UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	August 10, 2011

MEMORANDUM AND ORDER
(Granting Entergy's Request for Clarification)

On July 6, 2011, the Board, inter alia, admitted in part amended Contentions NYS-17B and NYS-37, which arise out of the NRC Staff's Final Supplemental Environmental Impact Statement (FSEIS) for Applicant Entergy Nuclear Operations, Inc.'s (Entergy's) License Renewal Application (LRA) for Indian Point Units 2 and 3 (IP2 and IP3).[1] NYS-17B and NYS-37 both focus on the analysis of the "no-action" alternative in the NRC Staff's FSEIS.

Entergy has moved for clarification of our admission of those two contentions in our July 6, 2011 Memorandum and Order.[2] Intervenor the State of New York (New York) opposes Entergy's Motion, while the NRC Staff supports the Motion.[3] For the reasons stated below, we grant Entergy's Motion to clarify our July 6, 2011 Memorandum and Order.

[1] Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011) at 16-19, 33-35, 71 (unpublished) [hereinafter July 6, 2011 Licensing Board Memorandum and Order].

[2] Applicant's Motion for Clarification of Licensing Board Admissibility Rulings on Contentions NYS-17B and NYS-37 (July 18, 2011) [hereinafter Entergy Motion].

[3] State of New York's Response to Applicant's Motion for Clarification of Licensing Board Admissibility Rulings on Contentions NYS-17B and NYS-37 (July 26, 2011) at 1 [hereinafter New York Answer]; NRC Staff's Answer to "Applicant's Motion for Clarification of Licensing

NYS-17B

Filed as part of New York's original hearing request and petition to intervene, NYS-17 claimed that Entergy's LRA "was flawed because it did not consider the positive impacts on land values in the Indian Point area that would accrue if the licenses for IP2 and IP3 were not renewed."[4] We admitted NYS-17 as a contention of omission.[5] After publication of the NRC Staff's Draft Supplemental Environmental Impact Statement (DSEIS), we admitted NYS-17A as an update to NYS-17, and consolidated them as NYS-17/17A.[6]

After publication of the FSEIS, we admitted NYS-17B in part and consolidated the contention with NYS-17/17A as Consolidated NYS-17B.[7] As relevant to Entergy's Motion for Clarification, we equated one position that "the presence of spent fuel itself on the [Indian Point] site affects property values" with a second position that "environmental impact[s] from the presence of spent fuel must be assessed on a site-specific basis."[8] We regarded both positions as outside the scope of this proceeding because the NRC's Waste Confidence Rule (10 C.F.R. § 51.23) explicitly mandates that the environmental impacts of on-site spent fuel storage for nuclear power reactor operating licenses under 10 C.F.R. Parts 50 and 54 need not be considered on a site-specific level in environmental reviews for such licenses.[9] But we also stated that:

Board Admissibility Rulings on Contentions NYS-17B and NYS-37" (July 28, 2011) at 1 [hereinafter NRC Staff Answer].

[4] LBP-08-13, 68 NRC 43, 115 (2008).

[5] Id. at 116, 218.

[6] Licensing Board Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) at 8, 17 (unpublished) [hereinafter June 16, 2009 Licensing Board Order].

[7] July 6, 2011 Licensing Board Memorandum and Order at 16-19, 71.

[8] Id. at 17 (citations omitted).

[9] Id. at 17-18 (citations omitted).

> [T]he negative effect on property values predicted by [New York's expert] that would result from the longer-term presence of spent fuel anticipated by the updated Waste Confidence Rule is not an environmental impact barred by the Waste Confidence Rule. The potential for spent fuel to indefinitely stay on-site is not an environmental impact associated with the spent fuel itself; rather, it is the occupation of the site by components of IPEC [Indian Point Energy Center] that has the potential to bring down property values if license renewal is granted. It is the value and uses of adjacent property that are site-specific environmental impacts. A challenge based on the impact of IPEC components' long-term on-site existence upon surrounding property values is not barred by the Waste Confidence Rule.[10]

We agree with Entergy and the NRC Staff that these two aspects of our admission of NYS-17B could be misunderstood as simultaneously closing and opening the door to litigation of issues barred by the Waste Confidence Rule.[11] While we disagree with New York that Entergy's Motion is a motion for reconsideration,[12] our decision to admit NYS-17B in part has not changed.

NYS-17/17A argued that Entergy (and later the NRC Staff) insufficiently analyzed the no-action alternative's positive impacts on property values near Indian Point.[13] NYS-17B, in addition to transferring concerns about Entergy's Environmental Report (ER) and the NRC Staff's DSEIS to the FSEIS, adds to NYS-17/17A the putative property value impacts of spent fuel storage.

We continue to view the environmental impacts of on-site spent fuel storage as outside the scope of this adjudicatory proceeding by operation of the Waste Confidence Rule but, in permitting litigation of "IPEC components' long-term on-site existence upon surrounding property values," we viewed (and continue to view) the property value impacts of the presence of spent fuel storage facilities when combined with the presence of other plant components

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[10] Id. at 18 (citations omitted).

[11] See Entergy Motion at 3; NRC Staff Answer at 5-6.

[12] See New York Answer at 1.

[13] June 16, 2009 Licensing Board Order at 8; LBP-08-13, 68 NRC at 115-16.

during the period of extended operations as within the scope of this proceeding. In effect, because of the operation of the Waste Confidence Rule, we have precluded assertions that the property value impacts from spent fuel storage can be isolated from impacts to property values emanating from the presence of other Indian Point plant components.

