

February 18, 2011

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/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER TO HUDSON RIVER SLOOP CLEARWATER, INC. AND
RIVERKEEPER, INC.'S JOINT MOTION AND PETITION TO ADD NEW CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), and the Board's "Scheduling Order" of July 1, 2010, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the motion and new contentions filed by Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc. (jointly, "Petitioners") on January 24, 2011, concerning the on-site storage of waste.¹

The new contentions, Clearwater EC-8 (Riverkeeper EC-6), Clearwater EC-9 (Riverkeeper EC-7), Clearwater SC-2 (Riverkeeper TC-3), and Clearwater SC-3 (Riverkeeper TC-4)² comprise duplicates and minor variations of two contentions which those parties had

¹ "Hudson River Sloop Clearwater, Inc. And Riverkeeper's Joint Motion For Leave To Add New Contentions Based Upon New Information And Petition To Add New Contentions" (Jan. 24, 2011) ("Motion").

² Each of the four contentions is twice-labeled with both a Clearwater designator and a parenthetical Riverkeeper label; for example, "Contention Clearwater EC-8 (Riverkeeper EC-6)." For ease of reference, the Staff will use only Clearwater's contention number; for example, "EC-8" herein refers to Clearwater Contention EC-8 (Riverkeeper EC-6).

previously-filed,³ and which were subsequently-rejected,⁴ i.e., Clearwater Contentions EC-7 and SC-1.

For the reasons set forth below, the Staff opposes the admission of Clearwater Contentions EC-8, EC-9, SC-2, and SC-3 inasmuch as the contentions (a) constitute impermissible challenges to the Commission's regulations on waste confidence (10 C.F.R. § 51.23), and the regulations governing the contents of the Staff's EIS (10 C.F.R. § 51.95(c)), and (b) opposes contentions SC-2 and SC-3, on the grounds that they lack adequate legal and factual support and do not meet the Commission's requirements in 10 C.F.R. § 2.309(f)(1).

BACKGROUND

Procedural History

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

³ See "Hudson River Sloop Clearwater, Inc.'s Motion For Leave To Add New Contentions Based Upon New Information," dated October 26, 2009, as corrected November 6, 2009 (proffering EC-7 and SC-1).

⁴ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, ___ NRC ___, (July 8, 2010) (slip op.) (directing the Board to deny EC-7 and SC-1); Board Order dated July 14, 2010 (dismissing EC-7 and SC-1).

Point LRA,⁵ and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.⁶

On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York ("State" or "New York")⁷ and Riverkeeper, Inc.;⁸ on December 10, 2007, Clearwater filed its initial petition to intervene and request for hearing.⁹ Responses to those petitions and the petitioners' contentions were duly filed by the Applicant and by the Staff.¹⁰

On July 31, 2008, the Board issued its Memorandum and Order ruling on the petitioners' standing to intervene and the admissibility of their contentions in which it *inter alia*, admitted Clearwater and Riverkeeper along with several of their contentions.¹¹

⁵ "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).

⁶ "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).

⁷ See "New York State Notice of Intention to Participate and Petition to Intervene" (Nov. 30, 2007.)

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

⁹ See "Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing" (Dec. 10, 2007) ("Original Clearwater Petition").

¹⁰ See "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County," dated January 22, 2008 ("Staff Response to Initial Petitions").

¹¹ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43 (July 31, 2008).

On September 5, 2008, Riverkeeper filed a fuel storage contention, Riverkeeper Contention EC-4, which alleged "The NRC Must Address the Spent Fuel Storage Impacts at Indian Point in a Supplemental GEIS."¹² The Staff¹³ and the Applicant¹⁴ opposed the contention. On December 18, 2008, the Board rejected Riverkeeper Contention EC-4. The Board concluded the contention was, in essence, an attack on the Commission's regulations, and therefore was outside the scope of the proceeding.¹⁵

On December 22, 2008, the Staff issued Draft Supplement 38 to the Generic Environmental Impact Statement ("Draft SEIS"), concerning the Indian Point LRA.¹⁶ The Board then granted New York and Riverkeeper an extension of time to file contentions related to the Draft SEIS,¹⁷ and the Board "reminded the parties that any new contentions may only deal with

¹² See (1) "Riverkeeper, Inc.'s New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel" (Sept. 5, 2008) at 23; and (2) "Riverkeeper, Inc.'s Conditional Motion for Leave to File New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel" (Sept. 5, 2008).

¹³ "NRC Staff's Answer to Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel" (Sept. 30, 2008).

¹⁴ "Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper's New and Amended Contentions Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel" (Sept. 30, 2008).

¹⁵ "Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding), (Granting in Part Riverkeeper's Motion for Clarification and Reconsideration of the Board's Ruling in LBP-08-13 Related to the Admissibility of Riverkeeper Contention EC-2), (Denying Riverkeeper's Request to Admit Amended Contention EC-2 and New Contentions EC-4 and EC-5), (Denying Entergy's Motion for Reconsideration of the Board's Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1)" (Dec. 18, 2008) (slip op. at 9).

¹⁶ NUREG-1437, Supplement 38, "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" (Dec. 2008).

¹⁷ See Transcript of Pre-Hearing Conference (Jan. 14, 2009), at Tr.768-69; "Memorandum and Order (Summarizing Pre-Hearing Conference)," dated February 4, 2009 ("Pre-Hearing Conference Order"), at 2-3.

new environmental issues raised by the 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.”¹⁸

On February 27, 2009, the State of New York filed its contentions regarding the Indian Point Draft SEIS,¹⁹ including New York Contention 34 -- in which the State sought to raise an issue concerning impacts to off-site land use resulting from the potential for “long-term or indefinite storage of high level nuclear waste on the Indian Point site.” New York DSEIS Contentions at 37. In support of this contention, New York challenged the continued applicability of the Commission’s “Waste Confidence” rule, 10 C.F.R. § 51.23, citing the Commission’s October 9, 2008 *Federal Register* notice of a proposed update to the Waste Confidence rule and findings. *Id.* at 38-41 and 44-45, *citing* 73 Fed. Reg. 59,551. The Staff opposed the admission of New York Contention 34,²⁰ noting, in part, that notwithstanding the State’s reference to the Commission’s proposed amendment of its waste confidence rule, it is clear that the current rule remains in effect and may not be challenged in this proceeding absent the grant of a petition for rule waiver under 10 C.F.R. § 2.335 – which the State had not filed.²¹

On June 16, 2009, the Board rejected New York Contention 34, finding that it was inadmissible in part, as an impermissible challenge to the Commission’s waste confidence rule.

The Board stated as follows:

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

¹⁹ “State of New York Contentions Concerning NRC Staff’s Draft Supplemental Environmental Impact Statement,” dated February 27, 2009 (“New York DSEIS Contentions”).

²⁰ “NRC Staff’s Answer To Amended And New Contentions Filed By The State Of New York And Riverkeeper, Inc., Concerning The Draft Supplemental Environmental Impact Statement” (March 24, 2009).

