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

NRC STAFF'S ANSWER TO AMENDED AND NEW CONTENTION (EC-3) FILED BY HUDSON RIVER SLOOP CLEARWATER, INC. CONCERNING THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the amended contention submitted by the Hudson River Sloop Clearwater, Inc. ("Clearwater") on February 3, 2011,[1] concerning the Staff's Final Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (December 2010) ("Final SEIS"). Clearwater's amended contention consists of three parts: the first part (which, for the sake of clarity, the Staff refers to hereinafter as "EC-3a") is substantially identical to Clearwater EC-3;[2] the second part (hereinafter "EC-3b") challenges the Staff's assessment of the impact of the no-action

[1] *See* "Motion for Leave to Amend and Extend Contention EC-3 Regarding Environmental Justice and Petition To Do So" (Feb. 3, 2011) ("Clearwater Motion").

[2] In the first part of its amended contention, EC-3a, Clearwater asserts: "Entergy's environmental report and the Final Supplemental Environmental Impact Statement contain seriously flawed environmental justice analyses that do not adequately assess the impacts of relicensing Indian Point on the minority, low-income populations in the area surrounding Indian Point." Clearwater Motion at 15.

alternative on minority and low-income populations;[3] and the third part (hereinafter "EC-3c") challenges the Staff's assessment of the impacts of the closed-cycle cooling alternative on minority and low-income populations.[4] For the reasons set forth below:

(a) the Staff does not oppose the admission of the portion of amended EC-3 that revises Clearwater's original contention to address the Final SEIS;

(b) the Staff opposes the remainder of Clearwater's amended contention EC-3 that challenges the Final SEIS analysis of the impacts of the no-action alternative and the closed-cycle cooling alternative on minority and low-income populations because they are nontimely; they fail to raise material issues of fact or law; they are unsupported by fact; and they lack specificity.

BACKGROUND

On April 23, 2007, Entergy Nuclear Operations, Inc. ("Applicant") filed an application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point"), for an additional period of 20 years. The Applicant submitted an "Environmental Report" ("ER"), as required by 10 C.F.R. §§ 51.53(c) and 54.23, as part of its license renewal application ("LRA"). On November 30, 2007, Clearwater filed a petition to intervene that included six environmental contentions, including, *inter alia*, Contention EC-3.[5] The Atomic Safety and

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[3] In the second part of its amended contention, EC-3b, Clearwater asserts: "the assessment of the impact of the no-action alternative on potentially affected environmental justice populations is inadequate." Clearwater Motion at 16.

[4] In the third part of its amended contention, EC-3c, Clearwater asserts: the assessment of the impact of adding closed cycle cooling on air quality and on potentially affected local environmental justice populations is inadequate." *Id.*

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

Licensing Board ("Board") re-framed and limited the contention, and then admitted it.[6] As admitted by the Board, Clearwater Contention EC-3 asserts: "The EJ analysis in the ER does not adequately assess the impacts of Indian Point on the minority, low-income and disabled populations in the surrounding area."[7]

On December 22, 2008, the NRC issued its Draft Supplemental Environmental Impact Statement ("Draft SEIS") concerning the Indian Point license renewal application.[8] Clearwater expressed a desire to be accorded the same extension of time as had been requested by the State of New York and Riverkeeper, Inc. to file contentions related to the Draft SEIS.[9] On January 14, 2009, the Board granted the Intervenors' request for an extension of time.[10] Clearwater, however, filed no contentions on the Draft SEIS.

On December 3, 2010, the Staff published the Final SEIS on the Indian Point license renewal application. On December 27, 2010, the Board issued an Order affording the Intervenors an extension of time until February 3, 2011 to file new or amended contentions on the Final SEIS.[11] On February 3, 2011, Clearwater filed the instant Motion, seeking leave to file

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[6] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 219 (July 31, 2008).

[7] *Id.*

[8] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment," NUREG-1437 Supplement 38 (Dec. 2008).

