

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	
	January 30, 2012

**ENTERGY'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF PRE-FILED
TESTIMONY AND EXHIBITS FOR CONTENTION CW-EC-3A
(ENVIRONMENTAL JUSTICE)**

William C. Dennis, Esq.
ENTERGY NUCLEAR OPERATIONS, INC.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3202
Fax: (914) 272-3205
E-mail: wdennis@entergy.com

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-3000
Fax: (202) 739-3001
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com

Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street
Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
E-mail: martin.oneill@morganlewis.com

COUNSEL FOR ENTERGY NUCLEAR
OPERATIONS, INC.

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I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319, 2.323, 2.337, 2.1204, the Atomic Safety and Licensing Board’s (“Board”) Scheduling Order of July 1, 2010, and subsequent Order dated November 17, 2011,¹ Entergy Nuclear Operations, Inc. (“Entergy”) hereby moves to exclude from the hearing record certain evidence proffered by Hudson River Sloop Clearwater, Inc. (“Clearwater”) on December 22, 2011, in support of Contention CW-EC-3A. Specifically, portions of the testimony of Dr. Michael Edelstein (CLE000003)² and his supporting report (CLE00012A-C);³ the entirety of the testimony of Ms. Manna Jo Greene (CLE000010)⁴ and Dr. Erik A. Larsen (CLE000005);⁵ portions of the testimony of Mr. Aaron Mair (CLE000007)⁶

¹ Licensing Board Initial Scheduling Order (July 1, 2010) (unpublished); Licensing Board Order (Granting Unopposed Motion by the State of New York and Riverkeeper, Inc. to Amend the Scheduling Order) (Nov. 17, 2011) (“Scheduling Order”) (unpublished).

² Exh. CLE000003, Pre-filed Direct Testimony of Michael Edelstein (Dec. 22, 2011) (“Edelstein Testimony”).

³ Exhs. CLE00012A-C, Michael R. Edelstein, Ph.D., Environmental Justice Impacts from the Proposed Relicensing of the Indian Point Nuclear Power Complex: a Focus on Sing Sing Prison (Oct. 5, 2011) Parts 1, 2, and 3 (“Edelstein Report Part []”).

⁴ Exh. CLE000010, Pre-Filed Direct Testimony of Manna Jo Greene (Dec. 22, 2011) (“Greene Testimony”).

⁵ Exh. CLE000005, Pre-Filed Direct Testimony of Dr. Erik Larsen (Dec. 22, 2011) (“Larsen Testimony”).

and Mr. Stephen Filler (CLE000009);⁷ the entirety of the testimony of Mr. Anthony Papa (CLE000004),⁸ Mr. John Simms (CLE000006),⁹ and Ms. Dolores Guardado (CLE000008);¹⁰ and certain other Clearwater exhibits are inadmissible in this proceeding and should be excluded pursuant to 10 C.F.R. § 2.337(a). Attachment 1 to this Motion identifies the specific evidence that should be excluded, including a description of the evidence and the reason(s) for exclusion.

II. LEGAL STANDARDS

U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) regulations governing the admissibility of evidence provide that, “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” Thus, pursuant to 10 C.F.R. § 2.319(d), the Board may “strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and under Section 2.319(e) the Board may restrict evidence or arguments for the same reasons.

Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to testimony and exhibits that are outside the admitted contention’s scope or that raise issues that were not properly presented in earlier pleadings.¹¹ Similarly, it may exclude

⁶ Exh. CLE000007, Pre-Filed Direct Testimony of Aaron Mair (Dec. 22, 2011) (“Mair Testimony”).

⁷ Exh. CLE000009, Pre-Filed Direct Testimony of Stephen Filler (Dec. 22, 2011) (“Filler Testimony”).

⁸ Exh. CLE000004, Pre-Filed Direct Testimony of Anthony Papa (Dec. 22, 2011) (“Papa Testimony”).

⁹ Exh. CLE000006, Pre-Filed Direct Testimony of John Simms (Dec. 22, 2011) (“Simms Testimony”).

¹⁰ Exh. CLE000008, Pre-Filed Direct Testimony of Dolores Guardado (In Spanish with English Translation) (Dec. 22, 2011) (“Guardado Testimony”).

