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

NRC STAFF'S ANSWER TO RIVERKEEPER, INC.'S MOTION FOR LEAVE TO FILE A NEW CONTENTION, AND NEW CONTENTION EC-8 CONCERNING NRC STAFF'S FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Board's Scheduling Order of July 1, 2010 ("Scheduling Order"), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to Contention EC-8[1] filed by Riverkeeper, Inc. ("Riverkeeper") on February 3, 2011, regarding the Staff's issuance of Final Supplement 38 to the Generic Environmental Impact Statement for License Renewal ("FSEIS") for Indian Point Units 2 and 3.[2]

For the reasons set forth below, the Staff opposes the admission of Riverkeeper Contention EC-8 for failing to meet the Commission's contention admissibility and timeliness standards. Most significantly, Contention EC-8 should be rejected because it does not raise a genuine dispute with the FSEIS in that it does not establish any legal basis for its claim that the NRC has failed to meet its obligations under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4331 *et seq.*

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[1] "Riverkeeper, Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement" (Feb. 3, 2011) ("Petition").

[2] "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Dec. 2010).

BACKGROUND

Riverkeeper Contention EC-8 states as follows:

> NRC Staff's FSEIS is deficient for failure to include or consider the assessment of . . . NMFS regarding impacts to endangered species due to incomplete ESA § 7 consultation procedures. A supplemental EIS must be prepared by NRC Staff that fully considers the outcome of the consultation process, including NMFS' forthcoming biological opinion, prior to any decision by the NRC regarding whether to relicense Indian Point.

Petition at 1. In filing this contention, Riverkeeper observed that the FSEIS discussion of endangered and threatened aquatic species identifies potential impacts to the shortnose sturgeon (an endangered species) and the Atlantic sturgeon (a threatened species) as a result of license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3").

Riverkeeper states that the NRC is obliged to consult with the National Marine Fisheries Service ("NMFS") regarding impacts to endangered and threatened species, which consultation has not yet concluded; the contention therefore alleges that the FSEIS contains an "inadequate consideration of environmental impacts to endangered and threatened aquatic species," namely, the shortnose and Atlantic sturgeon. Petition at 1. In support of this assertion, Riverkeeper argues that, since the NRC's consultation process under Section 7 of the ESA is ongoing, the FSEIS is deficient "for failure to include or consider the assessment of the [NMFS] regarding impacts to endangered species . . . ." *Id.* Riverkeeper asserts that NMFS's assessment "is necessary for NRC Staff to make informed conclusions in the FSEIS" regarding endangered and threatened species, *Id.* at 15; further, Riverkeeper asserts that because the NRC's consultation with NMFS has yet to culminate in a final assessment, the findings in the FSEIS are "flawed and patently deficient," and a decision on license renewal for IP2 and IP3 would be "factually and legally deficient." *Id.* at 14, 17. As such, Riverkeeper asserts that a supplement to NRC's FSEIS must be prepared "that fully considers the outcome of the consultation process." *Id.* at 1. As set forth below, Contention EC-8 lacks factual and legal basis, and the contention should therefore be rejected.

DISCUSSION

I. General Requirements for Contentions

The Commission has established general requirements for contention admissibility, 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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> (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; [and]
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> (vi) In a proceeding other than one under 10 CFR 52.103, provide 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).[3]

The Atomic Safety and Licensing Board ("Board") in this proceeding has previously addressed these standards at length, in its Orders denying certain petitions to intervene for

[3] 10 C.F.R. § 2.309(f)(1)(vii) applies to proceedings conducted under 10 C.F.R. § 52.103(b) (*i.e.*, proceedings for operation under a combined license ("COL")), and is inapplicable to a license renewal proceeding.

failure to state an admissible contention.[4] The Board summarized the standards in 10 C.F.R. § 2.309(f)(1), as follows:

> An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[5]

As the Board observed, sound legal and policy considerations underlie the Commission's contention requirements:

> The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." The Commission has emphasized that the rules on contention admissibility are "strict by design." Failure to comply with any of these requirements is grounds for the dismissal of a contention.[6]

The requirements governing the admissibility of contentions have been strictly applied in NRC adjudicatory proceedings, including license renewal proceedings. For example, in a recent decision involving license renewal, the Commission stated:

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[4] *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

[5] Memorandum and Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene) (Dec. 5, 2007), slip op. at 3; footnote omitted.