[9] *See* Transcript of Pre-Hearing Conference (Jan. 14, 2009) at 764, 768-69; "Motion by New York State and Riverkeeper for Extension of Time to File Timely Contentions Related to Draft Supplemental Environmental Impact Statement" (Jan. 9, 2009); "Memorandum and Order (Summarizing Pre-Hearing Conference)" (Feb. 4, 2009) ("Pre-Hearing Conference Order"), at 2-3

[10] *See* Tr. at 768-69; Pre-Hearing Conference Order, at 2-3.

[11] "Order (Granting Intervenor's Unopposed Joint Motion for an Extension of Time)" (Dec. 27. 2010), at 2.

amendments and new contentions in connection with its Contention EC-3. On February 25, 2011, the Board granted the Staff's request for a one week extension of time to answer the new and amended contentions;[12] accordingly, answers to the Intervenors' new and amended FSEIS contentions are due on March 7, 2011.

LEGAL STANDARDS

A. Legal Standards Governing the Admission of Late-Filed Contentions

The legal requirements governing the admissibility of contentions are well established, and are currently set forth in 10 C.F.R. § 2.309. The Staff previously addressed these requirements in its response to the original contentions filed in this matter,[13] and hereby incorporates that discussion by reference herein. In brief, the regulations require that a contention must satisfy the following timing and basis requirements in order to be admitted.

1. Requirements for Timely and Nontimely Filings

To be timely, the request and/or petition to intervene and initial contentions must be filed pursuant to the time specified in the *Federal Register* 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) through (c)(1)(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). The petitioner must address the following eight factors in its nontimely filing:

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[12] *See* "Order (Granting Time Extension)" (Feb. 25, 2011); "NRC Staff's Unopposed Request for an Extension of Time for the Staff's and Entergy's Answers to FSEIS Contentions" (Feb. 23, 2011).

[13] *See* "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to the 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 Cortland, and (7) Westchester County" (Jan. 22, 2008) ("Staff Response to Initial Petitions"), at 15-25.

> (i) Good cause, if any, for the failure to file on time;
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> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
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> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
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> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
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> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
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> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
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> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
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> (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i)-(viii) and (2).[14]

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:
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> (i) Provide a specific statement of the issue of law or fact to be raised or controverted, . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;

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[14] Clearwater is an admitted party to this proceeding, and has previously demonstrated its standing to intervene.

> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
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> (vi) [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).[15]

3. Contentions Must Be Based on Available Information

Further, as set forth in 10 C.F.R. § 2.309(f)(2), petitioners must base their contentions on existing documents and information, including the applicant's safety and environmental documents:

> 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. . . .

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[15] 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.

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 new or amended contention.[16]

4. Contentions Must Be Timely Filed

As further set forth in 10 C.F.R. § 2.309(f)(2), 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 any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--
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> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).[17] 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)

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

[17] There is a clear analogy between the requirement that data or conclusions must "differ significantly," 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.*

apply. *Shaw Areva Mox Services*, LBP-07-14, 66 NRC at 210 n.95.[18]

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, under the well-established standards for late-filed contentions – and this Board's Scheduling Order of July 1, 2010 – filing within 30 days after the new information becomes available is usually sufficient to meet 10 C.F.R. § 2.309(f)(2)(iii).[19]

DISCUSSION

I. Amendment of Original Contention to Address the Final SEIS (EC-3a)

The original contention admitted by the Board as Clearwater EC-3, challenged the analysis in the Applicant's Environmental Report. Specifically, it challenged the analysis of the impacts of Indian Point operation during the period of extended operations with respect to the emergency evacuation of minority and low-income populations in institutions and hospitals. EC-3a simply recasts the original contention in terms of the Staff's Final SEIS; in other words, instead of challenging the environmental justice analysis in the Applicant's Environmental Report, the first part of the amended contention challenges the analysis in the Staff's Final SEIS. The Staff respectfully reiterates its position that this portion of the contention (here, EC-3a) raises an emergency planning issue that is beyond the scope of this proceeding. However, inasmuch as (a) the Board has admitted Clearwater EC-3, and (b) like the Applicant's

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[18] 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).

