March 24, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO AMENDED AND NEW CONTENTIONS FILED BY THE STATE OF NEW YORK AND RIVERKEEPER, INC., CONCERNING THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

## INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to the new and amended contentions submitted by the State of New York ("New York" or "State") and Riverkeeper, Inc. ("Riverkeeper"), on February 27, 2009,[1] concerning the Staff's Draft Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996).[2] For the reasons set forth below:

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[1] *See* (1) "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," dated February 27, 2009 ("New York's DSEIS Contentions"); and (2) "Riverkeeper, Inc.'s Challenge to NRC Staff's Assessment of Impacts of Spent Fuel Pool Leaks in the Draft Supplemental Environmental Impact Statement," dated February 27, 2009 ("Riverkeeper's DSEIS Challenge").

[2] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment," NUREG-1437 Supplement 38 (December 2008) ("Draft SEIS" or "DSEIS").

(a) the Staff does not oppose the admission of New York Contention 12-A, as a revision of New York Contention 12, to address the Draft SEIS;

(b) the Staff opposes, in part, the admission of New York Contention 16-A, insofar as the amended contention seeks to introduce issues which the State could have raised earlier and/or which were excluded by the Atomic Safety and Licensing Board's ("Board") ruling on New York Contention 16;

(c) the Staff opposes, in part, the admission of New York Contention 17-A, in that the State's proposed amendment of Contention 17 impermissibly raises issues that could have been raised 15 months ago in New York's original petition to intervene;

(d) the Staff opposes the admission of New York Contention 33, in that this contention (1) constitutes an untimely attempt to re-assert issues as a no-action alternative contention, which the State had previously raised in contentions challenging the Applicant's discussion of alternate energy sources and which the Board rejected in LBP-08-13, and (2) fails to raise a genuine issue of material fact, in that it fails to show that materially different conclusions would be reached in the Draft EIS if the information presented in the contention had been considered;

(e) the Staff opposes the admission of New York Contention 34, in that it (1) constitutes an impermissible challenge to a Commission regulation, and (2) lacks legal basis insofar as it is based upon a proposed rule which has no legal effect at this time; and

(f) the Staff does not oppose Riverkeeper's request that Consolidated Contention Riverkeeper EC-3/ Clearwater EC-1 be applied to the Staff's Draft SEIS, notwithstanding the fact that Riverkeeper fails to demonstrate that the assertions contained in the consolidated contention, as previously admitted, pertain to the Staff's Draft SEIS.

## BACKGROUND

On April 23, 2007, Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") filed an application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3"), for an additional period of 20 years; as part of its license renewal application ("LRA"), the Applicant submitted an "Environmental Report" ("ER"), as required by 10 C.F.R. §§ 51.53(c) and 54.23. On May 11, 2007, the NRC published a notice of receipt of the Indian Point LRA,[3] and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.[4] The notice of opportunity for hearing required that petitions for leave to intervene and requests for hearing be filed by October 1, 2007;[5] this deadline was later extended to November 30, 2007.[6]

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[3] "Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 26,850 (May 11, 2007).

[4] "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 42,134 (Aug. 1, 2007).

[5] *Id.*, 72 Fed. Reg. at 42,135.

[6] "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period: Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding," 72 Fed. Reg. 55,834 (Oct. 1, 2007). The deadline for filing petitions to intervene was extended to December 10, 2007 for persons whose filing of a petition to intervene was impeded by the NRC's Agencywide Documents Access and Management System ("ADAMS"). *See* (1) Commission Order of November 16, 2007, and (2) Licensing Board "Order (Granting an Extension of Time to CRORIP Within Which to File Requests For Hearing)," dated December 5, 2007

On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York[7] and Riverkeeper.[8] In its petition, New York filed a total of 32 contentions including, *inter alia*, Contentions 12, 16, and 17. In Contention 12, New York alleged that the severe accident mitigation alternatives ("SAMA") analysis in the Applicant's ER did not accurately reflect decontamination and clean-up costs associated with a severe accident;[9] and in Contention 16, New York alleged, *inter alia*, that the Applicant's SAMA analysis did not accurately reflect the number of people who would be affected by a severe accident and that its air dispersion model did not accurately predict the dispersion of radionuclides in a severe accident;[10] in Contention 17, New York alleged that the Applicant's ER did not consider the positive impacts on land values in the Indian Point area that would accrue if the IP2 and IP3 operating licenses were not renewed.[11] For its part, Riverkeeper filed five contentions including, *inter alia*, Riverkeeper Contention EC-3, in which it alleged that the ER did not adequately address the impact of spent fuel pool leaks on groundwater and the Hudson River ecosystem.[12]

On July 31, 2008, the Board issued its Memorandum and Order ruling on the petitioners'

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[7] *See* "New York State Notice of Intention to Participate and Petition to Intervene" ("New York Petition" or "NY Petition"), filed November 30, 2007.

[8] *See* "Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant" ("Riverkeeper Petition"), filed November 30, 2007.

[9] NY Petition at 140-45.

[10] NY Petition at 163-67.

[11] NY Petition at 167-74.