²¹ *Id.* at 25.

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. Accordingly, NYS-34 is an impermissible challenge to NRC regulations and must be denied.

“Order (Ruling on New York State’s New and Amended Contentions),” slip op. at 16 (footnotes omitted) (June 16, 2009).

On October 26, 2009, as corrected November 6, 2009, Clearwater requested leave to file two new contentions, Clearwater Contentions EC-7 and SC-1, based on certain allegedly new information regarding the Waste Confidence rule.²² In its new contentions, Clearwater asserted as follows:

Contention EC-7

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of the potential impacts of additional waste storage on site, the alternative methods of accomplishing such storage, and potential alternatives to additional waste storage on the site, including the no-action alternative.

Contention SC-1

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.

²² “Hudson River Sloop Clearwater, Inc.’s Motion for Leave to Add a New Contention Based Upon New Information” (Oct. 26, 2009) as corrected on November 6, 2009 (“Corrected Motion”)

Corrected Motion at 15. In support of its late filing of these contentions, Clearwater cited a February 2009 study by its Declarant, Dr. Gordon Thompson,²³ and a September 2009 decision by the Commission disapproving in part SECY-09-0090.²⁴

On February 12, 2010, the Board issued an Order, in which it certified a question to the Commission regarding the admissibility of those two contentions.²⁵ On July 8, 2010, the Commission issued an Order²⁶ in response to the Board's certified question. The Commission stated:

"In the area of waste storage, the Commission largely has chosen to proceed generically" through the rulemaking process – that is, the Waste Confidence Rule, codified at 10 C.F.R. § 51.23 – instead of litigating issues case-by-case in adjudicatory proceedings.

The Commission further stated that petitioners or intervenors must raise their concerns in the rulemaking process, not adjudication, if they are dissatisfied with the Commission's generic approach to the safety and environmental impacts of onsite fuel storage pending ultimate off-site disposal. *Id.* slip op. at 3. The Commission directed the Board to deny admission of

²³ Gordon R. Thompson, Institute for Resource and Security Studies, "Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC's Waste Confidence Decision and Environmental Impact Determination" (Feb. 6, 2009) ("Thompson/TSEP Report").

²⁴ See SECY-09-0090, "Final Update of the Commission's Waste Confidence Decision" (June 15, 2009), Encl. 1, *Federal Register Notice* – Final Revision to the Waste Confidence Decision, & Encl. 2, *Federal Register Notice* – Final Rule: amendment to 10 C.F.R. § 51.23(a). The Commission disapproved SECY-09-0090, as reflected in the Commissioners' vote sheets.

²⁵ "Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater's Motion for Leave to Admit New Contentions)" (Feb. 12, 2010) (unpublished).

²⁶ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, ___ NRC ___, (July 8, 2010) (slip op. at 2) (*citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999) (Oconee); and *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (regarding generic rulemaking to assess dry cask design)).

Clearwater Contentions SC-1 and EC-7. *Id.* On July 14, 2010, the Board dismissed Contentions EC-7 and SC-1. Order dated July 14, 2010 (dismissing Clearwater Contentions EC-7 and SC-1).

On December 3, 2010, the Staff published its Final Supplement to the GEIS for Indian Point Units 2 and 3.²⁷

Waste Confidence Decision and Related Rulemaking Proceeding

The Commission issued its initial Waste Confidence Decision on August 31, 1984,²⁸ thereby resolving on a generic basis the issue of whether on-site storage of spent fuel after the expiration of reactor operating licenses needs to be considered in an individual reactor licensing proceeding. As part of its Waste Confidence Decision, the Commission made five reasonable assurance findings regarding waste storage and disposal, including a finding that environmental protection and safety would be assured for at least 30 years beyond the operating license term of the reactor. 49 Fed. Reg. at 34,658.²⁹ In an associated rulemaking, the Commission added

²⁷ See NUREG-1437, Vols. 1-3, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report, Main Report and Comment Responses" (Dec. 2010).

²⁸ See "Waste Confidence Decision," 49 Fed. Reg. 34,658 (Aug. 31, 1984); "Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses," 49 Fed. Reg. 34,688 (Aug. 31, 1984).

²⁹ The Commission found reasonable assurance that (1) safe disposal of high level radioactive waste and spent fuel in a mined geologic repository is technically feasible; (2) one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09, and sufficient repository capacity will be available within 30 years after expiration of any reactor operating license to dispose of existing commercial high level radioactive waste and spent fuel originating in such reactor and generated up to that time; (3) high-level radioactive waste and spent fuel will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all high-level radioactive waste and spent fuel; (4) if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating licenses at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations; and (5) safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed. 49 Fed. Reg. at 34,659-60.

10 C.F.R. § 50.54(b) as a new condition on every license issued, and a new § 51.23(a) -- providing, *inter alia*, the Commission's generic determination that, if necessary, a reactor's spent fuel can be stored at the reactor site, or away from the reactor site, safely and without significant environmental impacts, for 30 years beyond the licensed term of operation. 49 Fed. Reg. at 34,694. The same rulemaking added 10 C.F.R. § 51.23(b), which stated that no discussion of the environmental impacts of spent fuel storage beyond the term of the license is required in any environmental report, environmental impact assessment, or environmental impact statement pertaining to the issuance or amendment of a reactor operating license. *Id.*

On September 18, 1990, the Commission published the results of its review of its initial Waste Confidence Decision, in which it revised Findings (2) and (4) regarding the period of time covered by its decision.³⁰ In addition, the Commission revised its rules in § 51.23(a), to reflect delays in the opening of a high level waste repository, and to clarify that the 30-year post-operation period included the term of a renewed license.³¹

In 1996, the Commission revised § 51.53 and stated that no aspect of spent fuel storage within the scope of the generic determination of § 51.23(b) needs to be addressed in the

³⁰ Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990). In revising findings (2) and (4), the Commission found reasonable assurance that: (2) that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time; and (4) if necessary, 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, or at either onsite or offsite independent spent fuel storage installations. 55 Fed. Reg. at 38,474.

³¹ "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 55 Fed. Reg. 38,472 (Sept, 18, 1990).

environmental report submitted for license renewal.³² Subsequently, on December 6, 1999, the Commission announced the results of a 10-year review of the Waste Confidence Decision – in which it concluded that a comprehensive reevaluation of the Waste Confidence Decision was not then necessary.³³

On October 9, 2008, the Commission announced its decision to undertake an updated review of the Waste Confidence Decision.³⁴ As part of the update, the Commission proposed, *inter alia*, to find reasonable assurance that spent fuel generated can be stored safely without significant environmental impacts for at least 60 years beyond licensed reactor operation, instead of the previous 30 years. 73 Fed. Reg. at 59,551. The Commission sought public comment on the proposal. *Id.* at 59,552. In addition, the Commission published parallel proposed rules for comment.³⁵

On December 23, 2010, after consideration of the comments it had received, the Commission amended 10 C.F.R. § 51.23(a) and separately published a final update and revision to the Waste Confidence Decision.³⁶ The new rule increases the previous finding of safe and environmental storage from 30 years to at least 60 years, but does not involve any changes to

³² “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467 (June 5, 1996), as amended by 61 Fed. Reg. 66,537 (Dec. 18, 1996).

