

November 20, 2009

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

Before Administrative Judges:  
Lawrence G. McDade, Chair  
Dr. Richard E. Wardwell  
Dr. Kaye D. Lathrop

In the Matter of	)	
	)	
Entergy Nuclear Operations, Inc.	)	Docket Nos.
(Indian Point Nuclear Generating	)	50-247-LR
Units 2 and 3)	)	and 50-286-LR
	)	

**ANSWER OF RIVERKEEPER, INC. IN SUPPORT  
OF HUDSON RIVER SLOOP CLEARWATER  
INC.'S NEW CONTENTIONS EC-7 AND SC-1**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(h)(1), Riverkeeper, Inc. ("Riverkeeper") respectfully submits this Answer in support of the new contentions filed by Hudson River Sloop Clearwater, ("Clearwater") on October 26, 2009.<sup>1</sup> Clearwater's Petition asserts that, in light of new information concerning the U.S. Nuclear Regulatory Commission's ("Commission" or "NRC") position on "waste confidence," in the instant relicensing proceeding concerning the Indian Point nuclear power plants ("Indian Point"), Entergy Nuclear Operations, Inc. ("Entergy") and the Nuclear Regulatory Commission Staff ("NRC Staff") must analyze the environmental impacts of long-term onsite nuclear waste storage (EC-7), as well as ensure adequate aging management programs for long-term onsite nuclear waste storage structures (SC-1). For the following

<sup>1</sup> Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add New Contentions Based Upon New Information (October 26, 2009) (as corrected by the version electronically served on parties on November 6, 2009) ("Clearwater's Petition").

reasons, Clearwater has put forth two viable contentions which Riverkeeper urges the Atomic Safety and Licensing Board (“ASLB”) to admit for resolution at the forthcoming adjudicatory hearing in this proceeding.

## **II. CLEARWATER’S NEW CONTENTIONS HAVE A PROPER BASIS IN NEW MATERIAL INFORMATION AND SHOULD BE ADMITTED FOR HEARING**

Clearwater’s new contentions are based on recent Commissioner Votes which articulate the majority of the Commission’s current position on long-term nuclear waste storage in the United States. Based on this material new information, it is apparent that Entergy and the NRC Staff can no longer avoid site-specific consideration of the environmental impacts and safety implications of long-term nuclear waste storage onsite at Indian Point in the instant relicensing proceeding.

### **A. The Commissioner Votes on NRC’s Final Update of the Waste Confidence Decision Represent the Commission’s Current Position Concerning Permanent Nuclear Waste Disposal**

In September 2009, the three sitting Commissioners of the NRC voted on a draft final update of the Commission’s “Waste Confidence Decision.”<sup>2</sup> Commissioner’s Klein and Svinicki, together constituting a majority of the current Commission, declined to approve the proposed update since it failed to take into account recent changes to the Nation’s plans for long-term high-level waste disposal. In particular, both votes explicitly recognize that the long intended plan for a geologic repository at Yucca Mountain is no longer an option,<sup>3</sup> and expressed uncertainty about the future of long-term nuclear waste disposal.

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<sup>2</sup> See U.S. Nuclear Regulatory Commission, Commission Voting Records (CVR) for 2009, <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/> (last visited Nov. 20, 2009).

<sup>3</sup> As demonstrated by the lengthy discussion provided in Clearwater’s Petition, there is no dispute that the current Administration has brought the axe down on the Yucca project. Most recent accounts indicate that the U.S. Department of Energy intends to stop pursuing a license for the Yucca repository by this December. See, e.g., Keith Rogers, *Yucca Mountain: Memo casts doubt on license for Yucca repository*, LAS VEGAS REVIEW-JOURNAL (Nov. 10, 2009), <http://www.lvrj.com/news/memo-casts-doubt-on-license-for-yucca-repository-69639342.html> (last visited Nov. 20, 2009).

Commissioner Klein acknowledges the current plan to “eliminate the Yucca Mountain project,” stating that we are “in the midst of a dynamic environment that promises to affect the Nation’s approaches to storage and disposal of [high level waste] and [spent nuclear fuel].”<sup>4</sup> Commissioner Klein further gave credence to the “many commenters [who] argued that aspects of the proposed update were too speculative, particularly the Commission’s proposed estimate of a target date for the availability of a geological repository.”<sup>5</sup>

Commissioner Svinicki similarly acknowledges the “current cloud of uncertainty over the road ahead.”<sup>6</sup> Commissioner Svinicki plainly expressed concern that entirely new prospective approaches to long-term radioactive waste disposal would affect the Commission’s ability “to attach updated timeframes to the availability of disposal options.”<sup>7</sup> Svinicki squarely states that the timeframe “*is a prediction* that a repository will be available,” and based on the current reality, it “is a particularly difficult time to be in the prediction business.”<sup>8</sup>

Thus, these voting records indicate that the Commission currently cannot determine how and when permanent disposal of the country’s nuclear waste will occur.

