RAS E-303

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 November 19, 2009

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

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TEMPLATE = SECY 036

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The State of New York 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. Clearwater seeks a review of the environmental impacts of the long-term storage and disposal of high-level radioactive waste at the Indian Point facilities (EC-7) as well as an aging management program to monitor the high-density-storage spent fuel pool structures and the individual dry cask storage cylinders (SC-1). Recent official statements by the Commissioners – issued in a formal rulemaking proceeding conducted pursuant to the Administrative Procedure Act – make clear that the record currently before NRC does not provide reasonable assurance to predict when a permanent national disposal repository for spent nuclear fuel will be constructed or when it will accept the high-level waste from power reactors.

It is undisputed that questions involving the storage and disposal of nuclear waste pose serious health and environment concerns that require analysis under the National Environmental Policy Act (NEPA). In a 1979 case involving placement of additional nuclear waste in the spent fuel pools at Vermont Yankee and Prairie Island, 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). NRC then embarked on a journey to find "waste confidence." However, each of NRC's predictive dates has come to naught, and thirty years later, the high-level radioactive waste at Indian Point is no closer to a final disposal site. During the same time, the "leak tight" spent fuel pools at Indian Point released radionuclides into the environment. Given recent actions by the Commissioners, this Atomic Safety and Licensing Board should admit Clearwater's contentions for resolution in the upcoming hearing. Alternatively, the Board should refer the question of the contentions' admissibility to the Commissioners for resolution.

I. THE BOARD SHOULD GRANT CLEARWATER'S PETITION FOR ADMISSION OF NEW CONTENTIONS REGARDING INDEFINITE STORAGE OF SPENT FUEL AT INDIAN POINT

In September 2009, the three sitting Commissioners recognized that for now the administrative record does not provide "reasonable assurance" that a permanent disposal facility for high level radioactive waste will exist by a particular date. This recognition is reflected in the just-released voting notations of the three current Commissioners who have now decided 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).[1] These notation votes were not informal or off-the-cuff comments; they were written statements prepared as part of a formal rulemaking proceeding initiated by Commission Staff pursuant to the Administrative Procedure Act. This recognition is the capstone of recent events and pronouncements that, when viewed together, demonstrate that the Commission's statement of reasonable assurance, expressed in 10 C.F.R. § 51.23(a),[2] that a reliable, safe, and permanent waste disposal facility will be constructed and accepting waste by 2025, is no longer tenable. *See, e.g.,* 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).

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[1] 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/.

[2] 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."

A. The Commissioners' September 2009 Votes

As part of the rulemaking proceeding commenced on October 9, 2008 and in response to a Staff proposal contained in SECY-09-0090, each of the three commissioners prepared Notation Vote Response Sheets setting forth their votes and rationales concerning the rulemaking.

In SECY 09-0900, NRC General Counsel Burns advised the Commissioners that virtually no changes to the revised Waste Confidence findings or to the revision of 10 C.F.R. § 51.23(a) were warranted based on public comments received during the rulemaking proceeding. *See* SECY 09-0900, Final Update of the Commission's Waste Confidence Decision (June 15, 2009) ML091660274. The General Counsel recommended that the Commission approve the draft final update and the draft final rule for publication in the Federal Register. The SECY memo 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. On behalf of the Staff, the General Counsel also suggested that the Commission might defer action on the draft final update and 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. The Notation Votes reflect that the Commissioners decided not to go forward with the final rulemaking.

Commissioner Svinicki separated the issue of whether a technologically feasible permanent waste disposal solution exists and whether, if it does exist, it can be reasonably expected to be available in the future, from the entirely different question of whether a date by

which that solution will be implemented can be predicted. *See* Commissioner Svinicki Notation Vote at pp. 1-2. The latter she considers to be impossible in the current environment, concluding that "this is a particularly difficult time to be in the prediction business." *Id.* at 2.