¹¹ See, e.g., *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Licensing Board Memorandum and Order (Ruling on In Limine Motions) at 3-7 (Jan. 26, 2009) (unpublished) (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Licensing Board Order (Ruling on Pending Matters and Addressing Preparation of Exhibits for Hearing) at 2 (Mar. 24, 2008) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of a license renewal proceeding, because such issues “do not relate to aging and/or because they are addressed as part of ongoing regulatory processes”); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order

testimony and supporting evidence that is outside the scope of this license renewal proceeding, or, in accordance with 10 C.F.R. § 2.335(a), evidence attacking the validity of NRC regulations.

Recent Commission decisions explicitly hold that intervenors are not permitted to change the scope of a contention as admitted by the Board. In the *Vogtle* proceeding, the Commission emphasized that the scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases.¹² Similarly, in the *Pilgrim* decision, the Commission reiterated that longstanding precedent requires a Board to look back at the bases to determine the scope of a contention, because the “reach of a contention *necessarily* hinges upon its terms *coupled* with its stated bases.”¹³ The Commission stressed that NRC hearing “would prove endless if parties were free . . . to introduce entirely new claims which they either originally opted not to make or which simply did not occur to them at the outset.”¹⁴

In addition, while the Federal Rules of Evidence do not apply directly to NRC proceedings, Boards often look to those rules for guidance.¹⁵ Of particular relevance to this Motion, Federal Rule of Evidence 602 specifically requires a non-expert witness to have

(Ruling on Motions in Limine and Motion for Clarification) at 1-2 (Aug. 9, 2007) (unpublished) (granting in part motion to exclude evidence on topics outside scope of contention and license renewal proceeding); *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), Licensing Board Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) at 4-10 (Jan. 21, 2005) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of the admitted contention, including topics raised and rejected at the pleadings stage).

¹² *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 100-01 (2010).

¹³ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added) (citing *Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988)).

¹⁴ *Id.* at 311 (quoting *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-05-28, 62 NRC 721, 727-28 (2005)).

¹⁵ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2187 (Jan. 14, 2004) (“Although the Commission has not required the application of the Federal Rules of Evidence in NRC adjudicatory proceedings, presiding officers and Licensing Boards have always looked to the Federal Rules for guidance in appropriate circumstances.”).

personal knowledge of the matter on which he or she testifies. Consistent with Rule 602, Boards have excluded such testimony by witnesses who lack personal knowledge.¹⁶

Further, Federal Rule of Evidence 703 permits an expert witness to provide an opinion despite a lack of personal knowledge of the underlying facts, but consistent with Federal practice, Boards may exclude unreliable expert witness testimony.¹⁷ Thus, an expert's opinion is admissible only if it is offered by a witness who has demonstrated his or her qualification to provide expert testimony on the specific technical subject at issue.¹⁸ An expert's opinion is admissible "only if the factual basis for that opinion is adequately stated and explained in the affidavit."¹⁹ "A witness may qualify as an expert" by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."²⁰ Similarly, opinion testimony is only admissible if it is based on the "methods and procedures of science," rather than on "subjective belief or unsupported speculation."²¹ When the qualifications of an expert witness

¹⁶ See, e.g., *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-96-10, 43 NRC 231 (1996); see also *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 501 (1991) (non-expert's submission considered as argument, not evidence).

¹⁷ 10 C.F.R. § 2.319(d); see also *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982) (upholding Board conclusion that witness lacked sufficient expertise to testify).

¹⁸ See *Entergy Nuclear Vt. Yankee* (Vermont Yankee Nuclear Power Station), Licensing Board Order (Ruling on Motions to Strike and Motions in Limine) at 7-8 (July 16, 2008) (unpublished) (granting in part motion to exclude opinion testimony proffered by an individual outside of demonstrated expertise); 10 C.F.R. § 2.319(d); see also *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982) (upholding Licensing Board conclusion that witness lacked sufficient expertise to testify).

¹⁹ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 81 (2005) (citing *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990); *United States v. Various Slot Machs. on Guam*, 658 F.2d. 697, 700 (9th Cir. 1981)).

²⁰ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27-28 (2004) (alternation in original omitted) (internal quotation marks omitted).

