

RAS E-305

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

Entergy Nuclear Operations, Inc.  
Indian Point Nuclear Generating Units Nos.  
2 & 3, Application for Hearing Regarding  
Renewal of Facility Operating Licenses Nos.  
DPR-26 and DPR-64 for Additional 20-year  
Period

Docket Nos. 50-247 and 50-286

**ANSWER OF RICHARD BLUMENTHAL, ATTORNEY GENERAL OF  
CONNECTICUT 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**

**I. INTRODUCTION**

On November 30, 2007, Richard Blumenthal, Attorney General of Connecticut ("Attorney General"), submitted a Petition to Intervene ("Petition") in response to the filing of an Application for Operating License Renewal ("Application") for Indian Point Nuclear Generating Units 2 and 3 by Entergy Nuclear Operations, Inc. ("Entergy") that is currently pending before the Nuclear Regulatory Commission ("Commission"). The Attorney General's contentions primarily focused on the dangers associated with spent nuclear fuel storage and the problems associated with emergency evacuation in the event of an attack or accident at Indian Point. The State of Connecticut has been granted interested governmental party status.

The Attorney General of Connecticut now respectfully submits this answer in response to and in support of the proposed additional contentions submitted by Hudson River Sloop Clearwater, Inc., on October 26, 2009; and the Answer of the New York Attorney General filed on November 19, 2009. In its additional contentions, Clearwater seeks a review of the environmental impacts of the indefinite storage and disposal of high-level radioactive waste at Indian Point (EC-7) as well as the program to oversee the high-density-storage spent fuel pool structures and dry cask storage cylinders (SC-1). Recent developments, specifically official statements by the Commissioners, leave no doubt that important questions remain regarding safety and security of long-term storage of spent fuel under the unique conditions at Indian Point. As the Attorney General has

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repeatedly stated, Indian Point relicensing raises unique concerns to the State of Connecticut. Fully one-third of the population of Connecticut lives in the area potentially affected by an accident or attack on Indian Point. Any evacuation from Indian Point would primarily impact the State of Connecticut. Many of the principal safety and security issues at Indian Point relate to the storage of spent nuclear fuel at the site. The NRC has a legal duty to fully and thoroughly evaluate the safety and security of this fuel if it is to license the operation of this plant for an additional 30 years. As discussed below, Clearwater now raises new issues that show that the underlying basis for the Commission's past assurances regarding spent fuel storage are without support in the administration record. The Clearwater contentions should therefore be admitted.

### **Background**

The storage and disposal of nuclear waste pose serious health and environment concerns that require analysis under the National Environmental Policy Act (NEPA). Thirty years ago the Court of Appeals for the District of Columbia Circuit instructed the Commission to determine whether there was reasonable assurance that an off-site storage solution will be available by 2007-2009. *Minnesota v. NRC*, 602 F.2d 412, 418, 420 (D.C. Cir. 1979).

In response, the Commission eventually released its finding of reasonable assurance, known as the Waste Confidence Rule and contained in 10 C.F.R. § 51.23(a), that a reliable, safe, and permanent waste disposal facility will be constructed and accepting waste by 2025. The relevant portion of § 51.23(a) provides: "the Commission believes there is reasonable assurance that 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 30 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."

From time to time there have been updates to the Waste Confidence Decision. *See*, 73 Fed. Reg. 59,551, 59,557, 59,561 (Oct. 9, 2009)(Waste Confidence Decision Update); 73 Fed. Reg. 59,547 (Oct. 9, 2008)(Temporary Storage Rule). As part of an agency rulemaking action that was initiated over a year ago regarding this rule, on June 15, 2009, the NRC's General Counsel recommended that the Commission approve a new draft final update and the draft final rule for publication in the Federal Register. SECY 09-0900, Final Update of the Commission's Waste Confidence Decision (June 15, 2009) ML091660274. The SECY memo, however, also reported that:

Although the licensing proceeding for the Yucca Mountain repository is ongoing, DOE and the Administration have made it clear that they do not support construction of Yucca Mountain. The President's 2010 budget proposal states that the "Administration proposes to eliminate the Yucca Mountain repository program."

SECY 09-0090 at 3, citing *Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2010*, p. 68. The General Counsel further suggested that the Commission defer action on the draft final rule to incorporate “more precise information on near-term federal actions relevant to the development of the federal [High Level Waste] disposal program.” *Id.* at 4. Thus, the NRC Staff fully acknowledged that the Administration plans to terminate the Yucca Mountain Project.