In his Notation Vote, Commissioner Klein, like Commissioner Svinicki, recognizes that there will not be a waste disposal facility at Yucca Mountain – the administration has announced that the Yucca project will be cancelled – and recognizes that the current record available to the Commission is insufficient to determine a specific date by which a permanent facility will be available. *See* Commissioner Klein Notation Vote at 1 (recognizing "the Administration's proposed budget plan to eliminate the Yucca Mountain project"). Commissioner Klein emphasizes that new waste disposal options, other than a mined repository, might merit review and urges the Commission to broaden any statement about the future to include more than just mined repositories (*id.* at 2), thus making prediction of when a permanent repository will be available even less possible.

Chairman Jazcko's Notation Vote acknowledged the termination of the Yucca project referenced in the Staff's SECY paper. Based on his view of the administrative record before the Commission in the rulemaking proceeding, he proposed additional revisions that deleted reliance on the existence of "one mined geologic repository" and "repository" in Finding 2 and Finding 3. While he suggested that some high-level waste disposal "capacity" might be available in 50 years or perhaps 60 years beyond the licensed life a reactor, he also stated that he would support the extending the public comment period to solicit additional public input on this issue. Thus, the formal Notation Votes reveal that a majority of the current Commissioners do not now have a basis to make a finding of "reasonable assurance" that a mined repository for the permanent

disposal of high-level radioactive waste will be available to receive waste from Indian Point or other reactors at a specific future date.

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

Clearwater's contentions are admissible and differ from previously-submitted contentions on this issue given the Commissioners' votes; in addition, section 53.21 does not bar admission of these contentions, and, in any event, the basis for 53.21 has eroded.

1. Clearwater's Contentions Differ from Previously-Submitted Contentions on this Issue Given the Commissioners' Votes

In recent years, states and citizen groups have sought to obtain site-specific evaluations of the environmental impacts or safety concerns associated with the long-term or indefinite storage of spent fuel at power reactors included as part of the license renewal process. *See* State of Vermont Dep't of Public Service, Petition to Intervene, Contention 2, May 26, 2006, ML061640035; *see also* Clearwater Petition, at 20-21, 23, (discussing proposed contentions filed by the Commonwealth of Massachusetts and Riverkeeper, Inc.). As part of these efforts, parties have set out the evolving history of the erosion of the basis for the Commission's "waste confidence." Each new effort to introduce the issue into the proceeding was supported by newer, significant information that confirmed earlier predictions by intervenors that a permanent waste disposal facility would not be available by 2025. In this proceeding, the State of New York offered its proposed Contention 34,[3] presented the prior history of new and significant information demonstrating that the bases for the "waste confidence" finding had vanished, and

[3] NYS Contention 34: "The DSEIS Did Not Take into Account Significant New Information Regarding the Potential Impacts to Off-Site Land Use from Long-Term or Indefinite Storage of High Level Nuclear Waste on the Indian Point Site in Violation of NEPA and Related Regulations." *See* NYS Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement, February 27, 2009, at 37-46, ML090690303. As part of that contention, the State of New presented new and significant information that had then recently become available that reflected changes and an erosion of the waste confidence policy. *Id.* at ¶ 2-7.

buttressed its Contention with Commission rulemaking statements which were published in the Federal Register, that the State of New York believed demonstrated that the Commission had also concluded that the 2025 date was not attainable and proposing alternative regulatory action to address that changed circumstance. This Board rejected New York State proposed Contention 34 as premature, concluding:

> At this point, the Commission has not made a final determination vis-à-vis the waste confidence rule. Therefore, it is premature to use these publications as the bases for a new contention, as the regulations now in force, specifically 10 C.F.R. § 51.23(b), do not permit "discussion of any environmental impact of spent fuel storage" at nuclear reactor sites.

Order (Ruling on New York State's New and Amended Contentions), June 16, 2009 at 16. What distinguishes the above previous efforts from the contentions now proposed by Clearwater is that the Commissioners themselves have now described their views in formal votes in the APA rulemaking proceeding and have concluded that they cannot now make a reasonable assurance finding that an off-site permanent waste disposal repository will be available by any particular time in the future.