²¹ *Savannah River*, LBP-05-4, 61 NRC at 98-99 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993)) (disqualifying expert for certain purposes).

are challenged, the party sponsoring the witness has the burden of demonstrating that the witness is qualified.²²

III. ARGUMENT

A. Scope of Proceeding and of Contention CW-EC-3A

This proceeding concerns Entergy’s application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 (collectively, “Indian Point”). As initially proposed, CW-EC-3 raised various broad challenges to the environmental justice (“EJ”) analysis in Entergy’s Environmental Report (“ER”).²³ The Board, however, admitted CW-EC-3 only with respect to Clearwater’s narrow argument that the EJ evaluation allegedly fails to address alleged disparate severe accident impacts on minority and low-income populations in institutions near Indian Point.²⁴ In doing so, the Board emphasized that CW-EC-3 was admitted as an environmental contention brought under the National Environmental Policy Act (“NEPA”)—and not a safety contention brought under the Atomic Energy Act.²⁵ In subsequently admitting Clearwater’s proposed amendment to CW-EC-3 and consolidating the original and amended contentions as CW-EC-3A, the Board made clear it was doing so only to the extent that the amendment updated the contention, as originally admitted, to challenge the Final Supplemental Environmental Impact Statement (“FSEIS”) in addition to the ER.²⁶ Thus, the only relevant and remaining issue for CW-EC-3A, as admitted, is whether—under NEPA—the FSEIS and the ER

²² *Catawba*, CLI-04-21, 60 NRC at 27; *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1405 (1977).

²³ See Hudson River Sloop Clearwater Inc’s Petition to Intervene and Request for Hearing at 47-53 (Dec. 10, 2007) (“Clearwater Petition”), available at ADAMS Accession No. ML073520042.

²⁴ See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 200-01 (2008).

²⁵ *Id.* at 201.

²⁶ See Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56, 60 (July 6, 2011) (unpublished).

sufficiently analyze any disproportionate environmental impact on minority and low-income populations in nearby institutions in the event of a severe accident.

In admitting CW-EC-3A, the Board made clear it was *not* admitting a contention claiming that Indian Point emergency plans are deficient.²⁷ This restriction is wholly consistent with Commission case law and the Board’s emphasis on the limited scope of license renewal.²⁸ Specifically, this Board rejected several contentions challenging the adequacy of emergency preparedness and evacuation planning, explaining that “the NRC Regulation dealing with emergency plans, 10 C.F.R. § 50.47(a)(1)(i), provides that no finding relating to emergency planning is necessary for issuance of a renewed nuclear power reactor operating license” and thus, “[t]his language places consideration of emergency plans outside the scope of this proceeding and is supported by NRC case law.”²⁹ Since then, the Commission has confirmed that it is impermissible to use a license renewal NEPA contention to challenge the adequacy of emergency planning.³⁰ Accordingly, the scope of Clearwater’s NEPA Contention CW-EC-3A excludes challenges to existing emergency plans.

²⁷ See *Indian Point*, LBP-08-13, 68 NRC at 201.

²⁸ See *id.* at 149-150, 188.

²⁹ *Id.* at 149 (emphasis added) (rejecting proposed contention NYS-29); see also *id.* at 165-166 (rejecting proposed contention Connecticut EC-2).

³⁰ See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 302 (2010) (ruling that witness statements on “the issue of emergency planning—the need to provide accurate, ‘real time’ projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated” are beyond the scope of a license renewal severe accident mitigation alternative review).

B. Portions of Dr. Edelstein’s Expert Testimony and Report Should Be Excluded Because He (1) Lacks Relevant Expertise, (2) Challenges the Adequacy of Emergency Plans, (3) Addresses Issues Outside the Scope of NEPA, (4) Relies on Unreliable Interview Data, and (5) Raises Issues Likely to Become the Subject of Rulemaking

Clearwater offers Dr. Michael Edelstein’s expert testimony and report to raise issues related to emergency plan adequacy at the Sing Sing and Rockland County Correctional Facilities. Dr. Edelstein, a professor of environmental psychology, states that he is an expert in “psycho-social impact assessment.”³¹ The crux of Dr. Edelstein’s assessment is found in his report, which he incorporates as part of his testimony, and focuses on the adequacy of emergency planning at Sing Sing , as well as the potential for radiological and “psycho-social” impacts on its inhabitants. Dr. Edelstein also addresses lessons learned from the Fukushima accident in Japan as well as alleged non-nuclear emergency planning and evacuation issues associated with Hurricane Katrina. For the following reasons, the Board should exclude portions of Dr. Edelstein’s expert testimony and report.