### **The Commissioners’ Votes**

As part of the final vote on the proposed rule, each of the three commissioners prepared Notation Vote Response Sheets setting forth their votes and rationales concerning the rulemaking. The Notation Vote Response Sheets reflect the views of the three sitting commissioners: Chairman Jaczko (dated Sept. 17, 2009), Commissioner Klein (dated September 16, 2009), and Commissioner Svinicki (dated Sept. 24, 2009). The Notation Votes are available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/>. The Commissioners’ official comments on their votes on the Final Update of the Commission’s Waste Confidence Decision demonstrate that there is no “reasonable assurance” that a permanent facility will exist by any date. Thus this Atomic Safety and Licensing Board should admit Clearwater’s contentions for resolution in the upcoming hearing.

Specifically, the voting notations of the three current Commissioners demonstrate that *they will defer any final action on a proposed revision to § 51.23 pending further input from the public on the proposal and further development of a waste disposal policy by the Executive and Legislative authorities. See* Notation Vote, Response Sheets of Chairman Jaczko, Commissioner Klein, and Commissioner Svinicki (publicly released on September 25 and 28, 2009). These notation statements are written statements prepared as part of a formal rulemaking proceeding initiated by Commission Staff pursuant to the Administrative Procedure Act.

For example, Commissioner Svinicki separated the issue of whether it is technologically possible to create a waste disposal solution in a reasonable time from the question of when a date could be predicted. *See* Commissioner Svinicki Notation Vote at pp. 1-2. The issue of a proposed date she deemed impossible, concluding that “this is a particularly difficult time to be in the prediction business.” *Id.* at 2.

In his Notation Vote, Commissioner Klein likewise recognized that the Yucca Mountain project will be cancelled and therefore acknowledged that the administrative record available to the Commission today is insufficient to determine a specific date by which a permanent facility will be available. *See* Commissioner Klein Notation Vote at 1 Commissioner Klein stated that new options, other than Yucca Mountain, may need to be considered (*id.* at 2), thus making prediction even less possible.

Chairman Jaczko’s Notation Vote acknowledged the end of the Yucca Mountain project. He suggested that some form of high-level waste disposal capacity might be available 50 or 60 years after the licensed operating periods of current reactors. He also,

however, indicated support for extending the public comment period to solicit additional public input.

Overall, the Notation Votes reveal that a majority of the current Commissioners recognize that there is no support for a finding of "reasonable assurance" that a repository for the disposal of high-level fuel will be available to receive waste from Indian Point in the reasonable future.

### **Clearwater's Contentions Are Admissible Under 10 C.F.R. § 2.309**

The Attorney General of Connecticut supports the position taken by Clearwater and by the New York Attorney General's Office in its Answer filed November 19, 2009, that Clearwater's contentions are admissible and differ from previously-submitted contentions. The central basis for this position is the new information revealed in the Commissioners' Notation Votes. It is beyond serious dispute that the Commissioners fully recognize that by 2025 no national repository will exist. The issue of when or whether there will be a high level repository must be considered in evaluating the safety and environmental issues associated with storage of spent fuel waste under the unique situation at Indian Point for an additional 30 years license extension.

The central question posed by the Clearwater contention is whether the record provides evidence establishing that the 2025 date will be met. Before the September, 2009, vote, the Commission believed that it had reasonable assurance that offsite permanent storage capacity would be available by 2025. Therefore, the Commission believed that because it had evaluated the potential environmental and safety impacts of storage of spent fuel at a reactor site for 30 years after the reactor had ceased operation, the Commission could determine that 30 years of post-operation spent fuel storage on site would not present any significant environmental or safety concerns. 10 C.F.R. § 51.23(b). By the end of those 30 years, the Commission previously reasoned, offsite permanent high level waste storage would be available and so no further discussion was necessary.

The Commissioners no longer believe that they have reasonable assurance for the period after the end of the 30 years. Thus, Clearwater can demonstrate that not only is the Commission considering changing the "waste confidence" rule but that the Commissioners have concluded that there is no "reasonable assurance" that a permanent waste repository will be available by 2025. Thus, the record is insufficient to conclude that there is "reasonable assurance" that a permanent repository will be available by that particular date. Because § 51.23 states that spent fuel can be stored safely and without significant adverse environmental impacts for 30 years after a reactor's shutdown and that a waste repository will be open by 2025, and since there is now no basis to conclude that the spent fuel will be gone within 30 years after a reactor ceases power generation, Clearwater properly offers two contentions that (1) challenge the adequacy of the environmental analysis of indefinite spent fuel storage at the Indian Point site and (2) challenge the safety of maintaining spent fuel at the site indefinitely without an adequate aging management plan for the spent fuel storage structures. As Clearwater demonstrates, pursuant to the mandate of the National Environmental Policy Act and the

Atomic Energy Act, the consideration of relicensing of Indian Point cannot be completed unless all major environmental impacts and safety concerns have been thoroughly evaluated. *See Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979) and other cases cited by Clearwater Petition at pp. 31-33.