[12] Riverkeeper Petition at 74-86.

standing to intervene and the admissibility of their contentions.[13] In this regard, the Board found, *inter alia*, that New York Contentions 12 and 17 were admissible as filed,[14] and that New York Contention 16 was admissible "to the extent that it challenges [a] whether the population projections used by Entergy [in its SAMA analyses] are underestimated, . . . [b] whether the ATMOS module in MACCS2 is being used beyond its range of validity – beyond thirty-one miles (fifty kilometers) – and, [c] whether use of MACCS2 with the ATMOS module leads to non-conservative geographical distribution of radioactive dose within a fifty-mile radius of IPEC."[15]. Further, the Board admitted Riverkeeper Contention EC-3 "as it relates to the environmental impacts from the spent fuel pool leaks";[16] the Board then consolidated this contention with Hudson River Sloop Clearwater, Inc. ("Clearwater") Contention EC-1.[17]

On December 22, 2008, the NRC issued its Draft SEIS concerning the Indian Point LRA. On January 14, 2009, the Board granted New York and Riverkeeper a 37-day extension of time, until February 27, 2009, in which to file contentions related to the Draft SEIS.[18] In discussing the contentions which might be filed, the Board explicitly "reminded the parties that any new contentions may only deal with new environmental issues raised by the Draft SEIS. Tr. at 767-68. The Board will not entertain contentions based on environmental issues that

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[13] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC ___ (July 31, 2008).

[14] LBP-08-13, slip op. at 64-65 (NY Contention 12), and 82-83 (NY Contention 17).

[15] LBP-08-13, slip op. at 78.

[16] LBP-08-13, slip op. at 187.

[17] LBP-08-13, slip op. at 188, 227-28.

[18] *See* Transcript of Pre-Hearing Conference (January 14, 2009), at Tr.768-69; "Memorandum and Order (Summarizing Pre-Hearing Conference)," dated February 4, 2009 ("Pre-Hearing Conference Order"), at 2-3.

could have been raised when the original contentions were filed."[19]

On February 27, 2009, New York filed Amended Contentions 12-A, 16-A and 17-A, and new Contentions 33 and 34; also on February 27, 2009, Riverkeeper filed its "challenge" to the Draft SEIS, which "incorporate[d]" all of its arguments in Consolidated Contention Riverkeeper EC-3 / Clearwater EC-1, "to now apply not just to Entergy's assessment, but also to the NRC Staff's essentially identical analysis"[20] Riverkeeper did not formally amend the consolidated contention, but it requested that its filing be treated as an amendment, "[t]o the extent that the ASLB deems that a formal amendment to the Consolidated Contention is required."[21]

## DISCUSSION

### I. Legal Standards Governing the Admission of Late-Filed Contentions

The standards governing the admissibility of contentions filed after the initial deadline for filing (*i.e.*, "late-filed contentions") are well established. In brief, the admissibility of late-filed contentions in NRC adjudicatory proceedings is governed by three regulations. These are: (a) 10 C.F.R. § 2.309(f)(2), concerning new and timely contentions, (b) 10 C.F.R. § 2.309(c), concerning non-timely contentions, and (c) 10 C.F.R. § 2.309(f)(1), establishing the general admissibility requirements for contentions. *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

First, a late-filed contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial

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[19] Pre-Hearing Conference Order at 3; *see* Tr. 768.

[20] Riverkeeper's DSEIS Challenge, at 2.

[21] *Id.* at 4.

filing period may be admitted with leave, if it meets the following requirements:

> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that –
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> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

*Id.*, emphasis added.

Second, a contention that does not qualify for admission as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provisions governing nontimely contentions, set forth in 10 C.F.R. § 2.309(c)(1). As stated therein, nontimely contentions "will not be entertained absent a determination by the . . . presiding officer . . . that the . . . contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing":

> (i) Good cause, if any, for the failure to file on time;
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> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
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> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
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> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
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> (vi) The extent to which the requestor's/ petitioner's interests will be represented by existing parties;
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> (vii) The extent to which the requestor's/ petitioner's participation will broaden the issues or delay the proceeding; and
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> (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); *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006). Pursuant to 10 C.F.R. § 2.309(c)(2), each of these factors is required to be addressed in the requestor's nontimely filing.[22]

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). The requirements of this regulation were addressed at length by the Board in LBP-08-13, 68 NRC at ___, slip op. at 5-11. Specifically, in order to be admitted, a contention must satisfy the following requirements:

> (f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

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[22] The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *See, e.g., State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (*quoting Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
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> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). The purpose for the contention filing requirements set forth in § 2.309(f)(1) have been summarized by the Board in LBP-08-13, as follows:

> The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." The Commission has emphasized that the rules on contention admissibility are "strict by design." Failure to comply with any of these requirements is grounds for the dismissal of a contention.

*Indian Point,* LBP-08-13, slip op. at 6 (footnotes omitted).[23] Thus, for each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position, including references to specific sources and documents that support the contention; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute, or identification of each failure to include necessary information in the application, and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi); *Indian Point,* LBP-08-13, 68 NRC at ___, slip op. at 5-6.

More specifically, the Board in this proceeding, in its February 4, 2009 Memorandum and Order, made it clear that any new contentions concerning the Draft SEIS "may only deal with new environmental issues raised by the Draft SEIS," and that "contentions based on environmental issues that could have been raised when the original contentions were filed" would not be allowed.[24] The Board's admonition here is consistent with established case law.

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[23] Similarly, long-standing Commission precedent establishes that contentions may only be admitted if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of former § 2.714(b) (currently § 2.309(f)), and applicable NRC case law. *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), *aff'd sub nom. BPI v. Atomic Energy Commission*, 502 F.2d 424, 429 (D.C. Cir. 1974).