[19] "Scheduling Order" (July 1, 2010), at 6; *cf. 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).

ER, neither the DSEIS nor the FSEIS includes consideration of emergency planning issues as part of this analysis,[20] and (c) the amended contention claims no new bases beyond those contained in the original contention, the Staff does not oppose the admission of EC-3a.

II. Clearwater's Challenge to the Final SEIS Analysis of the Environmental Justice Impacts of the No-Action Alternative (EC-3b).

In the second part of the amended contention, Clearwater challenges the Final SEIS's analysis of the environmental justice impacts of the no-action alternative, asserting that "the assessment of the impacts of the no-action alternative on potentially affected environmental justice populations is inadequate." Clearwater Motion at 16. Specifically, Clearwater claims that the Final SEIS fails to analyze the effect of mitigative alternatives (wind, solar and other renewable energy sources) on the no-action alternative.[21] In this regard, Clearwater asserts that the Staff should have exercised more care in its analysis of comments regarding the health effects on minority and low-income populations that were raised by groups that Clearwater claims are funded by the Applicant. Further, Clearwater complains that the Final SEIS only covered the environmental justice impacts of the closed-cycle cooling alternative and did not address the environmental justice impacts of the no-action alternative. Finally, it asserts that the Final SEIS no-action alternative analysis includes two unidentified inconsistent statements.

A. This Portion of the Contention Is Not Timely

As discussed above, new information can support the admission of a contention after the original filing deadline has passed. However, Clearwater's present challenge to the Staff's environmental justice analysis regarding the no-action alternative is not supported by new

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[20] See, e.g., FSEIS, Appendix A, at A-111 – A-116 (explaining why emergency preparedness issues, including the evacuation of institutionalized persons, is not addressed in the FSEIS).

[21] Clearwater Motion at 4.

information. Rather, the contention is based upon old information. Thus, when the Staff issued its Draft SEIS in December 2008, over two years ago, the Staff addressed the environmental justice impacts of the no-action alternative. Draft SEIS, at 8-30 to 8-31. The Staff found that the impact of the no-action alternative (a plant shut-down), would be moderate for some jurisdictions, but that the impact would be spread out across a broad area and thus was not likely to have a significantly disproportionate impact on minority and low-income populations. Draft SEIS at 8-30. The DSEIS did not address how solar or wind or other renewable energy sources might compensate for the moderate effects of a shut-down. Clearwater, however, did not challenge the Staff's analysis of the no-action alternative in the Draft SEIS. Accordingly, its present attempt to challenge the same discussion in the Final SEIS comes too late. Because Clearwater did not raise this issue vis-à-vis the Draft SEIS when it had the opportunity to do so, its challenge to the Final SEIS is nontimely.

Clearwater argues that EC-3b is timely because it is "based upon conclusions reached in the FSEIS that are significantly different from the Applicant's ER." Clearwater Motion at 19. Clearwater further states that it "expected that NRC staff would remedy the deficiencies in the DSEIS [that were] identified in the comments. It could not have known that the NRC staff would fail to remedy these deficiencies prior to the publication of the FSEIS." *Id.* (emphasis added). This argument is without merit.