1. Dr. Edelstein Has Not Demonstrated Expertise in Emergency Planning, Severe Accidents, or Health Physics

The Board should exclude portions of Dr. Edelstein’s testimony and report because Clearwater has failed to meet its burden to demonstrate that Dr. Edelstein is an expert in all areas on which he offers an opinion, including emergency planning, severe accidents, and/or health physics.³² Dr. Edelstein states that his “specialty is psycho-social impact assessment of environmental disaster and change” and analysis of “psychological and mental harms.”³³ However, he seeks to testify about issues far afield from psychology and psycho-social impacts; namely: (1) the effectiveness of radiological emergency plans and associated protective actions

³¹ Exh. CLE00012A, Edelstein Report Part 1 at 2.

³² *Diablo Canyon*, ALAB-410, 5 NRC at 1405.

³³ Exh. CLE00012A, Edelstein Report Part 1 at 2.

at preventing health effects from radiation exposure in the event of a severe accident;³⁴ and (2) the likelihood and consequences of severe accidents.³⁵ Nothing in Dr. Edelstein's resume or testimony indicates that he has the requisite expertise, such as any education, knowledge, or experience in the fields of emergency planning, health physics, nuclear reactor safety, or severe accident phenomena, to testify on such issues.³⁶ Accordingly, Clearwater has failed to demonstrate that Dr. Edelstein is competent to give an expert opinion on these issues, and the Board should exclude all such evidence identified in Attachment 1 outside his professed expertise in "psycho-social impact assessment" and "psychological and mental harms."³⁷

2. Dr. Edelstein Challenges the Adequacy of Emergency Plans

As noted above, the Board already has ruled that all issues concerning the adequacy of emergency plans are outside the scope of CW-EC-3A,³⁸ and the Commission has since confirmed that NEPA-based contentions cannot be used to challenge emergency planning.³⁹ Despite this unambiguous direction, extensive portions of Dr. Edelstein's testimony and report challenge the adequacy of existing Indian Point, including state and county, emergency plans. Specifically, Dr. Edelstein first cites to alleged problems associated with evacuating prisoners

³⁴ Exh. CLE000003, Edelstein Testimony at 3-4 (stating that prison evacuations are "far more complex," sheltering "impacts are likely to be higher due to inability to seal the building," and radiation-related impacts would be significantly greater); *see also* Exh. CLE00012B, Edelstein Report Part 2 at 20-23, 28-31, 32-33, 36-38; Exh. CLE00012C, Edelstein Report Part 3 at 39-44.

³⁵ Exh. CLE000003, Edelstein Testimony at 4 (discussing the extent of radiological releases from the Fukushima accident); *see also* Exh. CLE00012A, Edelstein Report Part 1 at 16-18 (offering testimony on meteorological conditions, radiological plume dispersion, and radiological risk); *id.* at 18-19 (offering testimony on probability and consequences of severe accidents, including seismic risk); Exh. CLE00012B, Edelstein Report Part 2 at 37 (offering testimony on wind conditions and severity of radioactive release).

³⁶ Although Dr. Edelstein's resume (Exh. CLE000011, Curriculum Vitae of Michael Edelstein (Dec. 21, 2011)) lists experience related to evaluating psychological and sociological harms following Chernobyl accident, Clearwater fails to explain how this experience qualifies Dr. Edelstein as an expert on emergency planning, health physics, or severe accidents.

³⁷ Exh. CLE00012A, Edelstein Report Part 1 at 2.

³⁸ *See Indian Point*, LBP-08-13, 68 NRC 201; *see also id.* at 149, 165-166.

³⁹ *See Pilgrim*, CLI-10-11, 71 NRC at 302.

from, or sheltering-in-place at, Sing Sing in accordance with existing emergency plans.⁴⁰ He then insists that the Board consider emergency planning changes and improvements involving both Indian Point and Sing Sing.⁴¹ Despite Dr. Edelstein's characterization of these emergency planning improvements as "mitigation measures," they are in fact challenges to the adequacy of current emergency plans. Because the adequacy of emergency planning is not subject to challenge, this testimony is not within the scope of CW-EC-3A.