[24] Pre-Hearing Conference Order at 3; *see* Tr. 768.

*See, e.g., Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 532 (2005); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-74 (2006); *Duke Energy Corp.* (McGuire Nuclear Station Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 56 NRC 373, 385-386 (2002).

An intervenor must file contentions raising environmental issues based on the environmental report or promptly after the information supporting the contentions becomes available, rather than waiting for the Draft SEIS to be published, in accordance with 10 C.F.R. § 2.309(f)(2). The Commission explained this requirement in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998):

> Although the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered, intervenors must file their environmental contentions as soon as possible, even before issuance of the draft EIS, if the contested issue is addressed in the applicant's ER. *See* 10 C.F.R. § 2.714(b)(2)(iii). To the extent that the FEIS may differ from the ER, an intervenor is provided a second opportunity to file contentions on environmental issues. *Id.* [25]

Thus, where a draft EIS contains information or conclusions that differ from the applicant's ER, a new or amended contention should be filed to address the new material; alternatively, where the information has not changed and the draft EIS "is essentially *in para materia* with the ER analysis or discussion," a contention based upon the ER may be considered to be a challenge to the draft EIS. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008); *Private Fuel Storage, L.L.C.* (Independent Spent

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[25] The provisions of 10 C.F.R. § 2.714(b)(2)(iii), cited in *LES*, are now incorporated in 10 C.F.R. § 2.309(f)(2).

Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (the contention is viewed as "migrating" from the ER to the draft EIS).

II. The Admissibility of New York's Amended and New Contentions[26]

A. New York Contention 12-A.

New York Contention 12-A is substantially identical to original New York Contention 12; in general, it adds new Paragraph 3 and other references to the Draft SEIS, and otherwise reiterates the assertions in Contention 12. The amended contention does not claim that there are any new issues in the Draft SEIS; rather, it recasts the issues it had previously raised vis-à-vis the Applicant's Environmental Report, as issues vis-à-vis the Draft SEIS. The amended contention does not raise any issues or arguments that were not contained in New York Contention 12. Inasmuch as the Board has previously admitted New York Contention 12, the Staff does not oppose the admission of Contention 12-A, concerning the Staff's Draft SEIS.

B. New York Contention 16-A.

New York Contention 16-A generally seeks to revise original Contention 16 to apply to the Staff's Draft SEIS – but, in addition, impermissibly raises issues which the State failed to raise in Contention 16, and which exceed the scope of the issues that the Board admitted for litigation on Contention 16. In this regard, the Board's ruling in LBP-08-13 limited the scope of proposed New York Contention 16, admitting the contention "to the extent that it challenges"

[26] The Staff notes that it previously presented its view that New York Contentions 12, 16 and 17 were inadmissible. See "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," dated January 22, 2008 ("Staff Response to Petitions"), at 50-52, 56-59, and 112-15; *see also id.* at 89-92 (addressing Clearwater Contention EC-1). Inasmuch as the Board admitted these contentions, the Staff does not here re-argue the admissibility of those contentions.

(1) "whether the population projections used by Entergy [in its SAMA analyses] are underestimated, . . . [(2)] whether the ATMOS module in MACCS2 is being used beyond its range of validity – beyond thirty-one miles (fifty kilometers) – and, [(3)] whether use of MACCS2 with the ATMOS module leads to non-conservative geographical distribution of radioactive dose within a fifty-mile radius of IPEC." LBP-08-13, slip op. at 78, 163-67; emphasis added. However, in the title of the amended contention, New York introduces an assertion that the Staff "improperly accepted Entergy's . . . estimates of radiation released in a severe accident . . . ." New York's DSEIS Contentions, at 9; emphasis added; capitalization omitted. Similarly, New York presents an assertion that the model must include "the factors and analyses" contained in Dr. Egan's Declaration (filed in support of the State's petition to intervene), including his assertions about "the radionuclide content of any off-site release of radionuclides." *Id.,* at 12 n.5 (reiterating New York Contention 16, at 166 n.38). These assertions raise not the issue of radiation dispersal modeling which the Board admitted in Contention 16, but an additional issue involving the radiological source term used by Entergy in the ER's SAMA analysis. In raising this issue, the proposed amendment of Contention 16 constitutes an impermissible attempt to re-introduce an issue which was excluded by the Board in its ruling on New York Contention 16.

Further, in its basis statements, the State introduces new Paragraphs 10, 11 and 12, which challenge the sufficiency of the Draft SEIS. In new Paragraph 12, the State asserts, for the first time, that the Staff must use "a more accurate EPA approved air dispersion model" (New York DSEIS Contentions at 13; emphasis added). While original Contention 16 (¶ 6 at 165) asserted that the EPA had not authorized the use of the ATMOS model and that "newer EPA approved models" were more accurate than ATMOS, the State had not asserted (as it does here) that only an EPA-approved model would be acceptable. The State fails to explain

why it could not have made this assertion earlier, and it fails to provide any legal reference to support its view that only an EPA-approved model may be used. Further, the State incorrectly cites 10 C.F.R. § 51.53(c)(3)(ii)(L) in support of this contention; that regulation pertains to an applicant's environmental report, not to an EIS issued by the Staff.

Accordingly, the Staff opposes, in part, the State's proposed amendment of New York Contention 16, for the reasons and to the extent set forth above.