³³ “Waste Confidence Decision Review: Status,” 64 Fed. Reg. 68,005 (Dec. 6, 1999).

³⁴ “Waste Confidence Decision Update,” 73 Fed. Reg. 59,551 (Oct. 9, 2008).

³⁵ “Proposed Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation,” 73 Fed. Reg. 59,547 (Oct. 9, 2008).

³⁶ Final Rule, “Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation,” 75 Fed. Reg. 81,032 (Dec. 23, 2010) (to be codified at 10 C.F.R. § 51.23(a) (effective Jan. 24, 2011)); “Waste Confidence Decision Update,” 75 Fed. Reg. 81,037 (Dec. 23, 2010).

10 C.F.R. Part 54.³⁷ The newly-amended 10 C.F.R. § 51.23(a), as revised on December 23, 2010, now states:

§ 51.23 Temporary storage of spent fuel after cessation of reactor operation--generic determination of no significant environmental impact.

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

10 C.F.R. § 51.23 (emphasis added) ("Waste Confidence Rule"). The Commission explained its revision of Findings (2) and (4) in the final rule, stating as follows:

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

³⁷ In addition to the Waste Confidence Decision Update and associated rulemaking, the Commission is also actively engaged in rulemaking on the GEIS. See "Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 74 Fed. Reg. 38,117 (July 31, 2009). The NRC's environmental protection regulations in Part 51 require the Staff to prepare an environmental impact statement (EIS) as part of reviewing a license renewal request. *Id.* at 38,119. To help in the preparation of individual operating license renewal EISs, the NRC prepared the 1996 Generic Environmental Impact Statement ("GEIS") for License Renewal. *Id.* Based upon the GEIS, in 1996 and 1999, the Commission amended its environmental protection regulations in Part 51 to improve the efficiency of the environmental review process for license renewal applicants. *Id.* Through the GEIS, the NRC summarized the findings of a systematic inquiry into the environmental impacts of continued operations and refurbishment activities associated with license renewal. *Id.* Environmental issues were either resolved generically as "Category 1" issues, or required a further plant-specific analysis as a "Category 2" issue. *Id.* As discussed in the rulemaking, the Commission is not proposing to change its previous determination that onsite storage of spent nuclear fuel and offsite radiological impacts of spent nuclear fuel and high level waste disposal, were "Category 1" issues. *Id.* at 32,127.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

The Commission, in response to public comments, and to achieve greater consistency with Finding 4, is also modifying the rule to include a time frame for the safe storage of SNF:

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary

75 Fed. Reg. at 81,033.

Significantly, in adopting its December 2010 update of the Waste Confidence Rule, the Commission did not change 10 C.F.R. § 51.23(b), nor the other sections cited within § 51.23(b), *i.e.* §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95, and 51.97(a). Thus §§ 51.23(b) and (c) continue to state that no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) is required in any environmental impact statement prepared in connection with the issuance of a renewed license under 10 C.F.R. Part 54.

Likewise, regarding what an applicant's Environmental Report must contain, 10 C.F.R. § 51.53(c)(2) remains unchanged, and continues to state as follows:

[The Applicant's Environmental Report--Operating License Renewal Stage] need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with §51.23(b).

Similarly, regarding the Staff's environmental impact statement at the operating license renewal stage, 10 C.F.R. § 51.95(c)(2) does not require a discussion of spent fuel storage:

... the supplemental environmental impact statement prepared at the license renewal stage need not discuss . . . any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).

10 C.F.R. § 51.95(c) (emphasis added). Thus, the required contents of the applicant's ER described in 10 C.F.R. § 51.53(c), the Staff's draft supplemental EIS described in 10 C.F.R. § 51.71(d), and the Staff's final supplemental EIS described in 10 C.F.R. § 51.95(c) are not changed by the Waste Confidence Decision Update and Waste Confidence Rule.

Importantly, as the Commission observed, “the Waste Confidence Decision and Rule satisfy a portion of the NRC's NEPA obligations – those associated with the environmental impacts after the end of license life.” 75 Fed. Reg. at 81,033. The Commission further observed that “the Waste Confidence Decision is the Environmental Assessment – the NRC's NEPA analysis – that provides the basis for the generic determination of no significant environmental impacts reflected in the rule (10 C.F.R. § 51.23).” *Id.*

In the statement of consideration (“SOC”) for the rule, the Commission discussed the date by which a repository may be available. The Commission stated:

The Commission believes that there is no specific date by which a repository must be available for safety or environmental reasons; the Commission did not define a period when a repository will be needed for safety or environmental reasons in 1990 and it is not doing so now—it is only explaining its view of when a repository could reasonably be expected to be available after a Federal decision to construct a repository.

75 Fed. Reg. at 81,035 - 81,036.

DISCUSSION

I. Legal Standards Governing the Admissibility of Contentions.

The legal requirements governing the admissibility of contentions are well established, and have been discussed and applied in numerous occasions by this Board. In brief, the regulations require that a contention must satisfy certain timeliness and basis requirements in order to be admitted.

1. Requirements for Late-Filed Contentions

To be timely, the request and/or petition must be filed pursuant to the time specified in the Federal Register notice of opportunity for a hearing or as provided by the Board. 10 C.F.R. § 2.309(b)(3)(i). Nontimely filings will not be entertained absent a favorable ruling by the Board based upon a balancing of the eight factors of § 2.309(c)(1)(i)-(viii). See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 575 (2006). Pursuant to 10 C.F.R. § 2.309(c), the petitioner must address eight factors in its nontimely filing, the most important of which is “(i) Good cause, if any, for the failure to file on time.” See 10 C.F.R. § 2.309(c)(1)(i)-(viii).³⁸

As further set forth in 10 C.F.R. § 2.309(f)(2), following the initial deadline for filing contentions, any supplemental or amended contentions must be timely filed. In this regard, 10 C.F.R. § 2.309(f)(2) states:

The petitioner may amend [its] contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or

³⁸ Clearwater and Riverkeeper are admitted parties to this proceeding, and have previously demonstrated their standing to intervene. Accordingly, the “good cause” factor specified in 10 C.F.R. § 2.309(c)(1)(i) is the principal factor for consideration of the Petitioners' current contentions.