Dr. Edelstein's report also contains an extensive, detailed discussion of reported problems with emergency planning and evacuation associated with a Louisiana prison during Hurricane Katrina.⁴² This discussion should be excluded because: (1) Clearwater failed to offer the underlying American Civil Liberties Union ("ACLU") report as an exhibit, contrary to the requirements of the Board's Scheduling Order;⁴³ (2) Dr. Edelstein fails to explain why the ACLU report is methodologically sufficient (*e.g.*, how were prisoner surveys conducted?) for him to rely upon in his testimony; and (3) issues concerning a Louisiana prison and Hurricane Katrina are unrelated to Indian Point. With respect to the latter, Dr. Edelstein fails to demonstrate how an account of a Louisiana prison evacuation after a hurricane has any relevance to existing New York state and county emergency plans for a potential Indian Point radiological event. Thus, the evidence identified in Attachment 1 should be excluded because the underlying

⁴⁰ See, *e.g.*, Exh. CLE000003, Edelstein Testimony at 3 (asserting that prison evacuations are "far more complex" than evacuating the general population and "carries far more risk of harm," and that sheltering-in-place "impacts are likely to be higher due to inability to seal the building").

⁴¹ See, *e.g.*, *id.* at 4 (outlining "mitigation measures," including, among other things, evacuation planning, performing tests and drill, and improving communications); see also Exh. CLE00012B, Edelstein Report Part 2 at 21-38; Exh. CLE00012C, Edelstein Report Part 3 at 39-44. Dr. Edelstein's testimony similarly challenges the Rockland County Jail emergency plans. See Exh. CLE000003, Edelstein Testimony at 5.

⁴² See Exh. CLE00012A, Edelstein Report Part 1 at 7-11, 13, 19; Exh. CLE00012B, Edelstein Report Part 2 at 21-23, 26-28; Exh. CLE00012C, Edelstein Report Part 3 at 31-48.

⁴³ See Scheduling Order at 14 ("The exhibits shall include all documents that the party or its witnesses refer to, use, or rely upon for their statements or position. If such documents are not attached, the Board will not consider them for any purpose in making findings of fact.").

referenced report is not an exhibit, and both the report and associated testimony are unreliable and irrelevant.

3. Dr. Edelstein’s Report Focuses on Issues Concerning Psychological Impacts; Terrorism; and Crime, Violence, Racial Discrimination, and Other Forms of Mistreatment in Prisons That Are Outside the Scope of NEPA

The Board also should exclude those portions of Dr. Edelstein’s report that focus on issues that are irrelevant to the NRC’s NEPA evaluation, including: (1) the *potential* for psychological and mental impacts; (2) the *potential* for terrorism; and (3) the *potential* for crime, violence, racial discrimination, and other forms of mistreatment in prisons.

NEPA is concerned with actual physical impacts to the environment.⁴⁴ As the Supreme Court in *Metropolitan Edison* explained, the “theme of [NEPA] is sounded by the adjective ‘environmental,’” which means that NEPA does not require an agency to assess every impact on a project, but only those that have a “reasonably close causal relationship” with “a change in the physical environment.”⁴⁵ In *Metropolitan Edison*, the Supreme Court rejected a claim that NEPA required that the NRC consider allegations that the restart of one of the reactors at Three Mile Island after another unit had malfunctioned would result in severe psychological health damage to nearby residents. The Supreme Court found that fear arising from the “risk” of a nuclear accident was not an effect caused by a change in the physical environment and, thus, did not warrant consideration under NEPA.⁴⁶ Specifically, the Supreme Court held that the causal chain between the change in the environment and the “effect” at issue was “too attenuated.”⁴⁷ The Supreme Court similarly held in *Public Citizen* that “where an agency has no ability to

⁴⁴ See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983) (“Metro Edison Co.”).

⁴⁵ *Id.* at 772, 773.

⁴⁶ *Id.* at 775-76.

⁴⁷ *Id.* at 771, 773.

prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁴⁸

Applying the same principles here, the Board should exclude the portions of Dr. Edelstein’s report identified in Attachment 1 as irrelevant to the NRC’s NEPA evaluation. First, as Dr. Edelstein explains, his “specialty is psycho-social impact assessment.”⁴⁹ Aside from the subjects on which he is not qualified to opine (*i.e.*, emergency planning, health physics, and severe accidents, *see* Section III.B.1 above), Dr. Edelstein’s report is fundamentally focused on addressing prisoners’ psychological issues, including issues related to feelings of powerlessness, victimization, fear, and other psychological pressures.⁵⁰ As Dr. Edelstein’s discussions of the “dread associated with exposure to radioactivity,”⁵¹ “perceive[d] dangers not present,”⁵² “unknown and invisible threats,”⁵³ and “stigma”⁵⁴ make clear, these concerns are associated with inmate perception or fear of an accident. In fact, Dr. Edelstein admits that there is only a “remotely causal . . . connection” between these alleged phenomena and Indian Point.⁵⁵ As in *Metropolitan Edison*, such psychological concerns are too attenuated to warrant consideration

⁴⁸ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (“Public Citizen”) (holding that the Federal Motor Carrier Safety Administration need not consider the environmental impacts of increased cross-border truck traffic due to regulatory changes that would increase such traffic because it had no discretion to prevent cross-border operations) .

