April 7, 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-LR/ 50-286-LR
	)	
(Indian Point Nuclear Generating	)	
Units 2 and 3)	)	

NRC STAFF'S ANSWER TO HUDSON RIVER SLOOP CLEARWATER'S PETITION TO FILE NEW CONTENTION, BASED UPON NEW INFORMATION REGARDING ENVIRONMENTAL AND PUBLIC HEALTH IMPACTS OF USING THE HUDSON RIVER AS A DRINKING WATER SUPPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's ("Board") February 4, 2009, Memorandum and Order (Summarizing Pre-Hearing Conference), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to the motion for leave to file, and the petition to file a new contention, submitted by Hudson River Sloop Clearwater, Inc. ("Clearwater") on March 19, 2009[1] in response to a January 26, 2009 letter from the New York State ("NYS") Department of Environmental Conservation ("DEC") regarding New York State Environmental Quality Review Act (SEQR) lead agency

[1] *See* (1) "Hudson River Sloop Clearwater Inc.'s Motion for Leave to File A New Contention Regarding Environmental Impacts and Public Health Impacts of Indian Point on the Hudson Water As A Source of Drinking Water Supply" ("Motion"); (2) "Hudson River Sloop Clearwater, Inc.'s Petition To File A New Contention Based Upon New Information" ("Petition"), and exhibits attached thereto; (3) Declaration of Manna Jo Greene; and (4) Certificate of Service, each dated March 19, 2009.

coordination.[2] For the reasons set forth below, the Staff opposes the admission of the proffered contention and recommends that Clearwater's Motion and Petition be denied.

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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[2] *See* Letter dated January 26, 2009, from Betty Ann Hughes, Chief, SEQR & Training Units, NYS DEC Environmental Permits, Albany, to various involved agencies regarding Coordination to Establish SEQR Lead Agency for Proposed Long-Term Water Supply Project (LTWSP) by United Water New York, Inc. (UWNY). ("DEC Letter") attached as Exhibit 1 to Clearwater's Petition.

[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 (continued. . .)

On November 30, 2007, petitions for leave to intervene were filed by various petitioners,[7] and on December 10, 2007, petitions for leave to intervene were filed by other petitioners, including Clearwater.[8] In its Initial Petition, Clearwater filed six environmental contentions, including Clearwater Contention EC-1 ("Failure of Environmental Report to Adequately Address the Impacts of Known and Unknown Leaks"). Initial Petition at 18-24.

On July 31, 2008, the Board ruled on the petitioners' requests for hearing and the admissibility of their contentions.[9] In this regard, the Board found, *inter alia*, that Clearwater had demonstrated standing and had proffered at least one admissible contention.[10] In particular, as pertinent here, the Board admitted Clearwater Contention EC-1, and consolidated it with Riverkeeper Contention EC-3 ("Failure to Adequately Analyze Impacts of Spent Fuel Pool

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(. . .continued)

an Extension of Time to CRORIP Within Which to File Requests For Hearing)," dated December 5, 2007.

[7] Included among these was a request for hearing and petition to intervene filed by Riverkeeper, Inc. ("Riverkeeper"). *See* "Riverkeeper Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant" ("Riverkeeper's Initial Petition"), filed November 30, 2007.

[8] *See* "Hudson River Sloop Clearwater Inc.'s Petition to Intervene and Request for Hearing," dated December 10, 2007 (Clearwater's "Initial Petition").

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

[10] *See id.* at 188-192, admitting Clearwater EC-1 ("Failure Of ER To Adequately Address The Impacts Of Known & Unknown Leaks") (*id.* at 188). The Board noted that Clearwater EC-1 will be consolidated with Riverkeeper EC-3 (*id.* at 192). In the Order, the Board stated, "In support of the need to address the impacts of the contamination on the Hudson River, Clearwater notes that four municipalities currently take drinking water from the Hudson River and that *there is a plan in development to build a large water intake facility to serve Rockland County.*" Order at 191 (*citing* Hudson River Sloop Clearwater Inc's Reply to Entergy and the [NRC] Responses to Clearwater Petition to Intervene and Request for Hearing (Feb. 8, 2008) ("Clearwater Reply") at 4-5) (emphasis added).