The key new information revealed in the Commissioners' Notation Votes, which forms part of the basis and supporting evidence behind the Clearwater contentions, is that the Commissioners now accept the fact that the 2025 date will not be met. That recognition provides now, for the first time, the basis for this Board to explore issues concerning the long-term storage of high-level radioactive waste at Indian Point – assuming any party chooses to contest the Clearwater evidence that the 2025 date for a permanent waste repository is no longer valid and that there is no basis for reasonable assurance that another specific date will be met. Thus, resolution of that issue may be required in evaluating the safety and environmental issues associated with deciding whether spent fuel waste likely will continue to be stored at Indian

Point for the period beyond 30 years after cessation of operation. Such an evaluation is not barred from consideration by Commission regulations. The declaration in the current version of § 51.23(a) is merely that as of 1990, as reviewed in 1999, "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." *Id.* While it is evident "reasonable assurance" no longer exists, it is not necessary to challenge that conclusion to address, in this proceeding, the issue of whether, in fact, there will be a mined high level waste repository in place by 2025. The issue raised by the Clearwater Petition is not whether when the Commission *previously* made that finding it had a legally or factually adequate basis to have "reasonable assurance." Rather, the question is whether substantial evidence exists *today* that establishes that the 2025 date will be met. The Commissioners answered this question in their September votes: they have made clear they no longer have assurance that a mined geologic waste repository will be available by 2025.

Relying on the recently-released notation votes by the three current Commissioners, Clearwater now is able to demonstrate that not only is the Commission considering changing the "waste confidence" rule, which served as a basis for New York State's Contention 34, but that the Commissioners themselves have concluded that (1) there is no "reasonable assurance" that a permanent mined waste repository will be available by 2025 and that (2) the record before them is insufficient to conclude that there is "reasonable assurance" that a permanent repository will be available by any particular date, although they believe that some disposal capacity will eventually be available. Since § 51.23, as now written, states that spent fuel can be stored safely and without significant adverse environmental impacts for 30 years beyond the end of a reactor's operating license and that one mined geologic 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 plant 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.

2. Section 51.23 Does Not Bar Admission of Clearwater's Proposed Contentions

The language of 10 C.F.R. § 51.23(b) does not bar the Clearwater Petition. That provision merely prohibits consideration in this proceeding of the environmental impacts and safety concerns associated with spent fuel storage "for *the period* following the term of the reactor operating license or amendment." 10 C.F.R. § 51.23(b)(emphasis added). The phrase "the period" – read in the context of the regulation and the language of § 51.23(a) – clearly refers to the 30-year period for which the Commission found:

> spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least *30 years* beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin

10 C.F.R. § 51.23(a)(emphasis added). Since the principal focus of the Clearwater Petition is the period *after* 30 years - *i.e.* the indefinite period of spent fuel storage at Indian Point - it is not barred by the existing regulation.[4]

[4] In her Notation Vote, Commissioner Svinicki stated:

> I am confident that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental

Since the Commission had reasonable assurance that offsite permanent storage capacity would be available by 2025 and 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 previously determined 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. Significantly, the regulation, which binds this Board and the parties, is silent regarding potential environmental and safety implications of spent fuel storage at the Indian Point site *beyond* 30 years from the cessation of a reactor's operation. Entergy and NRC Staff may argue that the same factors which caused the Commission to conclude that it was safe and environmentally benign to keep wastes at plant sites for 30 years after operations ceased, could also form the basis for a similar conclusion for spent fuel storage at Indian Point for a longer period. However, that conclusion and reasoning have not been enshrined in a regulation promulgated under the Administrative Procedure Act and is a matter on which there is a material dispute among the parties. The Declaration of Dr. Gordon Thompson as well as the long-term leakage of radionuclides from Indian Point spent fuel pools demonstrates that the issue, at a minimum, is a litigable issue regarding the extent to which indefinite storage of spent fuel waste at Indian Point will cause environmental and safety

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> impact in either the reactor spent fuel storage basin, or in dry cask storage on an onsite or offsite independent spent fuel storage installation, or in some combination of these storage options, for many decades.