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--

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(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).³⁹ In delineating this requirement, the Commission further stated that:

[T]he rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Include[d] in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the timing of availability of the subsequent information. See § 2.309(f)(2)(iii). . . . This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available.⁴⁰

In discussing the Commission's rules establishing a framework for considering contentions filed after the initial petition was due, it has been held that when new contentions

³⁹ There is a clear analogy between the requirement that data or conclusions must "differ significantly" from information in previously available documents, as required by 10 C.F.R. § 2.309(f)(2), and the requirement that information must be "materially different," as required by § 2.309(f)(2)(ii). *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163, *aff'd on other grounds*, CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006). To be materially different under 2.309(f)(2)(ii), the proffered contention must pose matters material to the outcome of the proceeding. See *id.*

⁴⁰ Statement of Consideration, "Final Rule, Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

are based on new developments or information, they are to be treated as “new or amended” under 10 C.F.R. § 2.309(f)(2)(i)-(iii). *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007), *citing AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 395-96 & n.3 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005)). Where the information underlying a late-filed contention is not new, the stricter standards pertaining to non-timely filings, set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii) apply. *Shaw Areva Mox Services*, LBP-07-14, 66 NRC at 210 n.95.⁴¹ A newly-created document that is a compilation or repackaging of previously-existing information is not equivalent to, and does not provide, information that is “materially different” under 10 C.F.R. § 2.309(f)(2)(ii).⁴²

Finally, when new and materially different information is available, a proffered contention must be submitted in a timely manner. 10 C.F.R. § 2.309(f)(2)(iii). A specific time deadline is not given in the NRC’s regulations, but, consistent with the Board’s “Scheduling Order” of July 1, 2010 (at 6), and under the well-established standards for late-filed contentions, filing within 30 days of the new information is usually sufficient to meet 10 C.F.R. § 2.309(f)(2)(iii).⁴³

⁴¹ Information is not new merely because the petitioner was not previously aware of it. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009). A petitioner “must show that the information on which the contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it.” *Id.*, emphasis in original (discussing 10 C.F.R. § 2.309(c) and the need to establish good cause for late filing).

⁴² See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 142 (July 8, 2009) (slip op. at 79), *aff’d in part, rev’d in part on other grounds*, CLI-10-2, 71 NRC __ (Jan. 7, 2010) (slip op. at 1); see also *Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), “Memorandum and Order (Ruling on Request to Admit New Contention),” (unpublished), slip op. at 8 (Apr. 29, 2009).

⁴³ See generally, *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (May 25, 2006).

2. General Requirements for Contentions

The Commission has established general requirements for contentions, as set forth in 10 C.F.R. § 2.309(f)(1). As stated therein, contentions must meet 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:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, . . . ;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(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;

(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;

(vi) [P]rovide 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)(i)–(vi).⁴⁴ Further, the Commission has stated that "the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-08-17, 68 NRC 231, 237 (2008), citing *Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 168 n.73 (2008).

Furhter, as set forth in 10 C.F.R. § 2.309(f)(2), petitioners must base their contentions on existing documents and information:

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. . . .

10 C.F.R. § 2.309(f)(2). This requirement places an "ironclad obligation" on petitioners to examine available information with sufficient care to enable them to uncover any information that could serve as the foundation of a contention.⁴⁵

Finally, under 10 C.F.R. § 2.335, no rule or regulation of the Commission concerning the licensing of production and utilization facilities is subject to attack in any adjudicatory proceeding subject to this part absent a waiver under 10 C.F.R. § 2.335(b).

⁴⁴ 10 C.F.R. § 2.309(f)(1)(vii) applies to a proceeding under 10 C.F.R. § 52.103(b), and is inapplicable to a license renewal proceeding.

⁴⁵ See "Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

II. Petitioners' Contentions Are Inadmissible.

On January 24, 2011, in response to the Commission's publication of its final Waste Confidence Rule and Waste Confidence Decision Update, the Petitioners submitted two environmental contentions and two safety contentions. As discussed below, the Petitioners' request for admission of its proposed environmental contentions, which allege omissions of environmental analyses related to waste storage, are contrary to the mandate of 10 C.F.R. § 51.23(b), which declares that no such analyses need be provided.⁴⁶ Further, the Petitioners have not filed a petition for waiver of the Commission's regulations under 10 C.F.R. § 2.335,⁴⁷ as this Board has previously recognized is necessary for any such contentions to be considered.⁴⁸ In addition, the Petitioners' new safety contentions also constitute an impermissible challenge to the Commission's rules, fail to address the regulations and the contents of the Applicant's LRA, and are untimely filed without good cause. For these reasons,

⁴⁶ 10 C.F.R. § 51.23(b) states, in pertinent part:

“[N]o discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment, . . . , is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter,

⁴⁷ As stated in 10 C.F.R. § 2.335, absent the granting of a waiver or exception, “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to [10 C.F.R. Part 2].” 10 C.F.R. § 2.335(a).

⁴⁸ See, e.g., “Order (Ruling on New York State's New and Amended Contentions)” (June 16, 2009), slip op. at 16. (rejecting New York Contention 34 as an impermissible attack upon the Commission's regulations).; cf. *Tennessee Valley Authority (Watts Bar Unit 2)*, LBP-09-26, 70 NRC ___ (Nov. 19, 2009), slip op. at 44 (rejecting contention concerning need for power and alternative energy sources, as barred by § 51.95(b), absent the filing of a petition for waiver under § 2.335).

Petitioners' motion should be denied and Contentions EC-8, EC-9, SC-2, and SC-3 should be rejected.

A. Contentions EC-8 and EC-9 are Inadmissible

1. Contentions and Support

In Clearwater EC-8 (Riverkeeper EC-6), the Petitioners proffered a slightly altered version of previously-rejected Contention EC-7:

Clearwater EC-8 (Riverkeeper EC-6)

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of the potential impacts of generating more spent fuel leading to additional waste storage on site, the alternative methods of accomplishing such storage, and potential alternatives to additional waste storage on the site, including the no-action alternative.

Petition at 17. Next, recognizing that Contention EC-8 might be barred as an impermissible challenge to the Commission's rules, the Petitioners presented a second variation of rejected Clearwater EC-7, wherein they allege an inadequate analysis for the period commencing sixty years after the end of the license term, asserting as follows:

Clearwater EC-9 (Riverkeeper EC-7)

The environmental analysis carried out to assess the potential impacts of relicensing Indian Point Units 2 and 3 is inadequate because it provides an insufficient analysis of the potential impacts of generating more spent fuel during the period commencing 60 years after the expiration of each license. Missing elements include analysis of: a) the long term impact of additional waste storage on site; b) the alternative methods of accomplishing such storage; and c) potential alternatives to additional waste storage on the site, including the no-action alternative.

Petition at 18.