C. New York Contention 17-A.

In New York Contention 17-A, the State reiterates the assertions contained in New York Contention 17, providing additional references to the Draft SEIS and regulatory citations (*see, e.g.*, citations added to Paragraphs 2 and 4).[27] At the same time, however, the State impermissibly raises certain new assertions, which it could have, but failed to, raise earlier.

Thus, in Paragraph 15 of its amended contention, the State raises a challenge based on the NRC's October 9, 2008, publication of two proposed rulemaking actions. The State asserts:

> [6] As of October 9, 2008, the NRC is reconsidering this expectation. *See* 73 Fed. Reg. 59551 (Waste Confidence Decision Update) (Oct. 9, 2008); 73 Fed. Reg. 59547 (Temporary Storage Rule) (Oct. 9, 2008). Should either or both of these proposed findings or rules be finalized, waste would be stored on-site for considerably longer than currently expected, making this contention even more relevant. However, the NRC, while acknowledging that it no longer has confidence that there will be an off-site waste storage facility available to handle the new wastes generated by license renewal, continues to have

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[27] While the State claims that the Draft SEIS is deficient for failing to address certain land use issues, the sole reference provided by the State in support of these assertions is Draft SEIS at 4-41 (where the Staff discusses the "population-related impacts" of license renewal). *See* New York DSEIS Contentions, ¶ 17, at 18. The State fails to note that a discussion of the issues which it claims is missing, is presented in § 8.2 ("No Action Alternative") of the Draft EIS, regarding socioeconomic impacts. *See* Draft SEIS at 8-29 – 8-30. The State fails to challenge the adequacy of that discussion.

> confidence that there will be such a facility available to handle the wastes generated by existing nuclear plants under their original, non-renewed operating licenses.

New York DSEIS Contentions, at 17 n.6. Apart from failing to demonstrate any reason to believe that the publication of a proposed rulemaking action can have any impact on the Indian Point LRA, the State fails to explain why it failed to raise these assertions in a timely manner – i.e., on or before November 8, 2008 (30 days after publication of the proposed rulemaking action). The State's failure to raise this issue in a timely manner requires that this proposed addition to Contention 17 be rejected, under 10 C.F.R. §§ 2.309(c)(1) and (f)(2).

Second, the State impermissibly advances a new basis for the contention, relying on information that was available to the State when it filed its original petition. Thus, in Contention 17-A, the State cites the "Supplemental Declaration and Report" of Dr. Stephen C. Sheppard, entitled "Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation" ("Supplemental Report"). *See* New York DSEIS Contentions at 20, ¶ 24. In his Supplemental Report, Dr. Sheppard candidly discloses that his new submission is based upon a new assumption regarding the length of time that spent fuel might remain at Indian Point. He states:

> In my initial report submitted on November 29, 2007, . . . . I assumed that if license renewal were approved, the additional wastes generated by license renewal would be gone from the site and the site would be fully restored no later than 30 years after the renewed license expired – i.e. by 2065. However, . . . I have now been advised that it is possible the wastes generated by license renewal may remain on the site for much longer and perhaps indefinitely. This substantial additional delay in restoring the site to unrestricted use will have a substantial additional impact on off-site land values.

Supplemental Report at 1; emphasis added. No reason has been provided to demonstrate that Dr. Sheppard could not have performed his supplemental analysis earlier, when the State filed its original Contention 17. Further, while Dr. Sheppard presents new analyses and conclusions

regarding the impact on property values resulting from a longer period for site reclamation, Supplemental Report at 3-4, he does not cite any studies or data in support of his supplemental calculations that post-date his Original Report or were unavailable when his Original Report was filed. Accordingly, New York Contention 17-A does not meet the requirements for an amended contention, set forth in 10 C.F.R. §§ 2.309(c)(1) and (f)(2).

In sum, New York's use of Dr. Sheppard's Supplemental Report introduces a basis for the contention that New York could and should have submitted in its original filing. The Supplemental Report does not identify any new issue raised in the Draft SEIS, which would constitute grounds for amendment under 10 C.F.R. §2.309(f)(2). It does not identify any information that was previously unavailable, or that is materially different from information which was previously available, which would constitute grounds for amendment under 10 C.F.R. §2.309(f)(2)(i)-(ii). Accordingly, the Staff opposes the admission of Contention 17-A, for the reasons and to the extent set forth above.

D. New York Contention 33.

In Contention 33, the State presents numerous arguments concerning the adequacy of the analysis of alternative energy sources and energy conservation in the "no action alternative" discussion in Chapter 8 of the Draft SEIS. In doing so, the State essentially re-packages many of its previously rejected arguments in New York Contentions 9, 10, and 11 regarding energy alternatives, into a contention challenging the Draft SEIS discussion of the no-action alternative. The State's attempt to introduce these issues is deficient, however, in that (a) the State has not shown why it could not have presented these same arguments as challenges to the ER's discussion of (or failure to discuss) the no-action alternative when it filed its original contentions in November 2007, and (b) although the contention claims that the Draft SEIS reaches the "wrong" conclusions regarding certain alternative energy sources under the no-action

alternative, Contention 33 at 27 (¶ 11), it fails to show that a materially different conclusion would have been reached if the State's additional information had been considered.

1. New York's Attempt to Refashion Its Previous Contentions into Challenges to the Draft SEIS's "No Action Alternative" Analysis Is Untimely, and Would Circumvent the Board's Rulings in LBP-08-13.