Leaks"); this contention was then designated Consolidated Contention Riverkeeper EC-3/ Clearwater EC-1 ("Spent Fuel Pool Leaks"). *See* LBP-08-13, slip op. at 188-92, 227; 228.[11]

On December 22, 2008, the Staff issued its Draft Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996).[12] In accordance with the Board's ruling on certain Intervenors' request for an extension of time, contentions addressing the Draft SEIS were due to be filed by February 27, 2009.[13]

On March 19, 2009, Clearwater submitted its proposed new contention, purportedly based on new information regarding which NYS governmental entity will serve as lead agency for review of two applications for permits by UWNY for a water desalination plant on the Hudson River, in the Town of Haverstraw, to be used as a source of drinking water for Rockland County, NY as part of the LTWSP. Petition at 1-2. Clearwater failed to note, however, that over one year ago it had submitted substantially similar information to support the

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[11] In accordance with the Board's instructions, LBP-08-13, slip op. at 228, Riverkeeper and Clearwater (a) submitted a draft of the consolidated contention for consideration by the Board, and (b) designated Riverkeeper as the lead intervenor for litigation of the consolidated contention. *See* "Consolidated Contention of Petitioners Riverkeeper, Inc. (EC-3) and Hudson River Sloop Clearwater, Inc. (EC-1)-Spent Fuel Pool Leaks," dated August 21, 2008, at 2. Significantly, nowhere in the draft revised Consolidated Contention, submitted by Riverkeeper and Clearwater on August 21, 2008, was there any mention of drinking water treatment plants; nonetheless, the Board cited Clearwater's earlier references to those plants in its order denying Entergy's motion for reconsideration of the admission of Clearwater Contention EC-1. See "Memorandum and Order . . . (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1)," dated December 18, 2008, at 14.

[12] *See* (1) letter from Sherwin E. Turk to the Board, dated December 24, 2008; and (2) letter from Sherwin E. Turk to the Board, dated January 15, 2009, enclosing "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").

[13] *See* "Memorandum and Order (Summarizing Pre-Hearing Conference)," dated February 4, 2009 ("Pre-Hearing Conference Order"), at 2-3; Tr. at 768.

admission of its Contention EC-1,[14] and that the Board explicitly cited that information, (a) in ruling on the contention's admissibility and (b) in denying the Applicant's motion for reconsideration of that ruling.[15] Clearwater's effort to submit its new contention based upon substantially similar information should be denied; moreover, inasmuch as Clearwater specifically designated Riverkeeper as lead intervenor on the consolidated contention, its effort to supplement the consolidated contention with additional information should be rejected.

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 late-filed 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 Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC__,(April 1, 2009), slip op at 31-32; *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

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[14] *See* "Hudson River Sloop Clearwater Inc's Reply to Entergy and the [NRC] Responses to Clearwater Petition to Intervene and Request for Hearing," dated February 8, 2008, at [unnumbered] 4-5 (stating, "at least four municipalities in the tidal portions of the Hudson River do take drinking water from the River, and United Water New York is currently developing plans to construct a 10-15 million gallon per day facility to serve Rockland County. Haverstraw Bay, one of the other proposed locations, is located directly across from Indian Point").

[15] *See* (1) LBP-08-13, slip op. at 191; and (2) "Memorandum and Order . . . (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1)," dated December 18, 2008, at 14.

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 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.

10 C.F.R. § 2.309(f)(2); emphasis added.[16]

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

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[16] In this proceeding, the Board declined to set a schedule for the filing of new or amended contentions, stating that it would follow the requirements of 10 C.F.R. § 2.309(f)(2) and NRC case law. *See* Pre-Hearing Conference Order at 5.

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;
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> (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., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, slip op. at 31; *id.,* LBP-06-22, 64 NRC 229, 234 n.7 (2006). To show good cause for late filing under 10 C.F.R. § 2.309(c)(1), "a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-09-05, 69 NRC __ (March 5, 2009), slip op. at 15; emphasis in original.

As the Commission has recognized, the requirements governing late-filed contentions and untimely filings, set forth in 10 C.F.R. §§ 2.309(c)(2) and 2.309(f)(2), "are stringent." *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC__ (April 1, 2009), slip op at 31. Further, each of the factors set forth in the regulations is required to be addressed in a requestor's nontimely filing. *Id.* at 31-32. Indeed,

under NRC case law, a petitioner's failure to address the late-filing criteria in 10 C.F.R. § 2.309(c) or 10 C.F.R. § 2.309(f)(2) "is reason enough" to reject the proposed new contention. *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-09-05, 69 NRC __ (March 5, 2009), slip op. at 14.

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). *Id.,* slip op. at 32. 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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> (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;
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> (vi) In a proceeding other than one under 10 CFR 52.103, 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, emphasis added.[17] 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

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[17] 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).