[6] *Id.*, slip op. at 4; footnote omitted.

> To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design," and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." "Mere 'notice pleading' does not suffice." Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.[7]

Further, 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.[8]

Finally, it is well established that the purpose for the "basis" requirements is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally

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[7] *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted; emphasis added).

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

what they will have to defend against or oppose.[9] The *Peach Bottom* decision requires that a contention be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
> (5) it seeks to raise an issue which is not concrete or litigable.[10]

II. EC-8 is Inadmissible in that It Fails to Raise a Genuine Dispute on a Material Issue of Law or Fact.

A. Legal Requirements under NEPA and the ESA.

The NRC is required under NEPA and the agency's NEPA-implementing regulations in 10 C.F.R. Part 51 to consider the environmental impacts of license renewal, including impacts to threatened or endangered species.[11] Impacts to endangered species are considered by the NRC to be a Category 2 issue, requiring that site-specific review of possible effects on threatened or endangered species be completed.[12] In this regard, Appendix B to Supbart A in Part 51 states:

> Generally, plant refurbishment and continued operation are not expected to adversely affect threatened or endangered species. However, consultation with appropriate agencies would be needed at the time of license renewal to determine whether threatened or endangered species are present and whether they would be adversely affected.

Id.

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[9] *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

[10] *Peach Bottom*, ALAB-216, 8 AEC at 20-21.

[11] *See* 42 U.S.C. § 4332; *see also* 10 C.F.R. §§ 51.53(c)(3)(ii)(E) and 51.71(a).

[12] *See* 10 C.F.R. § 51.53(c)(3)(ii)(E).

As part of its compliance with NEPA and 10 C.F.R. Part 51, the NRC Staff engages in consultation with other Federal agencies, as appropriate, under Section 7 of the ESA. The ESA requires federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species."[13] When the possible effects of an agency action, such as a license renewal, affect marine species, the ESA requires consultation with NMFS. Under the Section 7 consultation requirement, the first task of an agency is to request information from NMFS on whether a listed or proposed species or a designated or proposed critical habitat is present in the area.[14] If NMFS advises that an endangered or proposed species may be present, the agency must conduct a biological assessment ("BA").[15] This assessment "may be" undertaken as part of the agency's compliance with the requirements of Section 102 of NEPA.[16] If the BA indicates effects to a listed or proposed species or habitat, the agency must engage in formal consultation with NMFS.[17]

In accordance with NMFS procedures, during formal consultation, NMFS determines "whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed

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[13] *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 160 (1978); 15 U.S.C § 1536(a)(2).

[14] 50 C.F.R. § 402.12(c).

[15] 50 C.F.R. § 402.12(b)(1).

[16] 50 C.F.R. § 402.06. Section 102(2)(C) of NEPA requires federal agencies, "to the fullest extent possible," to "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment; a detailed statement" on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C). Section 102(2)(C) further states that, "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." *Id.* *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC ___ (July 8, 2010), slip op. at 31-32.

[17] 50 C.F.R. § 402.14.

species . . . or destroy or adversely modify critical habitat."[18] At the close of formal consultation, NMFS will issue a biological opinion ("BO"), with a finding of either jeopardy or no jeopardy.[19] If a "no jeopardy" opinion is issued, then no further action is required by the action agency. If a "jeopardy" opinion is issued, NMFS will indicate reasonable and prudent alternatives, if any exist. NMFS may also issue an incidental take statement[20] in conjunction with either a "jeopardy" or "no jeopardy" finding in its BO. Once consultation is initiated with NMFS, an agency cannot make any "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" that the BO may raise.[21] Only after consultation is complete can an agency "determine whether and in what manner to proceed with the action in light of its section 7 obligations and [NMFS's] biological opinion."[22]

NMFS regulations anticipate an intersection between Section 7 consultation and an agency's NEPA review process. Specifically, 50 C.F.R. § 402.06 states that "[c]onsultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act"; the regulations further state that the results of consultation under Section 7 "should be included in the documents required by [NEPA]," namely, the EIS.[23]

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[18] "Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act," U.S. Fish and Wildlife Service, National Marine Fisheries Service (Mar. 1998) at 4-1 (**Attachment A hereto**).

[19] 50 C.F.R. § 402.14(h).