Contrary to Clearwater's claim, the Final SEIS reiteration of information contained in the Draft SEIS does not constitute "new information" that is necessary for admission of a late-filed contention. If there was some deficiency in the Draft SEIS, Clearwater should have raised it as a contention two years ago, when contentions on the Draft SEIS were due. It was the publication of the Draft SEIS that triggered Clearwater's obligation to file EC-3b. At this point, over two years after the publication of the Draft SEIS, a deficiency in the Draft SEIS, repeated in the Final SEIS, is not new information: it is old information. As the Board reminded the parties

with respect to contentions based on the Draft SEIS: "any new contentions may only deal with new environmental issues raised by the Draft SEIS. The Board will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed."[22] Similarly, any new contentions that are filed concerning the Final SEIS may only deal with new information that appears in the Final SEIS. Since this issue could have been raised with respect to the Draft SEIS, it should have been raised in 2009. This portion of the contention is nontimely now, and is not supported by a demonstration of good cause; it should therefore be rejected in accordance with 10 C.F.R. §§ 2.309(c)(1) and (f)(2).[23]

Clearwater is also mistaken when it asserts that differences between the Applicant's Environmental Report and the Final SEIS constitute the new information that will serve as bases for new contentions. Clearwater Motion at 19. First, the Applicant's environmental report does not address the environmental justice air quality impacts of the no-action alternative. The Draft SEIS does, however, address those impacts and so does the Final SEIS. This issue should, therefore, have been raised with the original contentions in November 2007 vis-à-vis the Applicant's Environmental Report.

Second, Clearwater's focus on the difference between the Applicant's Environmental Report and the Final SEIS is misplaced; the proper focus is on the difference between the Draft SEIS and the Final SEIS. The requirements of the Commission's regulations, in 10 C.F.R. § 2.309(f)(2), as consistently applied in NRC case law, are clear: Information contained in a

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[22] Pre-Hearing Conference Order at 2-3 (internal citations omitted).

[23] Nontimely contentions, i.e., contentions that are not based on new information must meet an eight factor balancing test under 10 C.F.R. § 2.309(c). Failure to address the eight factor test is grounds for immediate denial. *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998). In this instance, Clearwater has made no attempt to address the eight factor test for nontimely filing and this portion of contention EC-3b should be denied.

Final SEIS that is new or materially different than that in the Draft SEIS will support a late-filed contention. Where, however, the Final SEIS is substantially identical to the Draft SEIS, any challenges to the Staff's analysis were required to be filed promptly after issuance of the Draft SEIS. That rule applies here, and mandates the rejection of this portion of the contention as non-timely. The Final SEIS analysis of this issue is substantially identical to the analysis contained in the Draft SEIS, with only one exception: The Final SEIS adds one sentence to the discussion, stating: "Some minority and low-income populations located in urban areas could be affected by reduced air quality and increased health risks due to the burning of fossil fuel in existing power plants used to replace the lost power generated by Indian Point." Final SEIS § 8.2 at 8-26. While Clearwater states that the Staff should have analyzed the comments that asserted these health effects more carefully, Clearwater raises no challenge to the substance of the statement, but merely its provenance. And as shown below, that criticism – that the groups who proffered these comments were allegedly funded by the Applicant – does not raise a material issue. The only substantive issue Clearwater raises, the alleged failure to address the mitigative effects from implementation of other alternatives, is one that Clearwater could have, and should have, raised with respect to the Draft SEIS.

B. The Contention Does Not Raise a Material Issue

In order for a contention to be admitted, it must assert an issue that is "material," *i.e.*, an issue that will make a difference in the outcome of this license renewal proceeding "so as to entitle the petitioner to cognizable relief."[24] "This requirement of materiality often dictates that

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[24] *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998); Rules of Practice for Domestic Licensing Proceedings, Procedural Changes in the Hearing Process, 54 Fed. Reg. 33168, at 33172 (Aug. 11, 1989) (discussing 10 C.F.R. § 2.714, the predecessor to 10 C.F.R. § 2.309).

any contention alleging deficiencies or errors in an application also include some significant link between the claimed deficiency and either the health and safety of the public or the environment."[25] Clearwater's claims regarding the Final SEIS treatment of environmental justice impacts of the no-action alternative fail to meet this standard.

