

January 27, 2009 (8:30a.m.)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)	Docket Nos.	50-247-LR and
)		50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)		
)		
(Indian Point Nuclear Generating Units 2 and 3))		
)	January 26, 2009	

**ENTERGY'S REPLY TO RIVERKEEPER'S ANSWER OPPOSING INTERLOCUTORY
APPEAL OF LICENSING BOARD ADMISSION OF CONSOLIDATED CONTENTION**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Entergy hereby replies to Riverkeeper's and Clearwater's ("Intervenors") January 20, 2009, Answer to Entergy's January 7, 2009, request for interlocutory review ("Entergy's Appeal") of the Licensing Board's decision to admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1.¹ As previously explained, the Board's decision raises legal and policy issues of wide implication relevant to the requirements of 10 C.F.R. Part 51, the applicability and meaning of NRC regulations pertaining to environmental and exposure monitoring, as well as the scope of 10 C.F.R. Part 54. Thus, notwithstanding Intervenors' arguments to the contrary, immediate Commission review is necessary and warranted.²

ARGUMENT

I. The Board Committed Clear Legal Error by Not Applying the Correct Legal Standard

The Board did not apply the correct legal standard in ruling that the Consolidated Contention raises a material dispute concerning the "significance" of "new" information related to radiological

¹ See Riverkeeper, Inc.'s Answer in Opposition to Entergy's Petition for Interlocutory Review of the Atomic Safety and Licensing Board Decision Admitting Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 (Jan. 20, 2009) ("Intervenors' Answer").

² At the outset, Entergy also notes its disagreement with Intervenors' position that Entergy has overstated its litigation burden. Mandatory disclosures (which must be regularly supplemented) are just one part of the litigation process. If litigation on this issue proceeds further, then it might not conclude for several years. Entergy also notes that it intends to seek a temporary Board stay of supplemental disclosures on the Consolidated Contention pending the Commission's ruling.

contamination in site ground water. Neither NEPA nor Part 51 requires the application of Environmental Protection Agency ("EPA") drinking water standards or an assessment of "maximum groundwater impact" to assess the significance of the new information, as Intervenor suggest. Indeed, EPA drinking water standards cannot apply here because there are no drinking water exposure pathways to humans that are affected by the groundwater conditions at Indian Point.³

Rather, Part 51 codifies the controlling standard for assessing the significance of such "new" information. Specifically, Part 51 states that those radiological impacts "that do not exceed permissible levels in the Commission's regulations are considered small."⁴ The Commission explained the basis for this standard in the underlying rulemaking:

In response to comments on the draft generic environmental impact statement [GEIS] and the proposed rule, the standard defining a small radiological impact has changed from a comparison with background radiation to *sustained compliance with the dose and release limits* applicable to the various stages of the fuel cycle. This change is appropriate and strengthens the criterion used to define a *small environmental impact* for the reasons that follow. The Atomic Energy Act requires the [NRC] to promulgate, inspect and enforce standards that provide an adequate level of protection of the public health and safety *and the environment*. . . . A review of the regulatory requirements and the performance of facilities provides the bases to project continuation of performance within regulatory standards. *For the purposes of assessing radiological impacts, the Commission has concluded that impacts are of small significance if doses to individuals and releases do not exceed the permissible levels in the Commission's regulations.*⁵

The Board committed material legal error by not applying this standard in its admissibility ruling.

II. Application of the Correct Legal Standard Demonstrates That There is No Material Dispute Because Entergy Has Not Exceeded Applicable NRC Dose or Release Limits

Under the above standard, when NRC dose and release limits are not exceeded—or are only a small fraction of such limits, as is the case here—radiological impacts to humans and the

³ See Entergy's Appeal at 7-8, 21-22 (citing ER at 5-6); see also Draft Report for Comment, NUREG-1437, Generic Impact for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 (Dec. 2008) ("Draft SEIS"), Vol. 1 at 2-107 to 2-110.