Significantly, the Board has previously considered and ruled upon the State's claims that energy conservation must be considered as an alternative to license renewal, rejecting many of the same arguments which the State now asserts in Contention 33. In particular, the Board rejected New York Contention 9 insofar as it asserted that "Entergy's alternatives analysis for the defined goal of producing 2,158 MWe of base-load power generation is deficient by ignoring energy conservation," LBP-08-13, slip op. at 49. In this regard, the Board held as follows:

> For the alternatives analysis, the Commission has affirmed that NEPA does not require it to look at every conceivable alternative, but rather requires only consideration of feasible, non-speculative, reasonable alternatives. It is clear from Commission decisions that the Applicant in the alternatives analysis in its ER need only consider the range of possibilities that are capable of achieving the goals of the proposed action. In the instant case, this action is to re-license IPEC to generate approximately 2,158 MWe of base-load energy for an additional twenty years of operation.
>
> Consistent with the GEIS, this Board agrees that the reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are feasible technically and available commercially. Ignoring the feasibility question and its lack of commercial availability, energy conservation is clearly not discrete electric generation of any sort. . . . As affirmed by the Commission [in *Exelon Generating Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-07 (2005)], NEPA's "rule of reason" does not demand an analysis of energy efficiency, because, inter alia, conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required by a NEPA of reasonable alternatives. In summary, the Board agrees that it is not necessary for Entergy to look at energy conservation in its alternatives analysis for license renewal.

*Id.*, slip op. at 49-50; footnotes omitted.[28] Nonetheless, the Board accepted Contention 9, in part, to the extent that the State demonstrated "a material dispute with the Applicant regarding the omission of energy conservation from its "no-action" alternative analysis." *Id.* at 49; emphasis added. The Board concluded (*Id.* at 51):

> In summary, NYS has provided a concise statement of alleged facts, and established a genuine dispute with the Applicant on a material issue, specifically, the need for Entergy to consider energy conservation for the "no-action" alternative in its ER. The Board admits NYS-9 in this narrow aspect of NYS's argument related to the "no-action" alternative. We reject those portions of NYS-9 that allege ER deficiencies due to Entergy's lack of considering energy conservation in its alternatives analysis for the defined goal of producing 2,158 MWe of base-load generation. As clarified by the referenced Commission precedents, energy conservation is not within the range of reasonable alternatives related to the scope and goals of the proposed license renewal, and is not a discrete electric generation source that is feasible technically and available commercially. For these reasons, the Board finds that the portion of NYS-9 relating to the alternatives analyses is inadmissible, but the position of NYS-9 relating to the "no-action" alternative is admissible.

Notwithstanding these clear rulings, in Contention 33 the State presents many of the same arguments it had made in Contention 9 – although it now fashions those arguments into a challenge to the Draft SEIS's discussion of the no-action alternative. For example, the State asserts that the Draft SEIS "ignores or fails to include consideration of substantial comments and information" which the State had submitted in "its previous filings in this proceeding and in [the State's environmental] scoping comments." Contention 33 at 22 (¶¶ 4 and 5); emphasis

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[28] *Cf.* LBP-08-13, slip op. at 207-09 (rejecting Clearwater Contention EC-5 (renewable energy and energy conservation) as a challenge to § 8.1 of the GEIS, which limits an ER's analysis of reasonable alternatives for license renewal to a discussion only of "discrete electric generation sources that are technically feasible and commercially viable," which excludes renewable energy and energy efficiency, and holding that energy conservation and energy efficiency are beyond the ability of a license renewal applicant to implement and therefore do not constitute reasonable alternatives to license renewal).

added. The State then points to the assertions submitted in its previous contentions regarding energy alternatives, including (a) alternatives discussed in the November 2007 Declaration of David Schlissel and the November 2007 "Synapse Report," Contention 33 at 22 (¶ 5); (b) New York's "15 x 15" plan to reduce energy usage by 15% by 2015, *id.* at 23, 28, (¶¶6, 14) – a plan which it had addressed at length in Contention 9;[29] (c) alternatives discussed in the previously-filed Synapse Report, such as co-generation plants, repowering existing plants, importing additional power, and transmission system updates, *id.* at 23 (¶ 6); (d) the potential development of wind, hydro, geothermal and other renewable energy sources to replace IP2 and IP3 – as discussed in the Synapse Report and the November 2007 Declaration of Peter Bradford, *id.* at 27, 28 (¶¶ 11-13); (e) the asserted inappropriateness of considering the construction of a single coal or natural gas plant as an alternative to license renewal, based in part on the 2007 Synapse Report and Declaration of Peter Bradford (essentially restating its impermissible challenge to the GEIS), *id.* at 30-32 (¶¶ 16-19); (f) a failure to consider certain combinations of alternatives, presented in the 2007 Synapse Report and the 2007 Schlissel Declaration, *id.* at 32-34 (¶¶ 19-22); and (g) other unspecified assertions in "Contention 9, . . . paragraph[s] 9 [-] 27," "Contention 10, . . . paragraph[s] 6 [-] 33, " and "the November 2007 Declarations of David Schlissel and Peter Bradford with their attachments and the Synapse Report," *id.* at 35-36 (¶ 26).