Here, Clearwater asserts that because its new contentions allege NEPA violations, it has raised issues that are material to the findings that the NRC must make in order to support the issuance of a renewed license. Clearwater Motion at 17. But Clearwater confuses the requirement that a contention raise an issue within the scope of the proceeding with the requirement that a contention raise an issue that is material to the NRC's findings. The finding the NRC must make is whether the environmental impacts of continued operation of Indian Point Units 2 and 3 would be so great as to render the decision to issue a renewed license unreasonable. While an allegation of a NEPA violation presents an issue that is within the scope of the proceeding, this does not mean that an allegation is "material" to the finding the NRC must make, particularly where it is vague, lacks specificity or is unsupported by adequate basis, in contravention of the requirements at 10 C.F.R. § 2.309(f)(1)(ii), (iv) and (vi).

Instead, the bulk of Clearwater's complaint revolves around its assertion that air quality issues associated with the no-action alternative were raised by groups that it alleges were funded Entergy. *See* Clearwater Motion at 2, 4-6, and 8. Clearwater asserts that the environmental justice impacts of the no-action alternative "require careful analysis, particularly because some of the groups that made the allegation about the impacts of the no-action

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[25] *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 154 (2009).

alternative have actually been funded by Entergy and may even have been encouraged by Entergy to submit such comments in an attempt to influence the outcome of license renewal." *Id.* at 2. On its face, this claim fails to raise a material issue. In the Final SEIS, the Staff considered all of the comments it received regarding the Draft SEIS, addressing the substance of those comments without regard to whatever may have been the motives of the commenters.[26] Thus, comments were received from Entergy as well as Intervenors in this proceeding, as well as from numerous groups and individuals who either supported, or opposed, Entergy's license renewal application. None of the motives of these persons were considered. Any comment that raised a well-founded environmental issue was addressed, as the merit of any comments has no relation to, and does not depend on, the point of view of its sponsor. Given that the motivation of the commenter was irrelevant, the Staff's determination to consider the merits of the comment was not improper, and Clearwater's claim that the Staff should have provided a "careful analysis" with consideration of the comment's source does not establish a material issue for litigation.[27]

Clearwater has also failed to establish materiality in that it has not shown how the failure to take into account the alleged motivation of the commenters has caused any deficiency in the

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[26] The Staff does not collect information as to the funding or motivation of any commenters. Not only would this constitute an onerous burden on the Staff (with results that add nothing to the quality or lack thereof of the factual, scientific, or legal issue that the group or individual submitted), but it could also have a chilling effect on public participation in the licensing process – and could result in improperly disregarding important comments due to some perceived "motive" or bias of the commenter.

[27] Clearwater also asserts that the NRC "appears to endorse these comments because they are generally supportive of nuclear power and license renewal." Clearwater Motion at 6. Clearwater's assertion is incorrect. The Staff did not "endorse" the comments; the Staff's statement that certain comments were generally supportive of nuclear power and/or license renewal merely constitutes an objective characterization of the specified comments, where those comments were generally supportive of license renewal or nuclear power, and did not raise a concern regarding the adequacy of the Draft SEIS.

Staff's analysis. The deficiencies in the Final SEIS that Clearwater alleges (*i.e.*, that the Applicant's Environmental Report does not address environmental justice for the no-action alternative, and the Final SEIS does not adequately address the mitigative effect of other alternatives in conjunction with the no-action alternative, both of which are addressed below) have nothing to do with the motivation of the commenters.