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 Pre-Hearing Conference 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.[18] The Board's admonition here is consistent with established case law. *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

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

> 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.* [19]

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 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. <u>Clearwater's Proffered New Contention and Bases Should Be Rejected.</u>

In its late-filed contention, Clearwater asserts:

> The Environmental Report submitted by Entergy and Supplement 38 to Generic Environmental Impact Statement for License Renewal for Nuclear Plants, Regarding Indian Point Generating Units 2 and 3 (hereinafter referred to as "DSEIS") issued by the NRC Staff on December 22, 2008 fail to satisfy the requirements of NEPA, 42 U.S.C. §[ ]4332 *et seq.*, and NRC regulations implementing NEPA, because the ER and DSEIS do not assess the impacts of the license renewal on drinking water quality and drinking water degradation as it relates to the use of the Hudson River as a source of drinking water.

Petition at 8. Clearwater cites a letter from the NYS DEC, dated January 26, 2009 (Petition Exhibit 1), in which the NYS DEC announced that it is initiating review of the LTWSP permit application under the NYS Environmental Quality Review Act. *See* Clearwater Petition at 2;

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[19] 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).

Exhibit 1, at 1. Clearwater asserts that information which it "discovered" on February 25, 2009, shows that the Hudson River is a source of drinking water. *See id.* at 14-15. Further, Clearwater asserts that tritium, cesium-137 and strontium-90 have been detected in the groundwater at the Indian Point facility and that this groundwater flows into the Hudson River, *Id.* at 4-5. In addition, Clearwater states the LTWSP desalination facility will "extract contaminated water on a continuing and regular basis," and it asserts that the LTWSP's planned reverse-osmosis treatment method will not be effective in removing tritium, cesium-137, and strontium-90 from the water. *Id.* at 2, 3 . Finally, Clearwater lists four other municipal water treatment facilities along the river, and states that the impacts of license renewal on the water quality of these water supplies are neither assessed nor discussed in the ER and DSEIS, and that the DSEIS erroneously states that "there is no drinking water exposure pathway to humans that is affected by the contaminated ground water conditions at the IP2 and IP3 site." *Id.* at 6-7.

The Staff opposes admission of Clearwater's proposed new contention because, contrary to Clearwater's assertions, the contention is not based upon new information. In fact, as set forth below, the proposed desalination plant was previously cited by Clearwater in support of Clearwater Contention EC-1, and was explicitly cited by the Board in its decisions admitting that contention and denying reconsideration thereof.

A. Information Concerning the Proposed Water Plant Was Publicly Available and Known to Clearwater Long Ago.

Information regarding the proposed water plant has been available publicly for several years. For example, a news article dated January 30, 2007 on the website of *The New York*

Times describes the submission of a plan by UWNY to build a desalination plant along the Hudson River, stating as follows:[20]

> United Water, which supplies water to more than two dozen municipalities across the country, estimates that construction of the desalination plant would cost nearly $80 million, which the company will pay for in part by raising rates. It would be built in the vicinity of Stony Point, just across the Hudson from the Indian Point nuclear plant, and include a complex treatment system that must remove not only toxic chemicals like PCBs, tritium and strontium 90, but also an array of dissolved solids like sodium, sulfate and magnesium.

On December 10, 2007, almost a year after this article appeared in *The New York Times*, Clearwater filed its initial petition to intervene in the Indian Point License Renewal Proceeding – in which it proffered, *inter alia*, Clearwater EC-1, "Failure of ER [the Environmental Report] to Adequately Address the Impacts of Known & Unknown Leaks." Initial Petition at 18. After responses in opposition to the contention were filed by Entergy and the Staff, Clearwater filed its February 8, 2008 reply to the Answers of Entergy and the Staff, in which Clearwater stated:

> [A]t least four municipalities in the tidal portions of the Hudson River do take drinking water from the River, and United Water New York is currently developing plans to construct a 10 -15 million gallon per day facility to serve Rockland County. Haverstraw Bay, one of the other proposed locations, is located directly across from Indian Point.

Initial Reply at 4-5. Thus, Clearwater is already on the record in this proceeding as having been aware of the potential water treatment plant, since at least February 2008.

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[20] See http://www.nytimes.com/2007/01/30/nyregion/30water.html last visited April 6, 2009. The article noted that the plan was developed in 2006; UWNY proposed a rate increase in Rockland County and, in turn, was ordered by the State Public Service Commission to create a long-term solution for the county's growing water demands. As described in the article, water would be pumped through carbon filters to leach out pollutants, then pushed through enormous membranes that remove salt through a process called reverse osmosis.