In presenting these assertions, the State relies largely on the information it had cited 15 months ago in support of Contentions 9 and 10. The State fails to explain, however, why it could not have presented these assertions in support of a contention challenging the ER's discussion of the no-action alternative, rather than waiting to make these assertions after the

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[29] *See* New York Petition (Nov. 30, 2007), Contention 9 at 110-16 (¶¶ 10-20).

Draft SEIS was published. Thus, just as the State raised the issue of energy conservation as a "no-action" contention based on the Applicant's ER – an issue which the Board admitted in ruling on Contention 9 – the State could also have framed these additional issues as a no-action contention challenging the ER. The State's attempt to re-argue these matters as a no-action contention based on the issuance of the Draft SEIS comes too late, and should be rejected under 10 C.F.R. § 2.309(f)(2).[30]

2. New York's Challenges to the Draft SEIS's "No-Action Alternative" Analysis Fail to Show That a Materially Different Result Would Be Reached If the State's Information Had Been Properly Considered.

In Contention 33, the State presents a considerable amount of information -- both old (as discussed above) and new[31] -- in support of its claims that the Draft SEIS is deficient. While the State contends that this plethora of information either was not considered explicitly, or was considered improperly in the Staff's Draft SEIS, it fails to present any showing that proper

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[30] In addition, the State attacks the GEIS, insofar as the GEIS indicates that a site-specific Supplemental EIS should only consider single-source, stand-alone alternatives. *See* GEIS at 8-1. According to the State, "[r]egardless of the validity of that assumption 12 years ago, it is definitely not valid today." Contention 33, at 30 (¶ 16). This assertion must be rejected as an impermissible challenge to the GEIS.

[31] The State presents recent information which post-dates publication of the Draft SEIS, such as (a) the reduced energy usage and peak loads that have been experienced "as a result of the current economic recession," discussed in the Declaration of David Schlissel, filed on February 27, 2009, Contention 33 at 23 (¶ 5); (b) a June 2008 decision by the New York Public Service Commission ("NYPSC"), establishing an "Energy Efficiency Portfolio Standard" for the State, PSC Case 07-M-0548 "and [unidentified] related cases," *id.* at 23, 35 (¶¶ 6, 23); (c) a January 2009 decision by the NYPSC, approving "'Fast Track'" Utility Administered Electric Energy Efficiency Programs," *id.* at 23 (¶ 7); (d) the recently enacted American Recovery and Reinvestment Act of 2009, under which the State "could" receive an (as yet unknown) amount of funding for energy efficiency and other programs, *id.* at 25 (¶ 8); (e) a January 2009 announcement by New York Governor Patterson, which would expand the "15 x 15" program into a "45 x 15" program, *id.* at 28-29, 35 (¶¶ 14, 24); (f) a February 2009 White House memorandum on improved federal efficiency standards, *id.* at 26, 35 (¶¶ 9, 25); (g) a February 2009 New York Independent System Operator announcement on increased wind energy power generation, *id.* at 27, 36 (¶¶ 11, 29); (h) a December 2008 *Time* magazine article on energy efficiency, *id.* at 30, 37 (¶¶ 16, 32); and (i) a January 2009 publication by the Electric Power Research Institute concerning increased efficiency and demand response programs, *id.* at 30, 37 (¶¶ 16, 33).

consideration of this information in the Draft SEIS would have led to materially different conclusions -- *i.e.*, either that the "no-action" alternative would produce impacts that are materially different from the conclusions presented in the Draft SEIS, or that the environmental impacts of license renewal are so great that preserving the option of license renewal for IP2 and IP3 would be unreasonable.

For example, the State asserts that "the DSEIS incorrectly assumes that energy conservation would only result in a savings of 800 MW and . . . fails to consider energy conservation as a full replacement of one or both of the units under the no action alternative," Contention 33 at 25 (¶ 7), and that the Draft SEIS should take various "[energy] conservation and efficiency efforts into account." *Id.* at 26 (¶ 9). This issue, however, relates not to the no-action alternative, but to the likelihood that energy conservation might replace the power generated by IP2 and IP3 – an issue that is beyond the scope of a discussion of the impacts of the no-action alternative. Moreover, the State fails to show any reason to believe that the conclusions reached in the Draft SEIS concerning the environmental impacts of the no-action alternative are materially incorrect. In fact, the State concedes that the "[t]he DSEIS acknowledges that there is virtually no adverse environmental impact associated with energy conservation measures." *Id.* at 26-27 (¶10), *citing* the Draft SEIS at 8-66; emphasis added

In addition, although the State contends that "the energy conservation potential between now and 2012 is sufficient to displace at least one of the IP units, thus greatly enhancing the potential benefits and substantially reducing the perceived adverse impacts of the no action alternative," *id.* at 27 (¶10); emphasis added, the Draft SEIS in fact concludes that all of the environmental impacts of the no-action alternative, other than socioeconomic impacts to certain local jurisdictions near the Indian Point facility, are "SMALL". Draft SEIS at 8-26 (Table 8-2) and 8-30. Thus, there is no basis for the State's assertion. Similarly, the Draft SEIS evaluates

the environmental impacts of various alternative energy sources -- which may or may not be relied upon by other decision-makers to replace the power generated by IP2 and IP3 – and the State has not shown any reason to believe that the impacts of plant shutdown, as summarized in Table 8-2 of the Draft SEIS, are invalid.