The Petitioners did not present a different argument for Contention EC-8. In sum, Petitioners claim that the Waste Confidence Rule is invalid because it uses an agency rule to

sidestep NEPA. *Id.* However, Petitioners appear to acknowledge that EC-8 is a direct challenge to regulations, and that it is therefore inadmissible.⁴⁹ As factual basis for the contentions, the Petitioners rely upon the same Declaration of Dr. Gordon Thompson ("Thompson Declaration") which Clearwater had previously attached as "Exhibit 1" to its original Motion of October 16, 2009. *See* Petition at 19.⁵⁰

Petitioners base the contentions upon their assertion that the Commission cannot determine when offsite disposal will be available, from which Petitioners conclude that the Waste Confidence Decision update cannot be used to satisfy NEPA. Petition at 19. The Petitioners provide a lengthy discussion of how the GEIS has been applied and used (*id.* at 21-27), and how the GEIS relies upon the Commission's prior Waste Confidence Decision. *Id.* at 22. The Petitioners assert that the legal reasoning relied upon in the GEIS has been

⁴⁹ *See e.g.*, Petition at 20 (recognizing limits on consideration of a rule); *id.* at 41 (recognizing that existing rules do not contemplate the information Petitioners allege is missing).

⁵⁰ The "Thompson/TSEP" was prepared in February of 2009. Thompson Declaration at 2 (unnumbered). The Petitioners do not offer any updated information from Dr. Thompson that addresses the subsequent rulemaking and the new rule which became in effective January 2011.

In *Bellefonte*, the Board rejected, as not "materially different", the Thompson/TSEP Report -- which has also been filed by Clearwater in support of its Contentions EC-7 and SC-1 in this proceeding. *See* Declaration of Dr. Gordon R. Thompson, filed as Exhibit 1 to Corrected Motion, at 2, ¶¶ II-1 – II-2, and attached Thompson/TSEP Report. In *Bellefonte*, addressing the Thompson/TSEP Report, the Board stated:

[I]t seems apparent that the comments/analysis upon which Joint Intervenors rely is essentially an amalgam of information previously submitted in other forums and contexts that primarily focuses on purported impacts of spent-fuel pool fires. To whatever degree the information as it is now packaged may be pertinent and persuasive as waste confidence decision/rulemaking comments, its status as "materially different" for the purpose of interposing timely a new contention in this proceeding is problematic.

See Tennessee Valley Authority (Bellefonte Nuclear Power Units 3 and 4), "Memorandum and Order (Ruling on Request to Admit New Contention)," (unpublished), slip op. at 8 (Apr. 29, 2009).

destroyed by the Waste Confidence Decision Update, insofar as the rules previously presumed that waste would be on site for sixty years at most. Petition at 27. From this statement, petitioners conclude that waste storage is now a permissible legal issue for adjudication in this proceeding. *Id.* The Petitioners assert that the Waste Confidence Decision only applies for at most sixty years.⁵¹ Further, the Petitioners argue that the new rule is tantamount to new and significant information which must be incorporated into the EIS, particularly with respect to the absence of generic findings for the period beyond sixty years. Petition at 40-41. Finally, Petitioners claim their contentions are timely because they were filed within thirty days of the availability of new information, *i.e.* the final rule update, and they argue, as an alternative, that they meet the late-filing criteria of 10 C.F.R. § 2.309(c). *Id.* at 45-47.

2. Contentions EC-8 and EC-9 Constitute Inadmissible Challenges to the Commission's Rules.

Petitioners' four new contentions are inadmissible, as they impermissibly challenge the Commission's waste confidence and licensing renewal regulations. Under both the previous and current waste confidence decision and waste confidence rules, the Commission expressly decided to address the environmental and radiological effects of onsite spent fuel storage, generically, for license renewal.⁵² As amended, the Waste Confidence Rule states:

"[I]f necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include

⁵¹ See, *e.g.*, Petition at 33 (stating that generic findings relate only to period 60 years beyond license); Petition at 39 (stating that no sufficient generic environmental analysis exists to extend the 60-year finding).

⁵² See, *e.g.*, Final Rule, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 66,537, 66,538 (Dec. 18, 1996); Final Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032, 81,033 (Dec. 23, 2010).

the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations."

10 C.F.R. § 51.23(a) (effective Jan. 24, 2011). The rules also state that the "expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available."⁵³ An applicant's environmental report ("ER") therefore "need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination" in an NRC-prepared generic EIS, nor must the ER contain analyses of the "Category 1" issues listed in Appendix B Subpart A. 10 C.F.R. § 51.53(c)(2) & (c)(3)(iii).

Moreover, the 2010 rulemaking did not change the Commission's long-standing holdings regarding the limited scope of license renewal proceedings. Indeed, *after* the new waste confidence rule and waste confidence decision went into effect, the Board in the *Seabrook* proceeding reiterated the Commission's holding that Category 1 issues (like spent fuel storage) are exempt from analysis in an individual license renewal proceeding.⁵⁴

With respect to environmental issues, the Commission has limited the scope of license renewal proceedings to exclude generic "Category 1" issues. *See, e.g., Florida Power & Light Co.* (Turkey Point Units 3 and 4) CLI-00-23, 52 NRC 327, 329 (2001) (describing the scope of license renewal proceedings). The Commission has consistently concluded that the onsite

⁵³ See Table B-1 "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants," Part 51, Subpart. A, App. B.

⁵⁴ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1) LBP-11-02, 73 NRC __, __ (Feb. 15, 2011), slip op. at 44. Further, "[P]art 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically[]" and "[A]ll such issues, including accident risk, fall outside the scope of license renewal proceedings.[]" *Id.* at __ (slip op. at 44) quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 2 and 4), CLI-01-17, 54 NRC 3, 23 (2001).

storage of spent fuel is a "Category 1" issue addressed for all plants generically through the GEIS, and therefore is beyond the scope of individual license renewal proceedings. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21-22 (2001). Moreover, the Commission recently reiterated that onsite spent fuel storage is a "Category 1" issue, addressed generically in the GEIS, and thus does not warrant any additional site-specific analysis. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __, __ (June 17, 2010) slip op. at 29-38.

In its Waste Confidence Decision Update, the Commission re-affirmed this principle, relying on the GEIS discussion of spent fuel storage. The Commission stated:

For operating license renewals, the NRC may rely on NRC's GEIS for License Renewal of Nuclear Plants, NUREG-1437, May 1996, for issues that are common to all plants and must also prepare a Supplemental EIS that evaluates site-specific issues not discussed in the GEIS or "new and significant information" regarding issues that are discussed in the GEIS.

75 Fed. Reg. at 81,041.

The Commission observed (*id.*):

The generic determination in § 51.23(a) does play a role in the environmental analyses of the licensing and license renewal of individual NPPs; it excuses applicants for those licenses and the NRC from conducting an additional site-specific environmental analysis only within the scope of the generic determination in 10 CFR 51.23(a).