#### **B. The NRC No Longer Has A Basis to Evade Environmental and Safety Review of Long-Term On-Site Nuclear Waste Storage**

The NRC currently relies upon 10 C.F.R. § 51.23, which codifies the Waste Confidence Decision findings, to avoid site-specific review of the environmental impacts of onsite nuclear

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<sup>4</sup> Notation Vote of Commissioner Klein, SECY-09-0090 – Final Update of the Commission’s Waste Confidence Decision (September 16, 2009), *available at*, <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-dek.pdf> (hereinafter “Klein Vote”), at 1.

<sup>5</sup> *Id.*

<sup>6</sup> Notation Vote of Commissioner Svinicki, SECY-09-0090 – Final Update of the Commission’s Waste Confidence Decision (September 24, 2009), *available at*, <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-cls.pdf> (hereinafter “Svinicki Vote”), at 3.

<sup>7</sup> *See id.* at 1; *see also id.* at 2 (“[T]he challenge of shutting one’s ears to the din of the current debate is felt most acutely in attempts to establish the estimated ‘timeframe’ for repository availability.”)

<sup>8</sup> *Id.* at 2 (emphasis in original).

waste storage.<sup>9</sup> This is true in the instant proceeding, where the NRC has cited to the existing generic determination to justify the complete lack of review of long-term spent fuel storage issues.<sup>10</sup> However, continued reliance upon this regulatory preclusion is inappropriate in light of the Commission's votes on the proposed rule update.

In particular, 10 C.F.R. § 51.23(a) contains a generic finding that spent fuel "can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation." This regulation further states that the NRC has "reasonable assurance that at least one mined geologic repository will be available [by 2025], and sufficient repository capacity will be available within 30 years beyond the licensed life for operation" for permanent nuclear waste disposal.

However, the Commission has now explicitly acknowledged that a repository will not become available as anticipated, and has articulated uncertainty as to when sufficient disposal capacity will be ready.<sup>11</sup> Indeed, in view of the Commission's recognition of the current political reality of permanent nuclear waste disposal, it is evident that spent fuel will actually remain at power reactor sites in pools or dry cask storage for decades longer than the current regulation anticipates, if not indefinitely. Thus, reliance upon a generic determination of no significant impact which relates to a definitive timeframe of "temporary" onsite storage for 30 years beyond the expiration of a reactor's operation, is patently inappropriate.

Although the current regulation has not yet been officially repealed, based on the Commission's recent voting record, it is clear that the rule no longer has any valid basis. The

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<sup>9</sup> 10 C.F.R. § 51.23(b); *see also* Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, at § 6.4.6.3.

<sup>10</sup> *See* 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, Main Report (U.S. Nuclear Regulatory Commission December 2008), at xiv, 1-5.

<sup>11</sup> *See* Klein Vote; Svinicki Vote.

ASLB may be inclined to determine that the foregoing is “an impermissible challenge to NRC regulations,” similarly to how it disposed of a contention proffered by New York State in response to NRC Staff’s issuance of the Draft Supplemental Environmental Impact Statement.<sup>12</sup> New York State’s contention had asserted that the NRC’s publication of the Waste Confidence Decision update in the federal register in October 2008 undermined the generic environmental findings in the regulations, necessitating site-specific environmental review in the instant proceeding.<sup>13</sup> Your honors rejected that contention as premature since it was based on proposed revisions and the Commission had not made a final determination on the waste confidence rule.<sup>14</sup>

In stark contrast, here Clearwater’s new contentions are based on positions articulated by the Commissioners themselves. The Commissioner Votes discussed above constitute meaningful, well thought-out positions of the heads of the agency. Thus, while there is still no formal final determination as to the actual Waste Confidence Decision update, there is a definitively articulated determination as to the future of Yucca Mountain, which in turn, definitely removes the foundation of the current rule. Notwithstanding absence of a formal, official rule change, it is clear that the Commission no longer has “reasonable assurance” in the currently codified generic determinations. Accordingly, Entergy and NRC Staff should not be allowed to rely on a completely invalid regulation simply because the formal rulemaking has not been closed out.

Since nuclear waste will now remain onsite at Indian Point for the indefinable, foreseeable future, and since no consideration of long-term on-site nuclear waste has been

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<sup>12</sup> Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR, 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order Ruling on New York State’s New and Amended Contentions (June 16, 2009).

<sup>13</sup> State of New York Supplemental Contentions Concerning NRC Staff’s Draft Supplemental Environmental Impact Statement (Feb. 27, 2009), at 37-46.