Further, the State's discussion of alternative energy sources is misplaced. As required by 10 C.F.R. § 51.71, the Draft SEIS includes a discussion of alternatives, including alternative energy sources. As presented in § 8.3 of the Draft SEIS, these alternative energy sources include a super-critical coal-fired plant at an alternate site, a natural gas-fired plant at the Indian Point site, purchased power, and two combinations of alternatives -- (a) continued operation of either IP2 or IP3, along with a gas-fired plant, renewable energy, and conservation, and (b) shutdown of both IP2 and IP3, along with construction and operation of a new gas-fired plant, renewable energy, conservation, and purchased power. Draft SEIS, § 8.3 at 8-31.[32] The environmental impacts of these alternatives are discussed in § 8.3.5 of the Draft SEIS, and are presented in Table 8.3 (coal-fired plant), Table 8.4 (gas-fired plant at Indian Point and an alternate site), and Table 8-5 (combination alternatives). Significantly, while the State disagrees with the Draft SEIS's assessment of the <u>likelihood</u> that various alternatives might replace the energy generated by IP2 and IP3, it fails to show that the Draft SEIS's assessment of the <u>impacts</u> of these alternatives was deficient.[33] Further, while New York argues that other

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[32] Other alternatives that were considered and dismissed from further evaluation are listed in § 8.3.4 of the Draft SEIS.

[33] The Staff has been able to identify only three instances in Contention 33, in which the State presents a challenge the Draft SEIS's discussion of <u>the impacts</u> of alternative energy sources: (1) the State claims that the discussion of the impacts of constructing a new coal plant "is besides the point and appears to be a 'strawman' analysis," Contention 33 at 31 (¶ 17); (2) the State argues that the Draft SEIS incorrectly concludes "that a gas fired plant would have 'similar' impacts to the continued operation of IP2 and IP3" – citing another statement in the Draft SEIS (at 8-78) in support of its assertion, *Id.* at 32 (¶19) (in fact, the Draft SEIS indicated that the overall impact levels are similar, but the "impacts differ significantly (continued. . .)

combinations of alternatives should have been considered, again it fails to show, or even to allege, that the environmental impacts of those combinations would be materially different from those presented in the Draft SEIS.[34]

Finally, although New York Contention 33 nominally appears to be a challenge to the Draft SEIS's "no-action alternative" discussion, the contention in fact presents a challenge to the Draft SEIS's discussion of reasonable alternatives to license renewal. Thus, although New York asserts that the no-action alternative must include consideration of various alternative energy sources that might be used to replace IP2 and IP3, New York's assertions just as easily – and more appropriately – could have been fashioned as an alternative energy source contention – which is exactly how the State packaged these assertions in Contentions 9 and 10. Moreover, even though it has repackaged these assertions into a "no-action alternative" contention, New York ignores the fundamental reason why alternative energy sources and the no-action alternative are considered in a license renewal SEIS – *i.e.*, so that the impacts of those alternatives may be compared to the impacts of license renewal, in reaching a decision as to whether preserving the option of license renewal would be unreasonable. *See* 10 C.F.R.

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(. . .continued)

across resource areas." Draft SEIS at 8-78); and (3) the State asserts that other energy combinations "are realistic and environmentally preferable to operating IP2 and IP3 and demonstrate that the no-action alternative is the preferable alternative to the two already selected by the DSEIS." Contention 33 at 33 (¶ 21). Significantly, the State fails to describe the alleged impacts of its proposed alternative, and it fails to show that a materially different conclusion would be reached as to the impacts of any such alternatives, including the no-action alternative, if its assertions had been "properly" considered.

[34] The State incorrectly asserts that the GEIS concluded "that only gas or coal are viable alternatives and that the only option must be stand-alone single solution alternatives." Contention 33 at 32 (¶ 20). In fact, the GEIS stated that "a huge number of combinations or mixes can be assimilated to meet a defined generating requirement, [but] such expansive consideration would be too unwieldy to perform given the purposes of this analysis." GEIS at 8-1. Accordingly, the GEIS concluded that "a reasonable set of alternatives should be limited to analysis of single, discrete electric generation sources and only electric generation sources that are technically feasible and commercially viable." *Id.*

§ 51.95(c)(4); Statement of Consideration, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467, 28,471-73 (June 5, 1996). As discussed above, the State simply fails to show that the Draft SEIS incorrectly assessed the impacts of the no-action alternative or any alternate energy sources.

In sum, New York Contention 33 fails to show that a materially different conclusion would be reached, regarding the impacts of the no-action alternative or a determination as to whether the environmental impacts of license renewal are so great that preserving the option of license renewal would be unreasonable, if the Draft SEIS had considered the additional information presented in this contention.

E. New York Contention 34.

In Contention 34, the State seeks to raise an issue concerning impacts to off-site land use, resulting from the potential for "long-term or indefinite storage of high level nuclear waste on the Indian Point site." New York DSEIS Contentions at 37. In support of this contention, New York cites the Commission's October 9, 2008 publication of an update to its "Waste Confidence Decision,"[35] in which the Commission proposed amending its Waste Confidence

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[35] In *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), "Memorandum and Order (Ruling on Standing, Hearing Petition Timeliness, and Contention Admissibility)," LBP-08-__, 68 NRC __, slip op. at 61 (Sept. 12, 2008), the Board described the waste confidence rule as follows:

> [In] the Waste Confidence Rule . . . the Commission made a generic determination that (1) spent nuclear fuel can be safety stored at a generating reactor site without significant environmental impacts for at least thirty years beyond the reactor's licensed operation; (2) there is reasonable assurance at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within thirty years beyond the licensed life for operation of any reactor to dispose of the commercial high level waste and spent fuel originating in such reactor and generated up to that time; and (3) no ER discussion of any environmental impact of spent fuel storage at a reactor is required in, among others, a COL proceeding. See 10 C.F.R. § 51.23(a)-(b).