Notation Vote, at 4. The Clearwater contention does not raise the generic issue addressed by Commissioner Svinicki. It focuses instead on the more urgent question -- not whether conceptually such indefinite on site spent fuel storage can occur without significant environmental harm or safety problems but whether such storage *will* occur without significant environmental harm and safety problems *at the Indian Point site.*

problems that have not been addressed by NRC Staff or Entergy and that a material dispute exists among the parties in this proceeding regarding those issues.

3. In Any Event, the Findings Contained in Section 51.23 Have Eroded, and NRC No Longer Complies with the Directive in *Minnesota v. NRC*

In 1984, the NRC issued a "Waste Confidence Decision" in response to a remand from the United States Court of Appeals for the District of Columbia Circuit in *State of Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979), which raised the question of whether an off-site storage or disposal facility (*i.e.*, a repository) would be available for the spent nuclear fuel produced at two reactors at the expiration of their licenses or whether the spent nuclear fuel could be stored safely on-site until an off-site solution was available. The D.C. Circuit found insufficient the Commission's "implicit" policy of a "reasonable assurance that methods of safe permanent disposal of high-level wastes can be available when they are needed" and remanded the issue to the Commission to undertake additional review under NEPA. *Id.* at 417. The result was the 1984 Waste Confidence Decision. 49 Fed. Reg. 34,658 (Aug. 31, 1984); 10 C.F.R. § 51.23 (1984). In 1990, the Commission extended the opening date of the waste repository to 2025 after the passage of time revealed that the predictive dates in the 1984 Waste Confidence Decision could not be met. 55 Fed. Reg. 38,474 (Sept. 18, 1990) (Finding Two).

The Commissioners' September 2009 Notation Votes make clear that the reasonable assurance needed to make the prediction about the waste repository's opening date have eroded and evaporated. Because the Commissioners no longer have reasonable assurance that a mined geologic waste repository will be available by 2009 (the 1984 Waste Confidence Decision) or 2025 (the 1990 Waste Confidence Decision), the Commission now is out of compliance with its NEPA obligations as set forth in the D.C. Circuit's directive in *Minnesota v. NRC*.

Staff cannot continue to rely on the text of a regulation that the Commissioners have recognized – in writing in an APA rulemaking proceeding – is no longer tenable as a "shield" to prevent NEPA review of environmental impacts of the long-term storage of high-level radioactive waste at Indian Point. Since the 2025 date is no longer valid and if, as the Commissioners recognize, they are not currently able to predict a specific date by which on-site storage of spent fuel will end, then it is necessary to evaluate the environmental and safety issues that may exist with respect to indefinite spent fuel storage at the reactor site. As Clearwater notes, that question has not been answered since all previous analyses have assumed the validity of the 2025 date. Thus, since it is no longer realistic to assume that any wastes previously generated or to be generated at the Indian Point facility will be removed from the site within 30 years after the operation of the reactors, it is necessary to address the questions raised by Clearwater before authorizing the continued commercial operation of Indian Point and the attendant extended storage of high-level radioactive waste there.

C. Clearwater's Proposed Contentions Raise Environmental and Safety Issues That Are Specific to Indian Point

The Clearwater Petition in general, and the Declaration of Dr. Thompson in particular, make clear that the proposed contentions reflect site-specific concerns – both environmental and safety – at Indian Point. The options for addressing or mitigating those concerns are specific to each plant and each spent fuel pool. The following NRC or federal documents confirm that such concerns implicate facility-specific analyses:

- NUREG-1738, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants (January 2001)("Fuel assembly geometry and rack configuration are plant specific" * * * "Heat removal is very sensitive to . . . fuel assembly geometry . . . [and] rack configuration . . . [and is] subject to unpredictable changes after an earthquake or cask drop that drains the pool * * * [I]t was not feasible, without numerous constraints, to establish a generic decay heat level (and therefore a decay time) beyond which a zirconium fire is physically impossible * * * [S]ince a non-negligible decay heat

source lasts many years and since configurations ensuring sufficient air flow for cooling cannot be assured, the possibility of reaching the zirconium ignition temperature cannot be precluded on a generic basis");