[20] Section 7(b)(4) allows the Service to issue an "incidental take statement" for agency actions where the taking of an endangered species is incidental to the agency action. This written statement can set forth terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant.

[21] 50 C.F.R. § 402.09 (emphasis added).

[22] 50 C.F.R. § 402.15.

[23] 50 C.F.R. § 402.06(a), (b) (emphasis added).

B. Consultations between the NRC Staff and NMFS

Pursuant to Section 7 of the ESA, the Staff initiated consultation with NMFS on December 22, 2008, upon the release of the DSEIS and the Staff's original BA, which found that the relicensing of Indian Point Units 2 and 3 could adversely affect the shortnose sturgeon.[24] In response to that BA, on February 24, 2009, NMFS requested additional information from the Staff, which NMFS stated was required before it could begin formal consultation.[25] On July 1, 2009, the Staff obtained the requisite information from the Applicant;[26] on August 10, 2009, the Staff provided that information (including revised impingement data) to NMFS, and indicated that the data would be addressed in the FSEIS and a revised BA;[27] and on December 10, 2010, the Staff transmitted its revised BA to NMFS (one week after the FSEIS was issued).[28]

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[24] Letter from D. Wrona, NRC, to M. Colligan, Assistant Regional Administrator for Protected Resources, NMFS (Dec. 22, 2008) (**Attachment B hereto**); *see also* Biological Assessment of the Potential Effects on Federally Listed Endangered or Threatened Species from the Proposed Renewal of Indian Point Nuclear Generating Plant, Unit Nos. 2 and 3 (Appendix E to DSEIS) at E-100 (Dec. 22, 2008) ("original BA") (**Attachment C hereto**). As indicated in Attachment B hereto, the Staff had previously requested, on August 16, 2007, that NMFS provide "lists of Federally listed endangered or threatened species and information on protected, proposed, and candidate species, as well as any designated critical habitat, that may be in the vicinity of IP2 and IP3 and their associated transmission line right-of-ways." The Staff's letter of December 22, 2008, observed that NMFS had responded to that request on October 4, 2007, and had indicated that the "endangered species" shortnose sturgeon and "candidate species" Atlantic sturgeon "should be considered for potential impacts of license renewal and operation."

[25] Letter from M. Colligan, NMFS, to D. Wrona, NRC (Feb. 24, 2009) (**Attachment D hereto**). NMFS requested information including corrections to the life history and status information for the shortnose sturgeon in the Hudson River, updated information or estimates of the impact of impingement on shortnose sturgeon, information regarding the thermal impacts on shortnose sturgeon, and clarification regarding the possible future installation of cooling towers at Indian Point.

[26] Letter from F. Dacimo, Entergy, to D. Wrona, NRC (July 1, 2009) (Attachment E hereto).

[27] E-mail message from D. Logan, NRC, to J. Crocker, NMFS (Aug. 10, 2009) (**Attachment F hereto**). Upon reading Riverkeeper's Petition (at 9 n.9), the Staff discovered that this document had not previously been included among the Staff's publicly available document disclosures; the Staff has now made that document available in ADAMS (Accession No. ML092220524). Riverkeeper's claims regarding what it perceives to be a lack of NRC Staff responsiveness to the informational needs expressed by NMFS (*see* Petition at 9-10 and nn.10-12) are without merit, and appear to have resulted from the Staff's inadvertent failure to disclose this August 10, 2009 E-mail to NMFS (Attachment F) until now.

[28] Letter from D. Wrona, NRC, to M. Colligan, NMFS (Dec. 10, 2010) (**Attachment G hereto**); *see also* Revised Biological Assessment of the Potential Effects on Federally Listed Endangered or Threatened Species from the Proposed Renewal of Indian Point Nuclear Generating Plant, Unit Nos. 2 and 3 (Dec. 10, 2010) ("revised BA") (**Attachment H hereto**).