Clearwater EC-3b also asserts that the Staff's analysis of the no-action alternative in the Draft SEIS was inadequate because "it did not consider and analyze new information about various measures that could be taken if the no-action alternative were implemented". Clearwater Motion at 4. Clearwater acknowledges that the Final SEIS addressed the issue "obliquely" but asserts, without explanation, that the Final SEIS analysis was inadequate. *Id.*

Contrary to Clearwater's claims, the Final SEIS addressed this issue directly; the Staff simply disagreed with Clearwater's views as to how the information should be presented. Thus, Clearwater submitted comments on the Draft SEIS that asserted that the contributions of energy efficiency, solar, wind, and renewable energy sources in general, should be considered as alternatives to the no-action alternative.[28] In its response to comments in the Final SEIS, the Staff stated that it had "updated its consideration of energy alternatives in this SEIS [to include] conservation/energy efficiency as a full replacement alternative."[29] The Staff explained that it considered solar, wind and other renewables (including tidal and geothermal alternatives) and found that they would not be available or sufficient to replace the power supplied by Indian Point.[30] Given that the Staff has addressed these alternatives, the gravamen of Clearwater's

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[28] Comments submitted by Clearwater, Final SEIS at A-698, A-706, A731 to 734.

[29] Final SEIS at A-153.

[30] Final SEIS at A-154.

complaint boils down to its insistence that these alternatives be considered as a consequence of the no-action alternative, rather than the Staff's view that they may be considered as alternatives in their own right. As the Staff further explained, considering the alternatives in their own right does not preclude their consideration as a consequence of the no-action alternative:

> Insofar as these comments address alternatives as merely a consequence of the no-action alternative, the NRC staff disagrees. In developing and finalizing the staff's license renewal environmental rule, NRC staff specifically indicated – in response to comments from EPA, the Council on Environmental Quality, and others – that alternatives would not be handled as simply consequences of the no-action alternative. The NRC staff includes in this SEIS a range of alternatives that includes likely options that are "technically feasible and commercially viable," as set out in the FEIS. These alternatives can also be consequences of the no-action alternative, though they may be pursued by utilities even if the NRC renews a power plant license.

Final SEIS, at A-154.[31]

While the Clearwater disagrees with the Staff as to how the discussion should be presented, the fact is that the alternatives which Clearwater asserts should be discussed, have been discussed in the Final SEIS. Thus, wind power is discussed at FSEIS pages 8-43 to 8-44; solar power is discussed at FSEIS pages 8-45 to 8-46; wood and woodwaste are discussed at FSEIS pages 8-44 to 8-45; hydropower is discussed at FSEIS page 8-45; and geothermal, municipal solid waste and biomass-derived fuels are discussed at FSEIS pages 8-46 to 8-48. The Final SEIS also considered two combinations of alternatives: One combination consisted of repowering an existing fossil-powered plant, adding the energy derived from wind, hydropower, biomass, and landfill gas, and supplementing that total with contributions from conservation.[32]

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[31] Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 51 Fed. Reg. 28,468, 28,472 (June 5, 1996).

[32] Final SEIS at 8-61 to 8-67, 8-72.

The other combination of alternatives consisted of continued operation of a single unit at Indian Point (Unit 2 or Unit 3), plus the energy derived from renewables (wind, hydropower, biomass, and landfill gas) and conservation.[33] Clearwater's contention thus fails to raise a material issue. Whether an alternative is considered in one context or another, the fact is that the alternative has been addressed. A contention that complains that the issue is addressed in one section of the Final SEIS and not another does not raise a material issue.

C. The Contention Is Based on an Erroneous Reading of the Final SEIS

In order to be admissible, a contention must be supported by a concise statement of the facts or expert opinion upon which the intervenor intends to rely. 10 C.F.R. § 2.309(f)(v). Where a contention has no factual support, it should be denied.[34] This is the case with Clearwater Contention EC-3b. The contention is simply not supported by the facts.

Clearwater asserts that the "environmental justice analysis in Chapter 8 deals exclusively with the alternative of installing close[d] cycle cooling, not the no-action alternative." Clearwater Motion at 7. It is this alleged failure of the Staff to address environmental justice in the context of the no-action alternative that forms the basis for this part of Clearwater's contention. But the Staff did address environmental justice issues associated with the no-action alternative, in the Final SEIS at page 8-26. There, the Staff observed that, while "socioeconomic impacts of the plant shutdown would be MODERATE for some jurisdictions, the impacts of the plant shutdown are likely to be felt across the entire community and could

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[33] Final SEIS at 8-67 to 8-72.