- SECY-01-0100 (June 2001) (discussing NUREG-1738);

- National Academy of Sciences Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, *Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report* (2005)(recognizing that there are a "variety of designs" of spent fuel pools and "The potential vulnerabilities of spent fuel pools to terrorist attacks are plant-design specific. Therefore, specific vulnerabilities can be understood only by examining the characteristics of spent fuel storage at each plant"); and

- Sandia National Laboratories, Letter Report, Rev. 2, *Mitigation of Spent Fuel Loss of Coolant Inventory Accident and Extension of Reference Plant Analyses to Other Spent Fuel Pools* (November 2006) (identifying site-specific mitigation options and alternatives and confirming that many plant-specific variables are at play such as the density or dispersion of the fuel rods in the pool, the decay heat level, fuel burn up rate, power production rate, time since discharge, assembly inlet temperature, convective and conductive heat removal rates, and heat transfer rate to and from adjacent assemblies).

Clearwater Proposed Contentions EC-7 and SC-1 seek an evaluation of such site-specific issues and the relative effectiveness of different means to address the environmental and safety issues and a comparison of alternative ways to address those concerns, including the alternative of not allowing the generation of additional spent fuel following the end of the current license terms for Indian Point Units 2 & 3.

II. ALTERNATIVELY, THE BOARD SHOULD REFER THE DECISION ON ADMISSIBILITY OF THE CONTENTIONS TO THE COMMISSION OR NOTIFY IT THAT THE BOARD WILL AWAIT FURTHER COMMISSION ACTION

The State of New York recognizes that the current situation regarding "waste confidence" may be unique. Since the remand in *Minnesota v. NRC* 30 years ago, NRC has assumed that a permanent waste repository would be available by 2025, if not earlier. In the last ten years it has been apparent that the only possibility for that date to be met would be if the Yucca Mountain facility were licensed and built. In the last three years, serious questions have arisen about the

feasibility, integrity, and timeliness of the Yucca Mountain option. And, as recently recognized by SECY 09-0090 and the Commissioners' Notation Votes, it has become increasingly likely that the Yucca Mountain repository program will end. The Commission had already begun the process of reexamining its prior waste confidence findings and has included in the options it would explore, not fixing a date certain for when a permanent waste repository would be available. Now the Commissioners have acknowledged that the 2025 date – upon which the revised 1990 confidence determination was based – is no longer viable and that they do not have sufficient information to make a reasonable assurance finding regarding some other future date by which a permanent waste disposal repository will be in place and functioning.

At the same time these events were unfolding, research by NRC and others and the tragic events of September 11, 2001 have compelled the NRC to abandon its previous "one size fits all" conclusions regarding safety and environmental issues associated with long term storage of spent fuel at reactor sites following cessation of reactor operations. Instead, a variety of site-specific license amendments have been adopted at nuclear plants, including Indian Point, designed to partially address the issue of spent fuel pool protections from sabotage and partially to address the issue of fire hazards in spent fuel pools. In addition, a number of plants, including Indian Point, have experience substantial unplanned and uncontrolled leakages of radioactive wastes from spent fuel pools into the surrounding environment.

Staff and Entergy will likely argue that until the Commission formally promulgates a new version of § 51.23, the Board is bound by the text that appears in the Code of Federal Regulations – even if that text is obsolete. They also will likely argue that the only way that can occur in a particular case is by the Staff initiating a request to the Commissioners to suspend the rule or delay the administrative proceeding until the regulation is revised to reflect new and

significant information. *See* 61 Fed. Reg. 28,467, 28,470 (June 5, 1996). To date, it is unclear whether or not NRC Staff will pursue this avenue – although the State of New York is unaware of even a single instance in which the Staff availed itself of this regulatory mechanism over the last 13½ years since the issuance of the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437.