⁴⁹ Exh. CLE00012A, Edelstein Report Part 1 at 2.

⁵⁰ *Id.* at 9, 14-15; Exh. CLE00012B, Edelstein Report Part 2 at 21-23, 31-32, 36-39.

⁵¹ *Id.* at 22.

⁵² *Id.* at 31.

⁵³ *Id.*

⁵⁴ *Id.* at 36.

⁵⁵ Exh. CLE00012A, Edelstein Report Part 1 at 16.

under NEPA.⁵⁶ In turn, to the degree Dr. Edelstein’s report either describes such phenomena, or claims to rely upon on them for his opinions, it must be excluded as irrelevant.

Second, the Board should also exclude as irrelevant those portions of Dr. Edelstein’s report that address the *potential* for terrorism.⁵⁷ The Commission—and this Board—have consistently held that the NRC does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants, holding that impacts associated with such attacks are “simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.”⁵⁸

Third, the Board should exclude the sections of Dr. Edelstein’s report that address the *potential* for crime and violence,⁵⁹ racial discrimination,⁶⁰ and other forms of mistreatment in prisons. Apart from the fact that such discussions are unsupported and unduly speculative, these issues are far removed from Indian Point license renewal, the issues posed by CW-EC-3, and the requisite analysis under NEPA. As the Supreme Court explained in *Public Citizen*, “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁶¹ In the instant case, neither Entergy nor the NRC has any control or authority over Sing Sing or its guards or prisoners. This lack of authority over prisons demonstrates that there is no “reasonably

⁵⁶ *Metro. Edison Co.*, 460 U.S. at 772-76 (holding that fear of an accident is not a cognizable injury under NEPA).

⁵⁷ Exh. CLE00012A, Edelstein Report Part 1 at 16, 18 (discussing need to consider terrorism).

⁵⁸ *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007); *Indian Point*, LBP-08-13, 68 NRC at 143 (“[W]e are nonetheless bound by the Commission’s ruling in Oyster Creek ‘that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.’”).

⁵⁹ Exh. CLE00012A, Edelstein Report Part 1 at 7-11; Exh. CLE00012B, Edelstein Report Part 2 at 21-22, 31-32, 33-35.

⁶⁰ Exh. CLE00012A, Edelstein Report Part 1 at 10-11; Exh. CLE00012B, Edelstein Report Part 2 at 21-22, 36, 39.

⁶¹ *Public Citizen*, 541 U.S. at 770.

close causal relationship” between the Indian Point license renewal and potential impacts associated with crime, violence, racial discrimination, and other forms of mistreatment. Indeed, such impacts require at least two intervening events: (1) the act of a third-party criminal; and (2) the failure of all government agencies charged with protecting prisoners from such harms.⁶² Accordingly, such impacts are outside NEPA review and thus this evidence is irrelevant.⁶³

4. Dr. Edelstein’s Testimony Concerning Rockland County Jail Is Unreliable

The Board should exclude as unreliable the portions of Dr. Edelstein’s testimony that rely on undocumented interviews by Ms. Susan Shapiro concerning Rockland County Jail. It is well-established that the reliability of any interview’s results depends almost exclusively on whether the interview was conducted according to generally accepted interview principles—*i.e.*, the questions to be asked of interviewees are framed in a clear, non-leading manner and are asked by competent, unbiased interviewers to ensure objectivity.⁶⁴ Here, Ms. Shapiro’s so-called “research” interview has no indicia of reliability. Dr. Edelstein provides only a cursory description of the method in which the interviews were conducted and testifies only to the results without providing any underlying documentation.⁶⁵ Further, Dr. Edelstein provides no indication that any steps were taken to avoid interviewer bias. This failure is striking given the Board has previously found that Ms. Shapiro—the interviewer on which Dr. Edelstein relies—displayed an “appalling lack of candor” and “repeatedly misrepresented facts in pleadings filed with this

⁶² See *N.J. Dep’t of Env’tl. Prot. v. NRC*, 561 F.3d 132, 140 (3d Cir. 2009).