On February 16, 2011, NMFS formally responded to the NRC Staff's letter of December 10, 2010, stating that (a) NMFS is currently in possession of all the information it needs to complete a formal consultation, (b) NMFS considers formal consultation to have commenced on December 16, 2010, (c) NMFS expects the consultation will conclude within 90 days after it commenced (*i.e.*, by March 16, 2011), unless extended,[29] and (d) NMFS expects to issue its Biological Opinion by April 30, 2011.[30] On March 1, 2011, Entergy formally notified the Staff that it will participate in the consultation process, and requested a 45-day extension of the consultation conclusion date in accordance with 50 C.F.R. § 402.14(e).[31]

In sum, the NRC Staff has initiated consultation with NMFS as required by the ESA; those consultations are currently in progress, will include consideration of all the information requested by NMFS, and are likely to conclude within the next several months.

C. Riverkeeper Has Not Demonstrated a Material Dispute with the FSEIS

1. The NRC Staff Has Not Violated Section 7 of ESA By Issuing the FSEIS Before Consultation is Complete.

Riverkeeper takes issue with the fact that the NRC Staff's consultation with NMFS is ongoing, and was not complete before the Staff issued the FSEIS. Riverkeeper states that "the FSEIS recognized that the consultation process remains open and that NMFS will render an opinion." Petition at 10. Riverkeeper asserts, however, that because consultation has not been completed, the "NRC Staff's determinations regarding impacts to endangered species and the license renewal of Indian Point will not take into account any conclusions, findings, or recommendations of the consulting agency. This completely flouts the purpose of ESA § 7. . ." *Id.* at 12.

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[29] *Id.*

[30] Letter from P. Kurkul, NMFS, to D. Wrona, NRC (Feb. 16, 2011) (**Attachment I hereto**).

[31] Letter from F. Dacimo, Entergy, to A. Stuyvenberg, NRC (Mar. 1, 2011) (**Attachment J hereto**).

Contrary to Riverkeeper's *ipse dixit* assertions, the NRC Staff has not acted in contravention of the ESA by issuing the FSEIS before the agency's consultation with NMFS is complete. Indeed, the ESA requires only that consultation be completed before the NRC makes any "irreversible or irretrievable commitment of resources" that may foreclose implementation of any mitigation measures the BO may suggest. Issuance of the FSEIS does not cause or amount to an "irreversible or irretrievable commitment of resources." Although the NRC Staff has completed its NEPA environmental review, adjudicatory hearings are ongoing, and the NRC has not yet decided whether to renew the IP2 and IP3 licenses to permit operation for an additional twenty years. And, even if the license renewal application is ultimately granted, that action would not foreclose the imposition of mitigation measures. Further, NMFS regulations do not require a Section 7 consultation to be complete at the time an agency's final environmental review is issued. To the contrary, the regulations state that the results of NMFS consultation "*should be* included in the documents required by [NEPA];"[32] the regulations do not state that consultation findings "must" or "shall" be included in a final EIS to comply with the ESA.[33]

Further, the Staff's issuance of the FSEIS for license renewal of IP2 and IP3 prior to the conclusion of its ESA consultations is not unprecedented. For example, in November 2008, the NRC issued a renewed license for Wolf Creek Unit 1,[34] before completing its consultation with the U.S. Fish and Wildlife Service ("FWS") under Section 7 of the ESA, where the consultation process was likely to be delayed to await the conclusion of other studies.[35]

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[32] 50 C.F.R. § 402.06 (emphasis added).

[33] Indeed, despite Riverkeeper's unilateral interpretation of NMFS requirements, it is apparent that both NMFS and the NRC Staff are aware that the FSEIS has been issued and that they are engaged in the consultation process at this time – thus indicating no concern that the FSEIS has been issued.

[34] "Wolf Creek Generating Station, Unit 1; Notice of Issuance of Renewed Facility Operating License No. NPF-42 for an Additional 20-Year Period Record of Decision," 73 Fed. Reg. 72085 (Nov. 26, 2008).

[35] *See* Letter from T. Tran, NRC, to M. LeValley, NMFS (Nov. 13, 2008) (**Attachment K hereto**) (the Staff observed that license renewal "does not prohibit the formulation or implementation of future reasonable and prudent alternatives by the applicant in support of compliance with Section 7(a)(2) of the

