson Esq.
Assistants Attorney General
The Capitol
Albany, NY 12224-0341
(E-mail: john.sipos@oag.state.ny.us)

Joan Leary Matthews, Esq.
Senior Attorney for Special Projects
Office of the General Counsel
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12207
(E-mail: jlmatthe@gw.dec.state.ny.us)

Janice A. Dean
Office of the Attorney General
of the State of New York
Assistant Attorney General
120 Broadway, 26th Floor
New York, New York 10271
(E-mail: Janice.Dean@oag.state.ny.us)

John Louis Parker, Esq.
Regional Attorney
Office of General Counsel, Region 3
NYS Dept. of Environmental Conservation
21 S. Putt Corners Road
New Paltz, New York 12561-1620
(E-mail: jlparker@gw.dec.state.ny.us)

Michael J. Delaney, V.P. – Energy
New York City Economic Development Corp.
110 William Street
New York, NY 10038
(E-mail: mdelaney@nycedc.com)

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

Mylan L. Denerstein, Esq.
Executive Deputy Attorney General,
Social Justice
Office of the Attorney General
of the State of New York
120 Broadway, 25th Floor
New York, New York 10271
(E-mail: Mylan.Denerstein@oag.state.ny.us)

** Original and 2 copies

A handwritten signature in cursive script, reading "Paul Bessette", written over a horizontal line.

Paul M. Bessette, Esq.
Counsel for Entergy Nuclear Operations, Inc.

DB1/62447909