### **The Board May Defer Ruling Until the Commission Has Taken Final Action**

Alternatively, the Board may choose to defer further proceedings until the full Commission has taken action regarding the Waste Confidence Rule. Pursuant to 10 C.F.R. §§ 2.319(g) and (k) the Board has full authority to regulate the conduct of its hearings. Pursuant to 10 C.F.R. § 2.334(b) the Board is directed to notify the Commission if the hearing will be delayed more than 60 days, explain the reason for the delay and describe the steps necessary to mitigate the impact of the delay. If the contentions raised by Clearwater are not allowed, it is likely that this denial will be challenged and that this challenge will consume significant time. Further, it is not at all clear what actions the Commission will take with regard to 10 C.F.R. § 51.23, which regulation is clearly critical to the final relicensing decision. Denial of Clearwater's contentions will not, therefore, promote the Commission's interest in efficiency and predictability. Awaiting further Commission action, on the other hand, may provide additional relevant information.

### **CONCLUSION**

There is no doubt that the continued storage of ever-increasing amounts of spent nuclear fuel at more than 100 nuclear power stations is an important issue of public and agency concern. Re-licensing of Indian Point would add even more years of accumulated spent fuel at a site that poses unique concerns to the citizens of Connecticut. The Attorney General therefore asks that the Commission grant Clearwater's contentions in order to comply with federal law and fully address the critical concerns raised therein.

Dated: November 20, 2009

Respectfully Submitted,

/s/

Robert Snook  
Assistant Attorney General  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020  
Fax: (860) 808-5347



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR and 50-286-LR  
  
License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01  
  
Entergy Nuclear Indian Point 2, LLC DPR-26, DPR-64  
Entergy Nuclear Indian Point 3, LLC, and  
Entergy Nuclear Operations, Inc. November 20, 2009  
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**CERTIFICATE OF SERVICE**

I certify that on November 20, 2009, copies of the foregoing were served on the following by first-class mail and electronic mail on the following, as indicated below:

Lawrence G. McDade, Chair Administrative Judge Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mailstop 3 F23 Two White Flint North 11545 Rockville Pike Rockville, MD 20852-2738 <a href="mailto:Lawrence.McDade@nrc.gov">Lawrence.McDade@nrc.gov</a>	Zackary S. Kahn, Esq. & Josh Kirstein, Esq., Law Clerks Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mailstop 3 F23 Two White Flint North 11545 Rockville Pike Rockville, MD 20852-2738 <a href="mailto:Zachary.Kahn@nrc.gov">Zachary.Kahn@nrc.gov</a> <a href="mailto:Josh.Kirstein@nrc.gov">Josh.Kirstein@nrc.gov</a>
Richard E. Wardwell Administrative Judge Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mailstop 3 F23 Two White Flint North 11545 Rockville Pike Rockville, MD 20852-2738 <a href="mailto:Richard.Warwell@nrc.gov">Richard.Warwell@nrc.gov</a>	Kaye D. Lathrop Administrative Judge Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission 190 Cedar Lane E. Ridgway, CO 81432 <a href="mailto:Kaye.Lathrop@nrc.gov">Kaye.Lathrop@nrc.gov</a>
William C. Dennis, Esq. Assistant General Counsel Entergy Nuclear Operations, Inc. 440 Hamilton Avenue White Plains, NY 10601 <a href="mailto:wdennis@entergy.com">wdennis@entergy.com</a>	Elise N. Zoli, Esq. Goodwin Procter, LLP Exchange Place 53 State Street Boston, MA 02109 <a href="mailto:ezoli@goodwinprocter.com">ezoli@goodwinprocter.com</a>