Other Federal agencies have also issued a final EIS before concluding their ESA consultations. Thus, in a case decided by the First Circuit, the Environmental Protection Agency ("EPA") had issued its final EIS concerning a requested discharge permit for a proposed refinery in June 1978 – and "[s]everal months later," NMFS and the Department of Interior's Fish and Wildlife Service ("FWS") initiated consultations with EPA concerning the proposed refinery's impact on endangered species under § 7 of the ESA.[36] In a different context, the Second Circuit recently considered a case where the Federal Aviation Authority ("FAA") had issued a final EIS for a proposed airport, and later reinitiated formal consultation with the FWS and prepared a Biological Assessment to consider the proposed facility's impacts on a newly observed endangered species; FWS indicated that no further study was needed under the ESA or NEPA, in light of the FAA's determination in its BA that the project was unlikely to adversely affect the species.[37]

Riverkeeper points to no authority to suggest that issuance of an FEIS must await completion of the ESA consultation process, particularly where that consultation process is ongoing. Accordingly, Riverkeeper has not demonstrated that a genuine dispute exists with respect to the consultation requirements of Section 7 of the ESA. Contention EC-8 should be rejected for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

Endangered Species Act."). To the Staff's knowledge, as of this date, NMFS has not yet issued its BO for that proceeding.

[36] *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1044-45 (1st Cir. 1982), *rehearing en banc denied* (1982).

[37] *Natural Resources Defense Council, Inc. v.FAA*, 564 F.3d 549, 561 (2nd Cir. 2009) (upholding the FAA's determination not to prepare a Supplement to its FEIS). In a similar vein, the Ninth Circuit decided a case in which a Biological Opinion was issued by NMFS after FWS had issued its Draft EIS and one month before FWS issued its Final EIS; the court upheld FWS' view that it was not required to issue a supplement to its draft EIS to address the findings of the BO, in the absence of significant new circumstances or information that was not considered in the FEIS. *Westlands Water District v. U.S. Dept. of Interior*, 376 F.3d 853, 874 (9th Cir. 2004).

2. The NRC Staff Has Not Violated NEPA by Issuing the FSEIS Before its Endangered Species Consultation is Complete

Section 102(2)(C) of NEPA requires an agency to consult with other federal agencies that may have "special expertise with respect to any environmental impact involved" in the proposed federal action. The purpose of § 102(2)(C) consultation is to encourage "widespread discussion and consideration of the environmental risks and remedies associated with the pending project."[38]

Here, the agency's NEPA consultation requirement is being satisfied concurrently with the consultation requirement in Section 7 of the ESA. As evidenced by the history of communications between NMFS and NRC (*see* Attachments A-J hereto), the Staff sought comments from NMFS on its initial BA in 2008, received NMFS' comments and addressed them in its revised BA; further, formal consultation has been initiated, is continuing, and is expected to be completed within the next several months. The NRC Staff is unaware of any statute, regulation or case law that would require the agency to complete consultation with ESA before issuance of the FSEIS, in order to comply with NEPA.[39] Further, Riverkeeper has not shown that the NRC has violated NEPA by issuing the FSEIS before consultation with NMFS was complete. Accordingly, Contention EC-8 does not raise a genuine dispute of material fact or law in this proceeding, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

Furthermore, there is no basis for Riverkeeper's concern that issuance of the FSEIS prior to completion of consultations shows that NMFS's input is inconsequential to the NRC's

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[38] *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980).

[39] In accordance with Section 102(2)(C) of NEPA, the Staff solicited and received NMFS's input on the presence of endangered or threatened species in the vicinity of IP2 and IP3; provided its Draft SEIS and initial Biological Assessment to NMFS; obtained NMFS's comments on those documents; requested and obtained information from the Applicant to address NMFS's comments; and addressed NMFS's comments in its Final SEIS and revised Biological Assessment. These actions satisfied NEPA's requirement that, "[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." As discussed *infra* at 14, if any significant new information is obtained through the Staff's continuing consultation with NMFS that was not considered in the FSEIS, a Supplement to the FSEIS may be published.

decision-making process. Under NEPA, the NRC has a "continuing duty to gather and evaluate new information relevant to the environmental impacts of its actions."[40] Environmental impacts must be examined if they are reasonably foreseeable or have some likelihood of occurring.[41] Potential impacts to the shortnose and Atlantic sturgeon were extensively discussed in the FSEIS.[42] If NMFS's BO brings to light any significant new information that was not considered in the FSEIS, the Staff, in compliance with its continuing duty under NEPA, would consider issuing a Supplement to the FSEIS under 10 C.F.R. § 51.92(a)(2). Indeed, the Staff's issuance of the FSEIS in December 2010 does not foreclose the possibility that a supplement to the FSEIS will be issued (or that appropriate measures will be taken to address NMFS's findings and recommendations). Contrary to Riverkeeper's assertions, however, the Staff is not *required* to issue a supplement to the FSEIS unless significant new or materially different information is presented in NMFS's BO.[43] Indeed, as discussed *supra*, judicial precedent establishes that a supplement to an FEIS is not required after issuance of a BO, where the BO does not "present a significant new circumstance."[44]