<sup>14</sup> See *supra* Note 11, at 16.

performed to date in the instant relicensing proceeding, Clearwater has presented two valid contentions which should be admitted to a hearing. In order to fulfill all obligations of the Atomic Energy Act and the National Environmental Policy Act (“NEPA”), Entergy and the NRC Staff must perform site-specific environmental and safety analyses associated with long-term onsite nuclear waste storage. As discussed at length in Clearwater’s Petition and supporting expert exhibit, long-term nuclear waste storage implicates significant environmental and safety concerns which require analysis in light of the Commissioners’ votes.

**III. AT A MINIMUM THE ASLB SHOULD HEED NEW YORK STATE’S SUGGESTION TO DIRECTLY REQUEST THE COMMISSION’S FEEDBACK OR DEFER RULING UNTIL THE COMMISSION HAS TAKEN FURTHER ACTION**

Riverkeeper supports the arguments of New York State that, at a minimum, the ASLB should certify the issue directly to the Commission or defer ruling on the question of the admissibility of Clearwater’s new contentions until the Commission has taken further action.<sup>15</sup>

**A. Certification of the Issue to the Commission is Appropriate**

Pursuant to 10 C.F.R. § 2.319(l), a presiding officer has the authority to certify questions directly to the Commission. 10 C.F.R. § 2.323(f) offers guidance on when it is appropriate and helpful for a presiding officer to certify a question to the Commission:

If, in the judgment of the presiding officer, prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity, the presiding officer may refer the ruling promptly to the Commission.<sup>16</sup>

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<sup>15</sup> Answer of the State of New York to Hudson River Sloop Clearwater, Inc.’s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point (November 19, 2009).

<sup>16</sup> 10 C.F.R. § 2.323(f).

Section 2.341(f) in turn explains the requirements by which the Commission would accept such a certified question: an “issue certified to the Commission under § 2.323(f), will be reviewed if the certification . . . raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”<sup>17</sup>

Based on the foregoing criteria, certification to the Commission requesting guidance on how to proceed on this matter would be appropriate and beneficial. First, it would be highly detrimental to the public interest if interested entities were forced to await final formal resolution of the Waste Confidence Decision update to proffer a contention on this issue. This is simply because the case will be proceeding to hearing by approximately summer 2010, and will in all likelihood conclude before the Waste Confidence Decision update is finalized. This would prevent intervenors from litigating critical environmental and safety concerns, and would preclude review of long-term on-site nuclear waste storage at Indian Point, which has serious implications for the public.

Moreover, should the Waste Confidence Decision update become finalized while the Indian Point relicensing proceeding is still ongoing, intervenors would undoubtedly introduce contentions at that time. Thus, certifying this issue to the Commission now could prevent future delay caused by adjudication of new or amended contentions. Indeed, resolving whether this issue is litigable at the earliest opportunity by asking for the Commission to rule now would help ensure that the proceeding goes forward in an orderly and timely fashion, which is in the interest of all parties.

In addition, the issue is a novel one, which the Commission is well-suited to speak to. Never before has the Commission articulated that it no longer has reasonable assurance in the siting of a permanent waste repository at Yucca Mountain. This alters the foundation of the

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<sup>17</sup> 10 C.F.R. § 2.341(f).

existing regulatory scheme and poses critical new issues for the ASLB and the Commission to address as discussed above and in Clearwater's Petition. Moreover, since the Commission's Votes form the basis for Clearwater's new contentions, the Commission would be in a perfect position to determine the appropriateness of Entergy and the NRC Staff's apparent reliance on now baseless regulations.

**B. The ASLB Should Defer Action on Clearwater's Petition Until the Commission has Taken Final Action**

Should the ASLB choose not to certify this issue to the Commission, then, at a minimum, the Board should defer ruling pursuant to 2.319(g) and (k), until the Commission has taken final action on the Waste Confidence Decision update. Although this would cause delay, it would be necessary to ensure fairness to the parties and prevent detriment to the public interest which would result from failing to allow the parties to litigate this issue now.

**IV. CONCLUSION**

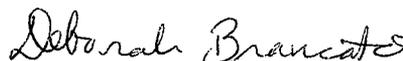
Based on the foregoing, Riverkeeper respectfully urges the ASLB to admit Clearwater's two new contentions for a hearing, or, in the alternative, certify the issue to the Commission or defer ruling on the admissibility of Clearwater's contentions until the Commission has taken further action.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on November 20, 2009, copies of the foregoing Answer of Riverkeeper, Inc. in Support of Hudson River Sloop Clearwater Inc.'s New Contentions EC-7 and SC-1, were served on the following by first-class mail and e-mail:

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