⁴ 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1 (note 3); see also GEIS, NUREG-1437, Vol. 1 at 4-84.

⁵ Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,476 (June 5, 1996) (emphasis added).

environment are appropriately estimated to be small. Intervenor's have not alleged, in their contention or Answer, *any* exceedance of the applicable NRC dose or release limits. It is irrelevant whether the radionuclide releases at issue are deemed "normal" or "abnormal," given that no exceedance of the applicable limits has occurred—*i.e.*, the impacts are still small. Accordingly, there is no legal basis for the Board's finding that, even if "the total body dose caused by the groundwater contamination is well below the NRC limit, there is still the question as to whether the maximum groundwater impact (and, in turn, the maximum dose) has been determined for the site."⁶ The Board's undefined "maximum" impact criterion is simply inconsistent with NRC regulations and constitutes clear and material legal error. Furthermore, Entergy correctly concluded that the information concerning radionuclides in site groundwater is "new" but *not* "significant."

III. Entergy's Ongoing Radiological Environmental Monitoring Adequately Addresses Potential Radiological Impacts to the Hudson River Ecosystem

Both the Board and Intervenor's overlook the fact that, under its Radiological Environmental Monitoring Program ("REMP"), Entergy routinely monitors and documents radiological impacts to the environment and the public in the vicinity of Indian Point, and compares those impacts to NRC standards.⁷ Those standards include the dose design objectives in Appendix I to Part 50 and the dose limits in Part 20.⁸ Importantly, the REMP includes measurement of activity in the waterborne pathway, which includes Hudson River water, fish and invertebrates, aquatic vegetation, bottom sediment, and shoreline soil. Recent reports confirm the ER's *unchallenged* conclusion that levels of

⁶ LBP-08-13, 68 NRC ___, slip op. at 192. Moreover, "NEPA also does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts." *La. Energy Servs. L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

⁷ See ER at 5-5 to 5-6; Draft SEIS, Vol. 1 at 2-103 to 2-106. As the GEIS explains, "[e]nvironmental monitoring programs are in place at all sites to provide a backup to the calculated doses based on effluent release measurements." GEIS at 4-86. Radiological releases, doses to members of the public, and the associated environmental impacts are summarized in two reports for IP2 and IP3: (1) the Annual Radioactive Effluent Release Report and (2) Annual Radiological Environmental Operating Report. Limits for radiological releases and dose calculation methodologies are specified in Entergy's Offsite Dose Calculation Manual ("ODCM").

⁸ These regulations allow routine monitored releases of radionuclides during normal operations. The Commission thus considered ecosystem impacts (including "bioaccumulation") in establishing the normal operating limits that have *not* been exceeded by the accidental leaks at Indian Point. Any suggestion by Intervenor's that these limits are not adequate to protect the environment improperly challenges current NRC regulations.

radionuclides in the environment near Indian Point are below applicable NRC limits.⁹ In view of the above, there is no basis for the Board's or Intervenor's conclusion that the significance of new groundwater information remains unaddressed or in dispute for purposes of NEPA and Part 51.

IV. The History of Leakage from the IP1 Spent Fuel Pool ("SFP") is Clearly Beyond the Scope of this Proceeding

At its foundation, the Consolidated Contention raises issues related to *existing* groundwater contamination that are *not* unique to the period of extended operation.¹⁰ Historical leakage from the IP1 SFP, in particular, is not relevant to the future operation of IP2 and IP3 or within the proper scope of this proceeding. The IP1 SFP (the sole source of the strontium contamination in site ground water) has been emptied and drained; all identified IP2 SFP leaks have been repaired; and no releases from IP3 have been identified.¹¹

Furthermore, as explained in Section III above, Entergy already performs routine radiological environmental monitoring under the REMP. Significantly, Entergy has developed additional monitoring actions as part of its site groundwater monitoring program to supplement the REMP and monitor potential impacts of operations throughout the current operating term as well as the license renewal term.¹² The NRC Staff, for its part, has made clear that its extensive inspections of