In sum, Riverkeeper has not demonstrated that a genuine dispute exists with respect to the NRC's consultation requirements under NEPA. Contention EC-8 should therefore be

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[40] *Warm Springs Dam*, 621 F.2d at 1023-24, *citing* 42 U.S.C. § 4332(2)(A) and (B); *Essex County Preservation Assn. v. Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976); *Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 917-18 (D.C. Cir. 1975). *See generally, Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370-71 (1989).

[41] *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), 69 NRC 613, 631 (2009) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 207 (2009) (*citing Louisiana Energy Services, LP* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006)).

[42] *See* FSEIS at 2-77 – 2-79.

[43] *See* 10 C.F.R. § 51.92(a)(2). *See also Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*quoting Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989), and *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)).

[44] *See, e.g., Natural Resources Defense Council, Inc. v.FAA*, 564 F.3d 549, 561 (2nd Cir. 2009); *Westlands Water District v. U.S. Dept. of Interior*, 376 F.3d 853, 874 (9th Cir. 2004).

rejected for failing to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

II. EC-8 is Inadmissible in that It Does Not Meet the Late-Filing Requirements of 10 C.F.R. § 2.309(f)(2) and (c)

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

The legal requirements governing the admissibility of contentions filed after the initial date specified for the filing of contentions are well established, and have been addressed by this Board on numerous occasions. In brief, pursuant to 10 C.F.R. § 2.309(c)(1) and (f)(2), contentions must satisfy the following timeliness requirements in order to be admitted.

First, to be considered timely, initial contentions must be filed within 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). The regulations state that nontimely filings will not be entertained absent a favorable ruling by the Board based upon a balancing of the factors set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii).[45] The petitioner must address these eight factors in its nontimely filing; of the eight factors, the most important is "(i) Good cause, if any, for the failure to file on time."[46]

Second, as further set forth in 10 C.F.R. § 2.309(f)(2), any supplemental or amended contentions must be filed in a timely manner when the new information upon which the contention is based becomes available. 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,

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[45] See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 575 (2006).

[46] *See, e.g., State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (*quoting Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)). Riverkeeper has previously established its standing to intervene. Accordingly, the "good cause" factor specified in 10 C.F.R. § 2.309(c)(1)(i) is the principal factor to be considered in assessing the timeliness of this contention.

> 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).[47] 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.[48]

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 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).[49]

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[47] 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.*

[48] Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

[49] *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)).

When new and materially different information is available, a proffered contention must be submitted in a timely manner.[50] Consistent with the Board's "Scheduling Order" of July 1, 2010 (at 6), and under the well-established standards for late-filed contentions, a contention that is filed within 30 days after the new information becomes available is usually sufficient to meet 10 C.F.R. § 2.309(f)(2)(iii).[51] In contrast, 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).[52] Finally, where the information underlying a late-filed contention is not new, the standards pertaining to non-timely filings, set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii), apply.[53]

B. Contention EC-8 is Untimely

In addition to the requirements set forth above, the Board's July 1, 2010 Scheduling Order provided that new or amended contentions, to be considered timely, must be "filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."[54] If a contention is filed more than thirty days after the supporting information became available, the contention will be considered untimely and will be evaluated under 10 C.F.R. § 2.309(c). Moreover, the Board established a deadline of February 3, 2011 for

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[50] 10 C.F.R. § 2.309(f)(2)(iii).

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

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

[53] *Shaw Areva Mox Services*, LBP-07-14, 66 NRC at 210 n.95. 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.* (discussing 10 C.F.R. § 2.309(c) and the need to establish good cause for late filing).

[54] Scheduling Order at 6.