Rule to reflect the possibility that on-site storage may be necessary for spent nuclear fuel generated during a power reactor's extended period of operation. *Id.* at 38-41 and 44-45, *citing* Proposed Rule, "Waste Confidence Decision Update," 73 Fed. Reg. 59,551 (Oct. 9, 2008).[36] Further, New York cites two February 2009 news articles, which reported that Congress has decreased the level of funding for the proposed Yucca Mountain high level waste repository. New York DSEIS Contentions at 41 n.10.

Notwithstanding the State's reference to the Commission's proposed amendment of its waste confidence rule, it is clear that the current rule remains in effect and may not be challenged in this proceeding absent the grant of a petition for rule waiver under 10 C.F.R. § 2.335 – which the State has not filed. *See, e.g., Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear*

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[36] In publishing this proposed rule, the Commission sought public comment on its proposal to undertake further review of its Waste Confidence Decision and to revise two of the findings it had reached therein. Specifically, the Commission proposed to revise findings (2) and (4) of the Waste Confidence Decision, to provide as follows:

> Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time.
>
> Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

73 Fed. Reg. at 59,551. Simultaneously, the Commission published a proposed amendment to its rules in 10 C.F.R. Part 51, containing its "generic determination on the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor operating licenses." *Id.* at 59,552; *see* Proposed Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 73 Fed. Reg. 59,547 (Oct. 9, 2008).

*Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17, *reconsideration denied*, CLI-07-13, 65 NRC 211, 214 (2007); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-__, 68 NRC __, ___, slip op. at 61-62 (Sept. 12, 2008); *Indian Point, LBP-08-13, 68 NRC at ___, slip op. at ___; Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)," slip op. at 2-3. Further, it is clear that the issue raised by the State is (or is about to become) the subject of general rulemaking by the Commission -- which further bars its litigation in this proceeding. *See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1; 22 (2007).[37]

Nor does the State's reference to Congress' recent cut in funding for the proposed Yucca Mountain high level waste repository establish a cognizable basis for this contention. The proposed repository is just that – a proposed facility – which did not exist when the State filed its original contentions, and did not exist when the Staff published its Draft SEIS. At all times, uncertainties have existed as to whether the Department of Energy will proceed with the proposed facility and whether the NRC will license the facility's construction. The recent cuts in funding do not alter that situation, nor do they constitute a final determination to abandon the proposed repository. Accordingly, the cuts in funding for Yucca Mountain do not establish a

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[37] In addition, even if the Commission's publication of its proposed rules could support the admission of this contention, the contention is impermissibly late, in that it should have been filed 30 days after the proposed rule was published in the *Federal Register* – i.e., to be considered timely, the contention should have been filed by November 9, 2008, as a challenge to the Applicant's ER.

cognizable basis for the admission of this contention.

Finally, to the extent that Contention 34 challenges the adequacy of the off-site land use analyses contained in the Draft SEIS, based on assertions the State had also raised in Contention 17-A (*see* Contention 34 at 42-44 and 46), the contention relies upon information which the State could have raised, but did not raise earlier. In this respect, as stated in response to Contention 17-A, supra, Contention 34 is nontimely and fails to satisfy 10 C.F.R. §§ 2.309(c)(1) and (f)(2).

## III. The Admissibility of (Amended) Consolidated Contention Riverkeeper EC-3/Clearwater EC-1.

Riverkeeper seeks to have its Consolidated Contention on the Environmental Report recast as a contention on the Draft SEIS, and it requests that its contention be amended, if necessary, to obtain that result. As several Boards have made clear, to the extent that Riverkeeper seeks to apply its previous assertions concerning the ER to the Staff's draft EIS, no amendment is necessary. *Vogtle ESP Site*, LBP-08-2, 67 NRC at 63-64; *PFS,* LBP-01-23, 54 NRC at 172. Accordingly, the Staff does not oppose Riverkeeper's request that Consolidated Contention Riverkeeper EC-3/ Clearwater EC-1 be applied to the Staff's Draft SEIS, notwithstanding the fact that Riverkeeper fails to demonstrate that the assertions contained in the consolidated contention, as previously admitted, pertain to the Staff's Draft SEIS. Accordingly, Riverkeeper's Consolidated Contention on the ER may be deemed a contention on the identical issue in the Draft SEIS.

## CONCLUSION

For the foregoing reasons, the Staff respectfully opposes, in part, the admission of New York Contentions 16-A and 17-A, and opposes the admission of New York Contentions 33 and 34; the Staff does not oppose the admission of New York Contention 12-A or Riverkeeper's modification of Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 as contentions challenging the Staff's Draft SEIS.

Respectfully submitted,

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Dated at Rockville, Maryland
this 24th day of March 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO AMENDED AND NEW CONTENTIONS FILED BY THE STATE OF NEW YORK AND RIVERKEEPER, INC., CONCERNING THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, dated March 24, 2009, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 24th day of March, 2009:

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