⁶³ See *id.*; see also *La. Energy Servs., L.P. (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77, 101 (1998) (“[N]othing in NEPA or in the cases interpreting it indicates that the statute is a tool for addressing problems of racial discrimination.”)

⁶⁴ See *Toys “R” Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983) (“Toys “R” Us”).

⁶⁵ Exh. CLE000003, Edelstein Testimony at 5.

Board.”⁶⁶ Therefore, Dr. Edelstein’s testimony concerning Rockland County Jail, which relies on unreliable foundation material, should be excluded in its entirety.⁶⁷

5. Dr. Edelstein’s Testimony and Report Raise Issues Concerning Fukushima That Are Likely to Become the Subject of Rulemaking

The Board also should exclude those portions of Dr. Edelstein’s testimony and report, identified in Attachment 1, concerning “lessons learned” from events at Fukushima.⁶⁸ Such issues currently are under active Commission review and are likely to be part of future NRC rulemaking.⁶⁹ Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is outside the scope of a licensing proceeding.⁷⁰

C. Ms. Greene’s Testimony Should Be Excluded In Its Entirety Because (1) She Lacks Relevant Expertise and Relies on Unreliable Interviews, (2) Challenges the Adequacy of Emergency Plans, (3) Raises Issues Concerning Non-Institutional and Non-EJ Populations, and (4) Raises Other Issues Outside the Scope of CW-EC-3A

Clearwater seeks to have Ms. Manna Jo Greene testify in her professional capacity as Clearwater’s Environmental Director based on her EJ experience. Ms. Greene primarily testifies about “interviews” Clearwater conducted at various facilities near Indian Point to assess their

⁶⁶ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Striking WestCAN’s Request for Hearing) at 1 (July 31, 2008) (unpublished), *aff’d* CLI-08-29, 68 NRC 899 (2008). Likewise, the Commission found that Ms. Shapiro’s misrepresentations were neither inadvertent nor isolated, and directed the Secretary of the Commission to screen all future filings with her signature. *Indian Point*, LBP-08-13, 68 NRC at 901.

⁶⁷ *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 747-748 (3d Cir. 1994) (If “underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.”) (citation omitted).

⁶⁸ *See* Exh. CLE000003, Edelstein Testimony at 4 (Q15 & A15); Exh. CLE00012A, Edelstein Report Part 1 at 18-19; Exh. CLE00012B, Edelstein Report Part 2 at 38.

⁶⁹ *See* Staff Requirements Memorandum – SECY-11-0124, Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011), *available at* ADAMS Accession No. ML112911571; SECY-11-0124 (Sept. 9, 2011), *available at* ADAMS Accession No. ML11245A127.

⁷⁰ *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 100 (July 8, 2010); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345 (1999) (holding that while the topic petitioners sought to raise was not governed by a current rule, the issuance of an SRM for the NRC Staff to initiate a rulemaking on the topic was sufficient to preclude the topic from litigation in individual licensing proceedings) (*citing Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

level of emergency preparedness and ability to evacuate. As discussed below, the Board should exclude Ms. Greene's testimony in its entirety.

1. Ms. Greene Lacks Relevant Expertise and Her "Research" Interviews Do Not Meet the Most Basic Requirements of Reliability

The Board should exclude Ms. Greene's testimony because Ms. Greene is neither qualified to testify on Clearwater's "interview" data, nor are the interviews underlying her testimony reliable. Clearwater relies on Ms. Greene's testimony to introduce the results of emergency planning interviews conducted by Ms. Greene and various other individuals associated with Clearwater.⁷¹ Clearwater, however, does not demonstrate that Ms. Greene has the requisite expertise in designing, conducting, or extrapolating data from interviews. Nor has Clearwater presented any evidence suggesting Ms. Greene or any of her co-interviewers has the expertise necessary to interpret the interview results and develop an opinion on whether there is, in fact, a potential for a disparate impact. Accordingly, Ms. Greene's testimony is not reliable evidence.