"new or amended contentions that are properly based on significantly new data or conclusions in the FSEIS."[55]

Contrary to the requirements established by regulation and by the Board's Scheduling Order of July 1, 2010, Contention EC-8 includes various assertions challenging some of the Staff's conclusions in the revised BA.[56] Those statements, however, had appeared two years earlier, in the Staff's original BA of December 22, 2008; indeed, none of the statements challenged by Riverkeeper is new or materially different from the information contained in the original BA. Accordingly, Riverkeeper's challenges to these statements could and should have been made in response to the Draft SEIS or original BA, two years ago, and are impermissibly raised at this time, under 10 C.F.R. § 2.309(f)(2)(ii) and (c).

Thus, Riverkeeper challenges the Staff's conclusions that thermal impacts could potentially adversely affect the shortnose sturgeon population in the Hudson River because these conclusions are allegedly based on inappropriate thermal modeling.[57] However, the Staff's conclusions, including consideration of thermal models, were stated in the Staff's original BA.[58] Similarly, Riverkeeper challenges the Staff's conclusion that impingement and entrainment are not likely to jeopardize the shortnose sturgeon population because this conclusion is based on data collected two decades ago.[59] Again, this conclusion was discussed in the Staff's original BA.[60] Finally, Riverkeeper takes issue with the Revised BA's statement that newly installed Ristroph screens may have decreased the mortality rate of sturgeon due to

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

[56] *See* Petition at 13 n.15.

[57] *Id.*

[58] Compare original BA (Attachment C) at E-99 to revised BA (Attachment H) at 13.

[59] Petition at 13 n. 15.

[60] Compare original BA (Attachment C) at E-97-98 to revised BA (Attachment H) at 13.

impingement, but that the data confirming this is lacking.[61] This conclusion also appeared in the original BA, and is, again, not new information.[62]

Accordingly, the Staff opposes admission of Contention EC-8, in part, insofar as it is based on information that is neither new nor materially different from information previously available to Riverkeeper, as required by 10 C.F.R. § 2.309(f)(2)(ii). Moreover, the information upon which this contention is based has been available to Riverkeeper since December 22, 2008, well outside the thirty day period established by the Board as reasonable. Riverkeeper has failed to show that good cause exists for its failure to file these assertions on time, contrary to the requirements of 10 C.F.R. § 2.309(c). These portions of Contention EC-8 are therefore inadmissible.

Furthermore, the revised BA was issued separately from the FSEIS, on December 10, 2010. Neither Riverkeeper nor any other party requested an extension of time to file contentions challenging the revised BA; accordingly, the Board's Order of December 27, 2010, extending the deadline for filing contentions on the FSEIS, does not apply to contentions challenging the revised BA, and those contentions were therefore required to be filed 30 days after the revised BA was issued – *i.e.,* on or before January 10, 2011. Accordingly, to the extent that Contention EC-8 challenges statements in the revised BA, they are untimely and should be rejected for failing to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(2) and 2.309(c).

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[61] Petition at 13 n. 15.

[62] Compare original BA (Attachment C) at E-98 to revised BA (Attachment H) at 12.

CONCLUSION

For the reasons set forth above, Contention EC-8 provides insufficient legal basis for its assertion that the NRC Staff has failed to meet its obligations under Section 7 of the ESA and NEPA, and therefore fails to raise a genuine dispute with the FSEIS, as required by 10 C.F.R. § 2.309(f)(1). Further, to the extent that the contention challenges statements contained in the FSEIS or revised BA that were published in the Staff's DSEIS, the original BA, or the revised BA, it fails to satisfy the timeliness and late-filing standards set forth in 10 C.F.R. §§ 2.309(f)(2) and (c). Finally, to the extent that Contention EC-8 challenges the revised BA, it is impermissibly late under 10 C.F.R. §§ 2.309(f)(2) and (c) The Staff therefore opposes the admission of Contention EC-8 and recommends that it be rejected.

Respectfully submitted,

Megan Wright
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, MD
this 7th day of March, 2011

CERTIFICATION OF COUNSEL

In accordance with 10 C.F.R. § 2.323(b) and the Board's Scheduling 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 were unsuccessful.

Respectfully submitted,

Megan Wright
Counsel for NRC Staff

Dated at Rockville, MD
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-LR/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 RIVERKEEPER, INC.'S MOTION FOR LEAVE TO FILE A NEW CONTENTION, AND NEW CONTENTION EC-8 CONCERNING NRC STAFF'S 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, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail, this 7th day of March, 2011:

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