<p>Sherwin E. Turk, Esq.  David E. Roth, Esq.  Andrea Z. Jones  Beth N. Mizuno, Esq.  Brian Harris, Esq.  Office of the General Counsel  U.S. Nuclear Regulatory Commission  Mailstop 15 D21  One White Flint North  11555 Rockville Pike  Rockville, MD 20852-2738  <a href="mailto:sherwin.turk@nrc.gov">sherwin.turk@nrc.gov</a>;  <a href="mailto:david.roth@nrc.gov">david.roth@nrc.gov</a>;  <a href="mailto:andrea.jones@nrc.gov">andrea.jones@nrc.gov</a>  <a href="mailto:beth.mizuno@nrc.gov">beth.mizuno@nrc.gov</a>  <a href="mailto:brian.harris@nrc.gov">brian.harris@nrc.gov</a></p>	<p>Martin J. O'Neill, Esq.  Morgan, Lewis &amp; Bockius, LLP  Suite 4000  1000 Louisiana Street  Houston, TX 77002  <a href="mailto:martin.oneill@morganlewis.com">martin.oneill@morganlewis.com</a></p>
<p>Kathryn M. Sutton, Esq.  Paul M. Bessette, Esq.  Mauri T. Lemoncelli, Esq.  Morgan, Lewis &amp; Bockius LLP  1111 Pennsylvania Avenue, NW  Washington, DC 20004  <a href="mailto:ksutton@morganlewis.com">ksutton@morganlewis.com</a>  <a href="mailto:pbessette@morganlewis.com">pbessette@morganlewis.com</a>  <a href="mailto:mlemoncelli@morganlewis.com">mlemoncelli@morganlewis.com</a></p>	<p>Office of Commission Appellate Adjudication  U.S. Nuclear Regulatory Commission  Mailstop 16 G4  One White Flint North  11555 Rockville Pike  Rockville, MD 20852-2738  <a href="mailto:ocaamail@nrc.gov">ocaamail@nrc.gov</a></p>
<p>Michael J. Delaney, Esq.  Vice President – Energy Department  New York City Economic Development  Corporation (NYCEDC)  110 William Street  New York, NY 10038  <a href="mailto:mdelaney@nycedc.com">mdelaney@nycedc.com</a></p>	<p>Daniel Riesel, Esq.  Thomas F. Wood, Esq.  Jessica Steinberg, Esq.  Sive, Paget &amp; Riesel, P.C.  460 Park Avenue  New York, NY 10022  <a href="mailto:driesel@sprlaw.com">driesel@sprlaw.com</a>  <a href="mailto:jsteinberg@sprlaw.com">jsteinberg@sprlaw.com</a></p>
<p>Office of the Secretary  Rulemakings and Adjudications Staff  U.S. Nuclear Regulatory Commission  Mailstop 3 F23  Two White Flint North  11545 Rockville Pike  Rockville, MD 200852-2738  <a href="mailto:hearingdocket@nrc.gov">hearingdocket@nrc.gov</a></p>	<p>Gregory Spicer, Esq.  Assistant County Attorney  Office of the Westchester County Attorney  Michaelian Office Building  148 Martine Avenue, 6<sup>th</sup> Floor  White Plains, NY 10601  <a href="mailto:gss1@westchestergov.com">gss1@westchestergov.com</a></p>

<p>Atomic Safety and Licensing Board Panel  U.S. Nuclear Regulatory Commission  Mailstop 3 F23  Two White Flint North  11545 Rockville Pike  Rockville, MD 20852-2738</p>	<p>Manna Jo Greene  Hudson River Sloop Clearwater, Inc.  112 Little Market Street  Poughkeepsie, NY 12601  <a href="mailto:Mannajo@clearwater.org">Mannajo@clearwater.org</a></p>
<p>Daniel E. O'Neill, Mayor  James Seirmarco, M.S.  Village of Buchanan  Municipal Building  236 Tate Avenue  Buchanan, N.Y. 10511-1298  <a href="mailto:vob@bestweb.net">vob@bestweb.net</a></p>	<p>Phillip Musegaas, Esq.  Deborah Brancato, Esq.  Riverkeeper, Inc.  828 South Broadway  Tarrytown, NY 10591  <a href="mailto:phillip@riverkeeper.org">phillip@riverkeeper.org</a>  <a href="mailto:dbrancato@riverkeeper.org">dbrancato@riverkeeper.org</a></p>
<p>Stephen Filler, Esq.  Board Member  Hudson River Sloop Clearwater, Inc.  Suite 222  303 South Broadway  Tarrytown, NY 10591  <a href="mailto:sfiller@nylawline.com">sfiller@nylawline.com</a></p>	<p>Ross H. Gould  Member  Hudson River Sloop Clearwater, Inc.  10 park Ave., #5L  New York, NY 10016  <a href="mailto:rgouldesq@gmail.com">rgouldesq@gmail.com</a></p>
<p>John J. Sipos  Janice A. Dean  Assistant Attorneys General  Office of the Attorney General for the State of  New York  The Capitol  State Street  Albany, NY 12224  <a href="mailto:john.sipos@oag.state.ny.us">john.sipos@oag.state.ny.us</a></p>	



Robert D. Snook  
Assistant Attorney General  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
(860) 808-5020  
(860) 808-5347  
[Robert.Snook@po.state.ct.us](mailto:Robert.Snook@po.state.ct.us)