[34] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247 (1993) (lack of basis for a contention); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51. 82 (July 8, 2009) (contention's assertion that information had been omitted from the application was incorrect; the contention was therefore inadmissible as failing to establish the existence of a material issue in dispute).

disproportionately affect some minority and low-income populations." The Staff went on to note that some urban environmental justice populations "could be affected by reduced air quality and increased health risks due to the burning of fossil fuel in existing power plants used to replace the lost power generated by Indian Point." Final SEIS at 8-26. Finally, the Staff examined the effect of the loss of revenue associated with plant shutdown on minority and low-income populations. *Id.* Thus, the Staff addressed the environmental justice impacts of the no-action alternative. Clearwater Contention EC-3b, which asserts otherwise, is based on a faulty premise and is inadmissible.

D. The Contention Is Vague

Clearwater Contention EC-3b lacks specificity. Clearwater does not specify what portions of the Final SEIS are deficient and does not specify the nature of the deficiency. In this part of the contention, Clearwater complains that

> the comments about potential EJ impacts of the no-action alternative raised an issue that had only been mentioned in two inconsistent sentences in the DSEIS and the FSEIS and had not been addressed at all in the ER. A conclusory sentence that contradicts a prior conclusory sentence does not constitute a sufficient analysis of the potential disproportionate effects of the no-action alternative raised by the comments.

Clearwater Motion at 2; *see also id.* at 8. Clearwater does not cite to any specific page of the Draft SEIS or the Final SEIS that it contends is inadequate. Other than these generalized references, Clearwater provides nothing to support its assertion. This portion of the contention is, therefore, impermissibly vague.

III. Clearwater's Challenge to the Final SEIS Analysis of the Environmental Justice Impacts of the Closed-Cycle Cooling Alternative (EC-3c).

Clearwater cites three alleged deficiencies in the Final SEIS's analysis of the closed-cycle cooling alternative:

> First, it is based purely on Entergy's assertions, not the NRC Staff's independent judgment. Second, it fails to consider the finding in the FSEIS that the air quality impacts from finding replacement power could be significant . . . . Third, if the local impacts were as severe as the air quality analysis indicates, the EJ analysis should have analyzed whether there would be disproportionate impact on the local EJ populations.

Clearwater Motion at 2.

Contrary to Clearwater, the Final SEIS reflects the Staff's "independent judgment" and explicitly addresses the air quality impacts of replacement power during the period of construction and operation. Accordingly, the Staff opposes the balance of EC-3c as inadmissible unsupported, conclusory statements that lack basis and fail to raise any material issue of fact. Furthermore, while Clearwater criticizes the Staff's environmental justice analysis for closed-cycle cooling, it fails to identify any minority or low-income populations that could be disproportionately affected by this alternative.

A. The Contention Is Unsupported

Clearwater incorrectly asserts that the Staff adopted the Applicant's data without exercising independent judgment. As the Staff explained in the Introduction to the Final SEIS,

> The NRC prepares an independent analysis of the environmental impacts of license renewal and compares these impacts with the environmental impacts of alternatives. . . . The NRC staff followed the review guidance contained in NUREG-1555, Supplement 1 (NRC 2000). The NRC staff, and the contractor retained to assist the NRC staff, visited the IP2 and IP3 site on September 11 and 12, 2007, and again on September 24 and 25, 2007, to gather information and to become familiar with the site and its environs. . . . This SEIS presents the NRC staff's analysis that considers and weighs the environmental effects of the proposed renewal of the operating licenses for IP2 and IP3, the environmental impacts of alternatives to license renewal, and mitigation measures available for avoiding adverse environmental effects.