Contentions EC-8 and EC-9 disregard these principles by (1) challenging the waste confidence rules, and (2) impermissibly challenging the regulations governing the contents of the Applicant's ER, the draft SEIS, and the final SEIS, as set forth in 10 C.F.R. §§ 51.53(c),

51.71(d), 51.95(c) and 10 C.F.R. Part 51, Appendix B, by raising issues that are addressed generically as "Category 1" issues therein.⁵⁵ In Contention EC-9, the Petitioners attempt to overcome the prohibition on attacking NRC regulations by limiting their contention to "the period commencing 60 years after" the licensed term. Petition at 18. Petitioners view the supporting analyses of the rule as limited to a period of 60 years following the term of license renewal. See *id.* at 27. However, this limitation does not withstand the plain language of the Waste Confidence Rule, which indicates that its findings are applicable for "at least 60 years beyond the licensed life" (emphasis added). If the Commission's intent was to limit the generic finding to a maximum of sixty years, and to require analysis commencing at the sixty-years point, it would have been a simple matter to do so. Moreover, as noted by the Petitioners, the Commission found it unnecessary to specify an upper bound, given its confidence that a permanent repository will be available when necessary. See Petition at 32.

The Petitioners' arguments that site-specific waste storage analyses must be provided are tantamount to asserting that such analyses are "Category 2" issues, not "Category 1" as currently categorized by 10 C.F.R. Part 51 and the GEIS. This is an impermissible challenge to the GEIS as adopted in Table B-1 of Appendix B. Further, as the Commission observed, the GEIS itself is currently the subject of rulemaking. See 75 Fed. Reg. at 81,041 n.4 Moreover,

⁵⁵ For example section 51.53(c) lists the information that the Applicant must include in its license renewal environmental report and expressly excludes, in 10 C.F.R. § 51.53(c)(3)(i), information on the environmental impacts of any issues identified as Category 1 issues in Appendix B to 10 C.F.R. Part 51. Appendix B, in turn, identifies on-site spent fuel storage as a Category 1 issue, finding that the "expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available." In a parallel fashion, 10 C.F.R. § 51.71(d) states that a draft SEIS prepared at the license renewal stage "will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part."

the GEIS rulemaking proceeding includes consideration of spent fuel storage. See 74 Fed. Reg. at 38,127. Thus, the Petitioners' claims may be addressed generically through rulemaking, and should not be admitted into an individual license renewal proceeding. See *Indian Point*, CLI-10-19, 72 NRC __ (July 8, 2010), slip op. at 2-3.⁵⁶

B. Contentions SC-2 and SC-3 are Inadmissible

1. Contentions and Support

In Contention SC-2, the Petitioners re-assert, unchanged, the previously-rejected Contention SC-1, which had stated as follows:

Clearwater SC-2 (Riverkeeper TC-3)

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site in the long term. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.

See Petition at 18. The Petitioners acknowledge that Contention SC-2 is impermissible, and they accordingly proffer Contention SC-3 an alternative contention, again starting their claim that the Applicant and Staff must address the period commencing sixty years after the end of the license:

⁵⁶ Contentions EC-8 and EC-9 conclude with a statement regarding "potential alternatives to additional waste storage on the site, including the no-action alternative" (see Petition at 17-18), but the Petitioners do not further develop this topic; there is no explanation of what the Petitioners allege is lacking. Also, the Petitioners make no reference to the discussions alternatives to license renewal discussed in Chapter 8 of the Final SEIS. Thus, in addition to being an impermissible challenge to the Commission's rules, those portions of EC-8 and EC-9 fail to meet the basic admissibility requirements in 10 C.F.R. § 2.309(f)(1) by failing, for example, failing to explain the basis for the contention (§ 2.309(f)(1)(i)), as well § 2.309(f)(2) for failing to frame the contention against the contents of the NRC's EIS.

Clearwater SC-3 (Riverkeeper TC-4)

The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the dry casks and spent fuel pools that could be used to store waste on the site during the period commencing 60 years after the date the license expires at each unit. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.

Id.

In support of these contentions, the Petitioners state that site-specific safety assessments must be done, and they identify Arnold Gunderson as their expert witness. *Id.* at 35. Further, they rely upon the Thompson/TSEP report to state that long-term wet storage of spent fuel does not meet NRC requirements. *Id.* at 36.

The Petitioners generally do not distinguish their arguments made in support of Contentions SC-2 and SC-3 from those made to support Contentions EC-8 and EC-9. They allege that the applicant must provide the NRC with a basis to make safety findings regarding long-term storage, but they fail to explain why such a finding must be part in a license renewal proceeding, other than to assert that Entergy must provide an adequate Aging Management Program (“AMP”) for casks and pools used to store spent fuel. See Petition at 18-19 and 34; see *also*, Petition at 43 (stating that Petitioners' expert believes storage of spent fuel in wet pools is less safe than what the Staff believes). The Petitioners, however, do not frame their arguments against the safety requirements and regulations in 10 C.F.R. Part 54, but instead broadly assert that existing safety analyses fail to address the potential for spent fuel pool leaks to get worse, and fail to address the problem, which the Petitioners say was known for over 10 years, that Boraflex may degrade. Petition at 35.

2. Contentions SC-2 and SC-3 Constitute Impermissible Challenges to the Commission's Regulations.

As a threshold matter, the Commission has already found that Contention SC-1 was inadmissible as a challenge to the (then ongoing) waste confidence rulemaking. *Indian Point*, CLI-10-19, 72 NRC __ (July 8, 2010). The completion of the rulemaking did not alter any requirements for the application, or any of the needed safety findings in the regulations. Thus, Contention SC-2 (which is a duplicate of Contention SC-1) along with the modification of SC-1 found in SC-3, remain inadmissible. *See id.*

With respect to safety issues, the Commission has limited the scope of license renewal proceedings to a review of the plant structures and components requiring an aging management review for the extended license term in accordance with 10 C.F.R. § 54.21(a)(1) and the plant systems, structures, and components subject to time-limited aging analyses under 10 C.F.R. § 54.21(c). *See, e.g., Florida Power & Light Co.* (Turkey Point Units 3 and 4) CLI-00-23, 52 NRC 327, 329 (2001). The Commission has noted that:

There are in fact a number of spent fuel pool structural components and related systems subject to the Part 54 aging management review for license renewal. [An applicant's] license renewal application provides extensive information on these spent fuel storage materials and components, and on the spent fuel cooling system.

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23 (2001).

The Commission recently reiterated the scope of the license renewal safety review in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) slip op. at 4-8. The safety focus of license renewal is to assure the safety functions outlined in 10 C.F.R. § 54.4(a)(i)-(iii) and to assure compliance with other specified rules in 10 C.F.R. Part 54. *Id.*, slip op. at 7-8. Where an intervenor files a contention regarding the safety of onsite spent fuel storage, it is obliged to

specify the portions of the application that it contends fail to meet these requirements. While discussing a contention which alleged in part that neither Applicant nor Staff had studied the risks of radioactive material and environmental contamination during the license renewal term, another Board held:

To the extent [a petitioner's] contention purports to raise a health and safety issue, it presents a challenge to 10 C.F.R. § 54.21 because the contention does not raise any aspect of the Applicant's aging management review or evaluation of the plant's systems, structures, and components subject to time-aging analysis.