While it is true that the Commission has not formally amended or suspended § 51.23, it is equally true that the Commissioners' formal Notation Votes NRC rulemaking proceedings Docket ID–2008–0482 and Docket ID–2008–0404 / RIN: 3150–AI47 demonstrate that they have decided that there is no longer a record upon which they can base a reasonable assurance finding that a permanent waste disposal solution will be available by 2025. At least two of the three Commissioners (Commissioner Klein and Chairman Jaczko) also believe that as currently written § 51.23 is erroneous because it refers only to a mined repository and that other options may be chosen instead, which options could have very different "delivery" dates. Under these circumstances, the fact that the Commissions have not yet incorporated their written votes and conclusions into regulatory text cannot form the basis to allow now discredited regulations and findings to remain as a barrier to a full and fair exploration of environmental and safety issues that federal statutes (NEPA and AEA) and federal courts require be addressed.

Even if the Board is not convinced that it can analyze questions that flow from the recent actions by NRC Staff and the Commissioners, the Board is not without the power to raise to the Commissioners' attention the issues raised by the facts discussed in Clearwater's Petition and the instant response filed by State of New York. The State of New York proposes two options that, if the Board believes it is constrained by regulations from admitting Clearwater's two contention

despite the merits of the claims, the State respectfully suggests the Board could pursue to assure that the Commission itself is allowed to address the problem created by current state of affairs.

A. Certifying the Question as to the Admissibility of Clearwater's Proposed Contentions to the Commissioners for Their Review and Determination

The Board possesses the authority to seek guidance from the Commission on any issue. 10 C.F.R. § 2.319(l). The issue of how to proceed with regard to the Clearwater Petition in light of the events described in that Petition and this submission is well-suited to Commission guidance, which, once given, will provide substantial clarity for these proceedings and expedite their ultimate resolution.[5]

10 C.F.R. § 2.319(l) authorizes the presiding officer in his or her discretion to certify questions to the NRC Commissioners for their determination. *See also* 10 C.F.R. 2.323(f)

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[5] In making this proposal, the State recognizes that deferring ruling on a request for admission on a contention has been disapproved in the specialized cases of Combined Operating License (COL) hearings. *See In the Matter of Duke Energy Carolinas, LLC (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2),* Docket Nos. 52-018-COL and 52-019-COL and *In the Matter of Tennessee Valley Authority)(Bellefonte Nuclear Power Plant, Units 3 and 4),* Docket Nos. 52-014-COL and 52-015-COL, CLI-09-21, Nov. 3, 2009 (deferral rejected because NRC Staff was already addressing the issue raised by the intervenors in another case and the Commission directed it to do so in the instant cases as well); *In the Matter of Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3)*, Docket Nos. 52-022-COL & 52-023-COL, CLI-09-08, May 18, 2009 (deferral rejected because of a mechanism applicable to COL proceedings by which issues can be referred to a simultaneous generic proceeding on the reactor design which design proceedings must be concluded before final action on the COL request); *In the Matter of PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant)*, Docket No. 52-039-COL, LBP-09-18, Sept. 23, 2009 (rejecting referral of a waste confidence related contention to the Commission because the contention was deemed inadmissible and thus referral, in the context of COL proceeding, was not permitted based on the Commission decision in *Shearon Harris*). In contrast to the COL procedures, because there is no automatic mechanism by which the issues sought to be raised in this Part 54 license renewal proceeding must be addressed and resolved prior to a final decision on the license renewal application and because the issue to be referred to the Commission and as to which action would be deferred is whether, in light of the current status of the "waste confidence" the contention should be admitted, the COL cases do not provide relevant authority.

("Referral and certifications to the Commission"). Such a referral would allow the three Commissioners to consider the arguments submitted by Clearwater, the State of New York, Entergy, and NRC Staff and provide direction to the parties and the Board as to how to proceed on this issue without delay.

B. Deferring a Ruling on Clearwater's Petition Until the Commission Has Taken Final Action

Pursuant to 10 C.F.R. §§ 2.319(g) and (k) the Board has broad authority to regulate the conduct of the hearing. 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 beyond its projected completion, explain the reason for the delay and describe the steps necessary to mitigate the impact of the delay. The current situation creates a substantial probability of delay in the completion of the proceeding if the contentions raised by Clearwater are not allowed to be pursued.