Final SEIS at 1-6. Clearwater provides no evidence in support of its claim that the Staff failed to exercise independent judgment. To be sure, Clearwater quotes portions of the Final SEIS where the Staff cited data and information provided by the Applicant. But this is not evidence of

a lack of independent judgment on the part of the Staff; it is merely a statement of the information the Staff, in the exercise of its independent judgment, considered and found to be acceptable. And while Clearwater cites a letter from an engineer who opined that the licensee overestimated the length of the outage at Oyster Creek that would be needed to install closed-cycle cooling, Clearwater proffers no similar expert opinion with respect to Indian Point. Clearwater's assertion thus fails to establish an admissible contention. While an intervenor need not put forward evidence sufficient to defend a motion for summary disposition, bare conclusory allegations will not suffice. *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 NRC 241, 292 (2008). This portion of Contention EC-3c should therefore be rejected.

B. The Contention Raises No Material Issue.

While Clearwater Contention EC-3c claims that the Staff failed to exercise independent judgment, it does not claim that that failure resulted in the inclusion of any faulty data or information or that it resulted in any erroneous analysis or conclusion in the Final SEIS analysis of the closed-cycle cooling alternative. Clearwater does not claim that any specific statement in the analysis is wrong or incorrect or inaccurate; it does not identify any error in data or information; and it identifies no error in the Staff's analysis. Accordingly, the contention raises no material issue.

C. The Contention Relies on a Mistaken Reading of the Final SEIS.

Clearwater claims that the Final SEIS fails to address the air quality impacts on minority and low-income populations of replacement power used during the construction of closed-cycle cooling towers. Clearwater states that the Final SEIS found that those impacts could be "significant," and it claims that the Final SEIS "implies that those impacts would be minimal in any given location due to the nature of [the New York Independent System Operator ("NYISO")] market." Clearwater Motion at 17. These assertions lack basis and should be rejected.

Contrary to Clearwater's claims, the Final SEIS did address the environmental justice impacts of replacement power for the closed-cycle cooling alternative; the Final SEIS did not find that the impacts could be "significant"' and the Final SEIS did not imply that the impacts would be minimal in any given location due to the NYISO market. Thus, while Entergy had stated that "replacement of IP2 and IP3 energy output during cooling tower installation would result in substantial increases in regulated air pollutants", the Staff did not characterize those impacts as substantial or significant. Final SEIS at 8-11. Instead, the Staff stated that "[t]o the extent that coal- and natural-gas-fired facilities replace IP2 and IP3 output, the NRC staff finds that some air quality effect would occur." *Id.* The Staff observed that "these effects would largely cease when IP2 and IP3 return to service." *Id.*; emphasis added. Consequently, the Staff found that "replacement power required during a 42-week outage could increase air quality effects in minority and low-income communities, depending on the location and characteristics of generator units used to replace IP2 and IP3 output." *Id.* at 8-18. However, the Staff concluded that because "these effects are likely to be short-lived (most will be no longer than the outage period)" the impact on minority and low-income populations "are likely to be small." *Id.*; emphasis added. Further, the Staff acknowledged that the impacts were subject to several variables, one of which was stated to be generator pricing on the NYISO operator grid. *Id.* at 8-18. The Staff did not state or imply that the impacts would be minimal because of the effect of NYISO pricing. *Id.* Thus, this portion of Clearwater's contention should be rejected as lacking in basis.

CONCLUSION

For the reasons set forth above, the Staff does not oppose the admission of Clearwater Contention EC-3 insofar as it revises Clearwater's original contention to address the Final SEIS

The Staff opposes the remainder of Clearwater Contention EC-3 on the grounds that it is nontimely, fails to raise material issues of fact, is unsupported, and lacks specificity.

Respectfully submitted,

Beth N. Mizuno
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of March 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.

Beth N. Mizuno
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of March 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. 50-247/286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF'S ANSWER TO AMENDED AND NEW CONTENTION (EC-3) FILED BY HUDSON RIVER SLOOP CLEARWATER, INC. CONCERNING THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT," dated March 7, 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 7th day of March, 2011:

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