Florida Power and Light Co. (Turkey Point, Units 3 and 4), LBP-01-6, 53 NRC 138, 164, *aff'd* CLI-01-17, 54 NRC 3 (2001).⁵⁷ Further, in *Turkey Point*, the Commission affirmed the Board's rejection of safety concerns where the petitioner failed to identify any deficiency in the renewal application's discussion of spent fuel storage and handling and the petitioner "never even refer[ed] to any part of the license renewal application." *Turkey Point*, CLI-01-17, 54 NRC at 23.

Here, the Petitioners present few supporting facts or discussion of Contentions SC-2 and SC-3, and make no reference to what is in the LRA and how it fails to satisfy the requirements of 10 C.F.R. Part 54. Further, the Petitioners make no meaningful effort to discuss and apply the factors in § 2.309(f)(1)(i)-(vii) to proposed Contentions SC-2 and SC-3. For example, pursuant to 10 C.F.R. § 2.309(f)(1)(ii), the Petitioners must provide a brief explanation of the contention. However, no meaningful explanation of the safety claims is made in their Petition. See Petition at 15-33 (discussing the history of the environmental claim, but providing only conclusory remarks on the safety claim). Similarly, Petitioners fail to show that the safety

⁵⁷ Petitioners make an argument analogous to the rejected *Turkey Point* contention, stating that the potential for leaks into the Hudson River to get worse was not analyzed in the license renewal assessments. See Petition at 35. Similarly, their claim does not discuss the contents of the LRA, and thus the argument must be rejected.

issues they raise are material to a decision on whether the LRA satisfies the requirements of 10 C.F.R. Part 54, contrary to the requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1)(iv); nor have Petitioners pointed to any specific portion of the LRA which they contend is deficient, contrary to 10 C.F.R. 2.309(f)(1)(vi). Contentions SC-2 and SC-3 therefore fail to state a material, admissible issue for litigation.

(a) Dry Cask Storage Is Beyond the Scope of the Proceeding

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a contention must raise issues that are within the scope of the proceeding. In Contentions SC-2 and SC-3, however, Petitioners raise concerns regarding the safety of dry cask storage. The safety of spent fuel dry storage casks, however, is an issue that is beyond the scope of this proceeding, which addresses the renewal of the IP2 and IP3 reactor operating licenses under 10 C.F.R. Part 54. Instead, the safety of a spent fuel storage cask is reviewed in a proceeding conducted under 10 C.F.R. Part 72.⁵⁸ Accordingly, the portions of SC-2 and SC-3 concerned with the safety of dry cask storage are inadmissible and beyond the scope of the Indian Point license renewal proceeding.

(b) The Petition Fails to Dispute Any Spent Fuel Pool Provisions in the LRA

10 C.F.R. § 2.309(f)(1)(vi) requires that a petitioner identify the specific portions of the application that it disputes, along with the supporting reasons for each dispute. Contrary to this requirement, Petitioners fail to identify any portion of the Indian Point LRA which they contend is inadequate. Within the LRA, Entergy discussed aging management programs associated with spent fuel pools. For example, for the Spent Fuel Storage Racks, the LRA indicates that the AMP for "Water Chemistry Control - Primary and Secondary" is used to manage the loss of

⁵⁸ A Certificate of Compliance ("CoC") is issued for spent fuel storage casks under 10 C.F.R. § 72.238. See, e.g., CoC No. 1014, approving the HI-STORM 100 Cask System for use from May 31, 2000, to June 1, 2020. The renewal of a CoC is governed by 10 C.F.R. § 72.240.

material aging effect. LRA at p. 3.5-51, Table 3.5.2-3, ("Turbine Building, Auxiliary Building, and Other Structures Structural Components and Commodities (IP2 and IP3)"). Nowhere does Clearwater challenge this, or any other AMP provided in the LRA for spent fuel pools, including those portions that directly deal with the aging of spent fuel storage components. Thus, because Petitioners fail to address and dispute the application, the spent fuel pool portions of SC-2 and SC-3 are not admissible.

(c) Long-Term Storage is Beyond the Scope of License Renewal

Petitioners allege in part, that long-term use of spent fuel pools as well as dry casks, starting sixty years after cessation of operations, is material to the proceeding. See Petition at 43. However, post-operation storage plans are subject to separate review and preliminary approval under the current operating license regulations under 10 C.F.R. § 50.54(bb), the provisions of which are a condition of the current operating licenses.⁵⁹ Petitioners provide no legal citation to support their view that the LRA must contain a long-term storage safety assessment, thus these portions of Contention SC-2 and SC-3 are inadmissible.

(d) The Petitioners' Challenge to Staff Performance is Not Admissible

In SC-2 and SC-3, the Petitioners allege that the NRC Staff has failed to establish the safety of long-term spent fuel storage. This assertion fails to state an admissible contention.

⁵⁹ Under 10 C.F.R. § 50.54(bb), a licensee must submit for NRC review and preliminary approval its program for management of all irradiated fuel at the reactor during the period following permanent cessation of operations until the Secretary of Energy takes possession of the fuel for ultimate disposal in a repository. In promulgating 10 C.F.R. § 50.54(bb), the Commission stated that, while no specific actions were required, the licensees' actions could include continued storage of spent fuel in the reactor spent fuel storage basin, storage in an on-site or off-site independent spent fuel storage installation licensed under 10 C.F.R. Part 72; and transshipment to and storage of the fuel at another operating reactor site in another reactor's basin. 49 Fed. Reg. at 34,689. On October 23, 2008, Entergy submitted information pursuant to 10 C.F.R. § 50.54(bb), for Indian Point Units 1 and 2 spent fuel storage. See Letter from J. E. Pollock to NRC, Subject "Unit 1 & 2 Program for Maintenance of Irradiated Fuel and Preliminary Decommissioning Cost Analysis in accordance with 10 CFR 50.54 (bb) and 10 CFR 50.75(f)(3)."

Pursuant to 10 C.F.R. § 2.309(f)(1)(vi), a petitioner must include references to specific portions of the application that it disputes; Petitioners' assertions concerning the Staff fails to meet this requirement. *Cf.* 10 C.F.R. § 2.309(f)(2) (requiring that contentions be based upon the application). Further, the Commission has stated that "the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review." *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station)*, CLI-08-17, 68 NRC 231, 237 (2008), *citing Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 168 n.73 (2008). Thus, the portions of Contention SC-2 and SC-3 that claim the Staff failed to perform its duties are inadmissible.

3. Contentions SC-2 and SC-3 Are Impermissibly Late.

Even if the Board concludes that Contentions SC-2 and SC-3 are not barred from admission in this proceeding, the contentions should be rejected as impermissibly late, in that they are not based upon any new or materially different information, as required by 10 C.F.R. §§ 2.309(f)(2)(i) & (ii).