Referral or deferral will promote the Commission's interest in efficiency and predictability. The State of New York submits that the primary challenge to the admissibility of Clearwater's contentions, § 51.23, will not stand and appears likely to be replaced. Awaiting further Commission action may provide additional clarity and would remove the likelihood of prejudice to parties which could result from the application of regulations which are, at a minimum, in flux.

CONCLUSION

Spent nuclear fuel constitutes extremely toxic waste. It can be fatal to humans and render land uninhabitable for years. *See generally, Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 538-39 (1978) (*citing* U.S. Atomic Energy Commission, *Radioactive Wastes,* 12 (1965)); *Minnesota v. NRC*, 602 F.2d at 413 ("When removed from the core, the assemblies generate enormous heat and contain highly radioactive uranium, actinides and plutonium."); *id.*

at 419 ("It is undisputed that questions involving storage and disposal of nuclear waste pose serious concerns for health and the environment.") (Tamm, C.J., concurring); *Scientists' Institute for Public Information, Inc., v. AEC*, 481 F.2d 1079, 1098 (D.C. Cir. 1973) (fast breeder reactor "wastes will pose an admitted hazard to human health for hundreds of years, and will have to be maintained in special repositories. The environmental problems attendant upon processing, transporting and storing these wastes, and the other environmental issues raised by widespread deployment of [breeder reactor] power plants, warrant the most searching scrutiny under NEPA.").

The State of New York is concerned about NRC Staff's statements contained in the October 8, 2008 Federal Register notices and the June 15, 2009 SECY-09-0090. It appears that NRC Staff is changing its previous waste confidence position that envisioned the complete removal of high-level radioactive waste from Indian Point within 30 years following the cessation of reactor operation and that Staff now may be readying itself to accept the storage of high-level radioactive waste at Indian Point until the end of this century, if not longer. Given the Commissioners' formal Notation Votes in NRC rulemaking proceedings Docket ID–2008–0482 and Docket ID–2008–0404 / RIN: 3150–AI47 that make clear there is no longer reasonable assurance that a permanent mined repository for high-level radioactive waste will be constructed and operating by 2025, the State requests NRC Staff to explain: (1) whether or not Staff will request that the Commissioners suspend § 51.23; and (2) whether or not Staff will accept the long-term or indefinite storage of high-level radioactive waste at Indian Point, which has the highest surrounding population within 50 miles of any power reactor site in the country.

Accordingly, the State of New York respectfully requests that this Board admit Clearwater's proposed contentions or, alternatively, refer the admissibility of the Clearwater

contentions to the Commissioners or alert the Commissioners that the Board awaits further Commission action.

Respectfully submitted,

s/

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dated: November 19, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 November 19, 2009

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2009, copies of the State of New York's Answer to Clearwater's Petition Presenting Supplemental Contentions EC-7 and SC-1, were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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s/

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Dated at Albany, New York
this 19th day of November 2009

Docket, Hearing

From: John Sipos [John.Sipos@oag.state.ny.us]
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Cc: Joan Matthews; John Parker; Janice Dean; John Sipos; Mylan Denerstein
Subject: State of New York Answer to Clearwater Proposed Contentions
Attachments: 2009 11 19 NYS Answer to CW Contentions.pdf; NYS COS.pdf

Dear Judges, Law Clerks, NRC Staff, and Parties:

Attached please find the State of New York's Answer to the Petition for Admission of Contentions recently filed by Hudson River Sloop Clearwater, Inc. Copies are also being served via U.S. Mail.

Respectfully submitted,

John Sipos
Assistant Attorney General
State of New York

November 19, 2009

Received: from mail1.nrc.gov (148.184.176.41) by OWMS01.nrc.gov
(148.184.100.43) with Microsoft SMTP Server id 8.1.393.1; Thu, 19 Nov 2009
15:00:03 -0500
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Thu, 19 Nov 2009 14:57:40 -0500
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X-Mailer: Novell GroupWise Internet Agent 7.0.3
Date: Thu, 19 Nov 2009 14:57:34 -0500
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Subject: State of New York Answer to Clearwater Proposed Contentions
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