Further, on July 14, 2008 at a transcribed public meeting by the Town of Haverstraw, New York, an individual ("Ms. Greene") identified herself as Clearwater's Environmental Director, and expressed concern about the availability of energy for the proposed desalination facility.[21] Ms. Greene explicitly related her concern to Indian Point and the potential for radioactive materials in the river water, stating, "Have you tested the water with regard to radioactivity from Indian Point? And, if so, what have you found?" Town Tr. at 105.

Moreover, the Board in this proceeding has explicitly cited Clearwater's concerns about the proposed water treatment plant, in its rulings on Clearwater contention EC-1. Thus, on July 31, 2008, the Board explicitly acknowledged Clearwater's concern that "that there is a plan in development to build a large water intake facility to serve Rockland County."[22] Similarly, the Board explicitly cited Clearwater's concerns about the proposed water treatment plant in its Memorandum and Order denying Entergy's motion for reconsideration of the admission of Clearwater Contention EC-1.[23]

Thus, it is indisputable that Clearwater has been aware of the proposed LTWSP for more than a year prior to filing the instant late-filed contention.

Clearwater asserts that it filed its contention 22 days from the date that new information was "discovered on February 25, 2009," which it claims was "materially different" from any prior

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[21] *See* Transcript of United Water Special Permit Application, July 14, 2008, at 103-07 (available at http://www.townofhaverstraw.us/pdfs/71408_publicmeeting_UnitedWater.pdf#zoom=100 last visited April 1, 2009 ("Town Tr.").

[22] LBP-08-13 at slip op. 191, *citing* Clearwater's Initial Reply at 4-5.

[23] "Memorandum and Order . . . (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1)," dated December 18, 2008, at 14.

information that the Hudson River was not a source of drinking water. Petition at 14-15. Clearwater states:

> Hudson River Sloop Clearwater, Inc. ("Clearwater") submits this contention because it has discovered that the New York State Department of Conservation ("DEC") has received, and has issued a letter that it will take lead agency status on, an application of United Water of New York ("UWNY") to build a desalination plant to extract water from the Hudson River for use as municipal drinking water for Rockland County.

Petition at 1. Similarly, Clearwater's representative, Manna Jo Greene, declares:

> On February 25, 2009, I learned that the New York State Department of Environmental Conservation ("DEC") had sought lead agency status in response to receiving a permit application from United Water New York ("UWNY") seeking to build a desalination plant to extract potable water from the Hudson River and therefore the Hudson River would become a source of drinking water.

Declaration of Manna Jo Greene at 2.

Significantly, although Clearwater asserts that the new information that DEC "has issued a letter that it will take lead agency status" for review of the water plant,[24] nothing in Clearwater's proposed new contention and supporting bases is related to the fact that DEC will serve as the lead reviewing agency and is initiating its review of the LTWSP permit application. Moreover, Clearwater has not shown how the DEC's assumption of lead agency status, or that fact that it is initiating its review, is relevant to the Indian Point license renewal application, or why it believes that this information is materially different, for purposes of this proceeding, from any information that was previously available to it. In fact, the DEC's decision to serve as lead agency for the NYS review of this long-known plan for a water plant, and the DEC's initiation of its review, simply do not provide a sufficient basis for the admission of a new contention, in that

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[24] Petition at 1.

they add nothing that is material to this proceeding. Moreover, Clearwater has put forward no argument or explanation to demonstrate the relevance or materiality of the NYS DEC's assumption of lead agency role or the initiation of its permit application review.[25]

In addition to the information not being new, Clearwater improperly asserts that its contention is timely because Clearwater filed within 22 days of when it became aware of the contended issue. Petition at 14-15. However, as the Commission recently stated in *Millstone*, the issue is when the information was "*reasonably available to the public*, not merely that the *petitioner* recently found out about it." *Millstone,* CLI-09-05, 69 NRC at __ , slip op. at 15. Under this clearly enunciated standard, it is clear that Clearwater's filing is impermissibly late with no showing of good cause.