Contentions SC-2 and SC-3 raise concerns as to the safety of spent fuel storage at Indian Point. Under the Commission's regulations, safety is addressed by the requirements of 10 C.F.R. Part 54, which requires, *inter alia*, the provision of adequate aging management programs (AMP). Contentions SC-2 and SC-3 claim to be triggered by the Commission's recent waste confidence decision update. *See* Petition at 40-41. However, the recent completion of rulemaking in 10 C.F.R. Part 51 had no effect on the AMPs required as part of an LRA, *i.e.* the rulemaking did not change the scope of or requirements for systems, structures and components subject to aging management in 10 C.F.R. Part 54.

The Petitioners' concerns in Contentions SC-2 and SC-3 about aging management of casks and fuel pools, and long-term safety, could have been filed much sooner -- *e.g.*, upon Petitioners' initial review of Entergy's application. Their current attempt to raise these issues

now is impermissibly late. While the revised rule *increased* the minimum period during which environmental protection and safety would be assured from at least 30 years to at least 60 years following the license term, the Petitioners do not explain why they had to wait until the revised rule was adopted before they could file these safety contentions. Thus, the Petitioners do not identify any recent change that only now permitted them to allege under 10 C.F.R. § 2.309(f)(1)(vi), that the application fails to contain information on a relevant matter.

The Petitioners rely upon the Declaration of Dr. Gordon Thompson (“Thompson Declaration”) and the Thompson/TSEP Report, which it had previously attached as Exhibit 1 to its Original Motion. See Petition at 36. Petitioners’ reliance on these documents does not support the admission of their new contentions. First, Petitioners do not contend that the Thompson materials constitute new information, and indeed, his statements are not new. Apart from the fact that the Thompson/TSEP Report was published long ago (in February 2009), the contents of that report were not new even when the report was published. Thus, several other Boards have recently held that similar contentions supported by Dr. Thompson and his Thompson/TSEP Report failed to satisfy 10 C.F.R. § 2.309(f)(2) because they were not based upon information that was previously unavailable. See, e.g., *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LPB 09-10, 70 NRC 51, 143-44 (2009);⁶⁰ *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), “Order Denying Motion to Admit Proposed Contention Eight”

⁶⁰ The Board in *Levy County* also rejected the suggestion that the October 9, 2008 Federal Register Notice that the NRC was revisiting its Waste Confidence findings and was soliciting comments thereon was per se sufficient to meet 10 C.F.R. § 2.309(f)(2)(i). *Levy County*, LPB-09-10, 70 NRC at 144. The Levy County Board analyzed and rejected the proffered contention under the eight-factor balancing test of 10 C.F.R. 2.309(c). *Id.* See also, *Bellefonte*, Order of April 29, 2009 at 7-8 (holding that the petitioners had failed to show that the notice of proposed rulemaking constituted newly available and materially different information).

(June 9, 2009), slip op. at 5 (unpublished); *Virginia Electric and Power Co. d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Unit 3), "Order Denying Motion to Admit Proposed Contention Nine" (June 2, 2009), slip op. at 5 (unpublished); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), Licensing Board Memorandum and Order, (Apr. 29, 2009), slip op. at 8 (unpublished).⁶¹

4. A Balancing of the Factors in § 2.309(c)
Does Not Support Admission of SC-2 and SC-3

The Petitioners state that their filing meets the requirements of 10 C.F.R § 2.309(c), although they assert that this standard is inapplicable. Petition at 45-47. However, in their discussions of 10 C.F.R § 2.309(c), the Petitioners do not address their safety contentions separately from their environmental contentions, and instead broadly assert that good cause exists under § 2.309(c)(1)(i) because they could not file their contentions before the waste confidence decision update was complete. *Id.* at 47. However, the Petitioners' argument fails, because the updated rule did not alter the required safety regulations or requirements governing the contents of the LRA. The amended rule did not affect 10 C.F.R. Part 54; with respect to the safety portions of the LRA, the updated rule maintained the *status quo*. Further, the Petitioners could have filed their concerns based on Dr. Thompson's Declaration and the Thompson/TSEP Report in the past upon initial review of the application. Indeed, the prior multiple filings in other proceedings of related contentions supported by Dr. Thompson's report demonstrate that

⁶¹ Likewise, the information provided by Mr. Gunderson is not new. Mr. Gunderson states that between 30 to 21 years ago from 1981 to 1990, he was responsible for manufacturing "boroflex" neutron absorber racks, aging issues and movement of the absorber was not considered. Petition at 35 n. 7. This information is over two decades old, and does not constitute new information to support a late safety contention.

Petitioners could have filed sooner. Thus, the "good cause" factor in § 2.309(c)(1)(i) does not weigh in Petitioners' favor.

The balancing factor of "broadening and delaying the proceeding" set forth in 10 C.F.R. § 2.309(c)(1)(vii) also weighs against Petitioners, as multiple issues including the renewal of dry storage cask certificates (under 10 C.F.R. Part 72), and consideration of the proposed Yucca Mountain repository project (under 10 C.F.R. Part 63), would substantially exceed the scope of the issues pertinent to license renewal under 10 C.F.R. Parts 51 and 54. The Petitioners' assertion that the admission of their contentions would avert any delay which might result from an incorrect decision in this proceeding (see Petition at 47) is to no avail; this concern is speculative and fails to recognize that the admission of an untimely and inadmissible contention would itself cause delay in the proceeding.

Finally, the Petitioners state that admitting the contentions would assist in developing a sound record because, according to Petitioners, the present record is insufficient. Petition at 47. However, that conclusory statement misses the mark. Under 10 C.F.R. § 2.309(c), the Petitioners must address how their participation would assist in developing a sound record. *Cf. Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976) (discussing, in the context of discretionary intervention, the issues related to developing a sound record). The Petitioners offer no explanation of *how* they will assist in developing the record. Further, the issues of waste storage are already addressed through rulemaking and through the separate certification process associated with dry storage casks. Thus, the NRC has already addressed the topic.

CONCLUSION

The Petitioners' new contentions constitute impermissible challenges to the Commission's Waste Confidence Rule, as revised. Further, they have not demonstrated the existence of new and materially-different information to support the admission of their new contentions, and their contentions on safety issues are impermissibly late. The Petitioners' request for the admission of Contentions EC-8, EC-9, SC-2 and SC-3 should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Roth', with a long horizontal flourish extending to the right.

David E. Roth
Counsel for NRC Staff

Dated at Rockville, MD
this 18th day of February 2011

Answer Certification

Pursuant to the Board's Order of July 1, 2010, I certify that I made a sincere effort to make myself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

A handwritten signature in black ink, consisting of a stylized 'D' followed by a long, sweeping horizontal line that curves slightly upwards at the end.

David E. Roth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of February 2011

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/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO HUDSON RIVER SLOOP CLEARWATER, INC. AND RIVERKEEPER, INC.'S JOINT MOTION AND PETITION TO ADD NEW CONTENTIONS," dated February 18, 2011, 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 18th day of February, 2011:

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