Arguably, the presence of plant systems, structures, and components (SSCs) (including stored spent fuel) might have an adverse effect on nearby property values. Whatever that effect might be, we believe it is impossible to segregate the incremental effects of spent fuel storage from the presence of other SSCs until these other components are removed during decommissioning. Stated another way, whatever hypothesized impact IPEC has on property values during the period of extended operations is not affected to a measurable degree by any one component (including the presence or absence of spent fuel), but rather is influenced by the presence of the entire plant as an entity.

Thus, "[t]he negative effect on property values predicted by [New York's expert] that would result from the longer-term presence of spent fuel anticipated by the updated Waste Confidence Rule is not an environmental impact barred by the Waste Confidence Rule"[14] when considered in conjunction with the negative effect of other SSCs at IPEC. Any attempt by New York to focus on the impacts associated with just the presence of spent fuel up through the period of extended operations and for the longer periods after decommissioning is barred by the Waste Confidence Rule. And, more broadly, any incremental impact of spent fuel alone need not be given any role in assessment of property values. Only impacts based on the presence (or not) of SSCs are required for evaluation.

The Waste Confidence Rule's preclusion of consideration of site-specific environmental impacts from on-site storage of spent fuel focuses on the sixty years after the period of

[14] July 6, 2011 Licensing Board Memorandum and Order at 18.

extended operations.[15] On the other hand, 10 C.F.R. § 50.82(a)(3) and (6) dictate a decommissioning period of up to sixty years beyond the period of extended operations, and we have said previously that New York could seek an analysis of the impacts on property values during the decommissioning period.[16] Therefore, as long as plant components exist on-site after the period of extended operations, these components' impacts on property values need to be evaluated in the no-action alternative.

In summary, we grant Entergy's Motion, and clarify that the impact of IP2's and IP3's components on nearby property values may be litigated in this proceeding, but impacts attributed solely to the presence of spent fuel itself may not be litigated in this proceeding.

NYS-37

We admitted NYS-9 from New York's original hearing request and petition to intervene in part, inasmuch as it alleged that Entergy's LRA's analysis of the no-action alternative did not account for the ability of energy conservation to take the place of IP2 and IP3.[17] After publication of the NRC Staff's DSEIS, we admitted NYS-33 and consolidated it with NYS-9 as NYS-9/33.[18] NYS-33 updated NYS-9's claims to the DSEIS, postulating inadequate acknowledgement of the ability of, inter alia, "energy conservation and efficiency, the viability of renewable energy resources, energy transmission capacity, and possible combinations of different energy sources" to fill the void of power production left by IP2 and IP3 in the no-action alternative.[19]

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[15] 10 C.F.R. § 51.23(a).

[16] See Licensing Board Memorandum and Order (Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A) (Apr. 22, 2010) at 14-15 (unpublished) (citing 10 C.F.R. § 50.82(a)(3), (6)(ii)).

[17] LBP-08-13, 68 NRC at 92-93, 218.

[18] June 16, 2009 Licensing Board Order at 13, 17.

[19] Id. at 9, 11-13.

Our July 6, 2011 Memorandum and Order admitted NYS-37, consolidating it with NYS-9/33 as NYS-37, to the extent it claimed "that the FSEIS is deficient for failing to discuss information, published after the DSEIS's issuance in December 2008, that is material to understanding the environmental impact of the no-action alternative and also that it fails to adequately address comments made to the DSEIS."[20] However, we did not permit "a broad-ranged inquiry into alternative scenarios and the need for power, which would be precluded by Commission regulations," and "f[ou]nd New York's concerns about the FSEIS's analysis of certain non-fossil alternatives untimely, given that these issues go beyond those raised by New York in its contentions on the DSEIS and New York could have raised them earlier."[21]

We agree with Entergy and the NRC Staff that "[i]t is not clear . . . which of New York's 'concerns' about the FSEIS's analysis of 'certain non-fossil alternatives' the Board . . . excluded as untimely."[22] Accordingly, we grant Entergy's Motion for Clarification of NYS-37.

The specific non-fossil alternatives we were referring to were those arising from the 2004 New York State Renewable Portfolio Standard, which existed before the DSEIS was issued, were not raised as challenges in NYS-9/33, and were raised for the first time in NYS-37.[23]

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[20] July 6, 2011 Licensing Board Memorandum and Order at 34, 71.

[21] Id. at 35 & n.156.

[22] Entergy Motion at 4; see NRC Staff Answer at 6-8.

[23] Compare State of New York Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement (Feb. 3, 2011) at 19 with State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement (Feb. 27, 2009) at 28-29.

However, NYS-37 echoed concerns raised in NYS-9/33 for its other non-fossil alternatives, and we thus do not exclude any of them from admission in NYS-37.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[24]

/RA/

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Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

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Dr. Kaye D. Lathrop
ADMINISTRATIVE JUDGE

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ADMINISTRATIVE JUDGE

Rockville, Maryland
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[24] Copies of this Memorandum and Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Sean Murray, the Representative for the Village of Buchanan; and (10) Michael J. Delaney, counsel for the City of New York.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR
	)	50-286-LR
	)	
(Indian Point Nuclear Generating Station, Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (Granting Entergy's Request for Clarification), has been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-247-LR and 50-286-LR
MEMORANDUM AND ORDER (Granting Entergy's Request for Clarification)

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
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