B. Clearwater's New Contention Is Untimely Insofar as It Is Based On the Applicant's ER or the Staff's Draft SEIS.

On December 22, 2008, the Staff issued its Draft SEIS concerning the Indian Point LRA. On January 14, 2009, the Board granted New York and Riverkeeper's request for a 37-day extension of time, until February 27, 2009, in which to file contentions related to the Draft SEIS.[26] 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

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[25] Clearwater cannot claim that the DEC's lead agency status is a surprise or was otherwise unexpected. In fact, in the Town Meeting attended by Clearwater, Riverkeeper's representative stated that it requested that DEC serve as lead agency for the environmental review of pilot water project. Town Tr. at 92. Later during the meeting, Clearwater expressed its opinion that Riverkeeper's lawyers would "sort out whether or not it is required that a full environmental impact review occur for this project." *Id.* at 107. The transcript thus demonstrates that Clearwater knew of the potential for DEC to be lead agency long before DEC's letter of January 29, 2009, and long before Clearwater filed the current contention based upon "new" information.

[26] *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.

Draft SEIS. Tr. at 767-68. The Board will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed."[27]

Clearwater, in its new contention, discusses several existing water treatment plants and alleges that "[t]he impacts of license renewal on the water quality of these water supplies are not assessed or even mentioned in the ER or the DSEIS." Petition at 3. An omission of information on existing water plants cannot reasonably be viewed as newly discovered information, particularly in light of Clearwater's assertion that the Applicant's ER similarly omitted reference to those plants. *Id.* at 3. Clearwater's claims of an omission from the ER of information on an existing water treatment facility should have been made during the initial filing against the applicant's ER -- and in any event, should have been made on or before February 27, 2009, when contentions addressing the Draft SEIS were due to be filed. All such claims are now impermissibly late. *See* Pre-Hearing Conference Order at 3.

Further, in the Draft SEIS, the Staff discussed the issue of leaks, drinking water, and dose impacts to the public. DSEIS at 2-108 -- 2-110. In pertinent part, the Staff stated:

> Currently, there is no drinking water exposure pathway to humans that is affected by the contaminated ground water conditions at the IP2 and IP3 site. Potable water sources in the area of concern are not presently derived from ground water sources or the Hudson River, a fact confirmed by the New York State Department of Health.

Id. at 2-108. Clearwater disputes this Draft SEIS conclusion. *See* Clearwater Petition at 3.

Under the Commission's rules, a new contention on the Draft SEIS is permissible if there are data or conclusions in the Draft SEIS that differ significantly from the data or conclusions in the ER. 10 C.F.R. § 2.309(f)(2). Contrary to this requirement, however,

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

Clearwater repeatedly asserts that the DSEIS has the same omission as the ER. *See, e.g.* Petition at 3 ("The impacts of license renewal on the water quality of these water supplies are not assessed or even mentioned in the ER or the DSEIS."). Clearwater has made no showing of a significant difference between the Applicant's ER and the NRC Staff's Draft SEIS; thus, its new contention should not be admitted, under 10 C.F.R. § 2.309(f)(2).

Moreover, Clearwater's new contention should be rejected as an impermissible attempt to support Clearwater's original contention EC-1. Because the late-filing criteria are not met, such late-filed support is impermissible under the Commission's rules. *See Oyster Creek*, CLI-09-07, slip op at 32.

C. The Contention Does Not Meet the Criteria in 10 C.F.R. § 2.309(f)(1).

Clearwater's proposed new contention fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v), in that it is altogether lacking in support.

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), a contention is required to have factual support. Clearwater claims that the leaks are significant and are likely to increase. Petition at 7. Clearwater offers no facts to support its claim of increasing leaks. Clearwater provides no support for this assertion; the Declaration of Ms. Greene does not support the argument that leaks are likely to increase, and Clearwater makes no effort to reconcile its claim against the Applicant's mitigation activities documented in the Draft SEIS. *See* Draft SEIS at 2-107 -- 2-108 (discussing ground water monitoring and corrective actions). Also, Clearwater has provided no factual support for its central and significant concern, *i.e.,* that contamination from Indian Point will impact the water quality of the proposed water treatment plant. Clearwater states that contaminated water is migrating toward the Hudson River (Petition at 11), but provides no discussion about river volumetric flow rates, water dilution factors, or any other information that

would support Clearwater's claim that any contaminated groundwater will adversely impact the water quality of the potential water treatment plant..

CONCLUSION

For the foregoing reasons, the Staff respectfully opposes the admission of Clearwater's new contention and recommends that it be rejected.

Respectfully submitted,

David Roth
Sherwin Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of April 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 HUDSON RIVER SLOOP CLEARWATER'S PETITION TO FILE NEW CONTENTION, BASED UPON NEW INFORMATION REGARDING ENVIRONMENTAL AND PUBLIC HEALTH IMPACTS OF USING THE HUDSON RIVER AS A DRINKING WATER SUPPLY," dated April 7, 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 7th day of April, 2009:

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