⁹ See Draft SEIS, Vol. 1 at 2-105 (discussing the results of Entergy's Annual Radiological Environmental Operating Report for 2006, available at ADAMS Accession No. ML071420088). Entergy's dose calculations use bioaccumulation factors contained in Regulatory Guide 1.109, and analysis of the most recent fish samples shows no radioactivity distinguishable from background. Thus, there is no basis for Intervenor's claim that bioaccumulation of radionuclides in the Hudson River is "wholly unaddressed." Intervenor's Answer at 25. Intervenor even concedes that there is no "definitive evidence of adverse impacts." See Consolidated Contention (Aug. 21, 2008) at 14.

¹⁰ See Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,481 (May 8, 1995) (stating that "safety and environmental matters not unique to the period of extended operation" should not be the subject of a license renewal hearing "absent specific Commission direction"). CEQ guidance also emphasizes that "[t]he environmental analysis required under NEPA is *forward-looking*, in that it focuses on the potential impacts of the *proposed action* that an agency is considering." Council on Environmental Quality, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (June 24, 2005) at 1 (emphasis added).

¹¹ See ER at 5-5 to 5-6; Draft SEIS, Vol. 1 at 2-107 to 2-108. Intervenor's claim that there are "likely additional" leaks from IP2 and "future leaks" from IP3 are factually incorrect and speculative. Intervenor's Answer at 21.

¹² See ER at 5-5 to 5-6; Draft SEIS, Vol. 1 at 2-107 to 2-108.

Entergy's remedial actions AND groundwater monitoring program are "part of the NRC's *ongoing regulatory oversight program*."¹³

Accordingly, if not reversed, the Board's admission of the Consolidated Contention will improperly permit litigation of a *current licensing basis* issue under the rubric of NEPA. There simply is no basis for Intervenor's claim that "an accurate assessment of the significance of spent fuel leaks under NEPA must take into account the cumulative effects of contamination, which includes the IP1 plume."¹⁴ Entergy's "sustained compliance" with NRC dose and release limits during both the current and renewed-license operating terms, as contemplated by NRC regulations, ensures that environmental impacts, cumulative or otherwise, remain of small significance. The Board thus materially erred in concluding that there is a genuine dispute regarding the significance of environmental impacts associated with historical leakage from the Indian Point spent fuel pools.

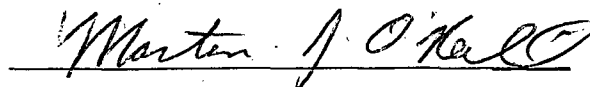
CONCLUSION

For the reasons set forth above and in Entergy's Appeal, the Commission should review and reverse the Board's admission of the Consolidated Contention. The instant matter is more than a "routine" contention admissibility dispute, as Intervenor's incorrectly suggest. Indeed, the Intervenor's Answer makes it abundantly clear that the Board materially erred by not applying the controlling legal standard codified in 10 C.F.R. Part 51, and by expanding the scope of this proceeding to allow litigation of a matter that is *not* unique to the period of extended operation. The result is a ruling that has substantial adverse implications for this and future license renewal proceedings similarly held under the provisions of 10 C.F.R. Part 51 and Part 54.

¹³ Draft SEIS, Vol. 1 at 2-107 (emphasis added). Based upon its own independent review and investigation, the Staff has concluded that the radionuclide releases to groundwater are within NRC radiation dose limits and "are not considered to have a significant impact on plant workers, the public, or the environment." *Id.* at 4-49.

¹⁴ Intervenor's Answer at 21.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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)	January 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Reply to Riverkeeper's Answer Opposing Interlocutory Appeal of Licensing Board Admission of Consolidated Contention," dated January 26, 2009, were served this 26th 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.

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