As noted above in Section III.B.4, the reliability of any interview's results depends on whether the interview was conducted according to generally accepted interview principles.⁷² Here, the "research" interviews conducted by Clearwater have no indicia of reliability. Ms. Greene provides only a cursory description of the method in which the interviews were conducted and testifies only to the results without providing any underlying documentation other than a single blank interview form.⁷³ Ms. Greene provides no indication that any steps were taken to avoid interviewer bias and, indeed, all evidence is to the contrary given that all of the

⁷¹ Exh. CLE000010, Greene Testimony at 3-4.

⁷² See *Toys "R" Us*, 559 F. Supp. at 1205.

⁷³ Exh. CLE000010, Greene Testimony at 3-4; see also Exh. CLE000033, Hudson River Sloop Clearwater, Emergency Evacuation Interview Questions (2011).

interviewers are affiliated with Clearwater. This is not a trivial point, as the Board has previously found that one of Clearwater’s interviewers, Ms. Susan Shapiro, displayed an “appalling lack of candor” and “repeatedly misrepresented facts in pleadings filed with this Board.”⁷⁴

In summary, Ms. Greene’s testimony is presented as an objective recounting of Clearwater’s interviews, but is lacking any indicia of reliability. This is further demonstrated by gratuitous, argumentative, and unreliable statements in her testimony. For example, Ms. Greene states: “Clearwater also attempted, but was unable, to interview several people who expressed concern for their jobs or funding for their programs, because Entergy provided charitable donations to these facilities.”⁷⁵ Such reported statements by unknown individuals are inherently unreliable and, therefore, inadmissible.⁷⁶

2. Ms. Greene’s Testimony Challenges the Adequacy of Emergency Plans

The Board should also exclude Ms. Greene’s testimony for directly challenging the adequacy of existing emergency plans. In fact, the sole purpose of Ms. Greene’s testimony is to summarize interviews Clearwater conducted at various facilities “*to assess their level of preparedness and ability to evacuate* if there should be a radiological emergency at Indian Point that required an emergency response.”⁷⁷ Based on these interviews, Ms. Greene concludes that “the level of emergency preparedness varies considerably among the various facilities,” “[r]euniting children with their parents is also problematic,” and, “[w]hile Clearwater questions the viability of any emergency evacuation for everyone . . . around Indian Point, . . . much better

⁷⁴ *Indian Point*, CLI-08-29, 68 NRC at 899.

⁷⁵ Exh. CLE000010, Greene Testimony at 4.

⁷⁶ *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92, 121 (1977) (finding non-expert testimony unreliable when based only on what he was told by anonymous expert). The incomplete nature of these interviews casts further doubt on the reliability of Clearwater’s interview process.

⁷⁷ Exh. CLE000010, Greene Testimony at 3 (emphasis added).

outreach and disaster preparedness is needed for institutions that house poverty-stricken or low-income, disabled, minority and non-English-speaking populations.”⁷⁸ Because the adequacy of emergency plans is not subject to challenge in this proceeding, this testimony is irrelevant.

3. Ms. Greene’s Testimony Addresses Non-Institutional and Non-EJ Populations That Are Beyond the Scope of CW-EC-3A

Ms. Greene’s testimony is irrelevant for an additional reason. The Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.⁷⁹ Ms. Greene’s testimony largely ignores this issue and focuses on non-institutional, transportation-dependent populations;⁸⁰ non-residential day care centers and head start programs;⁸¹ nursing homes, hospitals, and other facilities that are not EJ populations;⁸² non-institutional affordable housing communities;⁸³ and emergency services providers.⁸⁴ Because none of this testimony concerns impacts associated with severe accidents on EJ populations residing in institutions, none of this testimony is relevant.

4. Ms. Greene’s Testimony Concerns the Impacts of PCBs and Other Toxins that Are Outside the Scope of CW-EC-3A and that Were Previously Rejected

Ms. Greene improperly expands the scope of CW-EC-3A by claiming that the FSEIS should have considered EJ impacts associated with ingestion or exposure to PCBs, mercury, dioxin, and other chemicals, in conjunction with planned releases of radioactivity from Indian Point.⁸⁵ As the Commission stated, the scope of a contention is limited to issues pled with

⁷⁸ *Id.* at 29.

⁷⁹ *See Indian Point*, LBP-08-13, 68 NRC at 200-01.

⁸⁰ Exh. CLE000010, Greene Testimony at 4-6.

⁸¹ *Id.* at 6-13.

⁸² *Id.* at 13-22.

⁸³ *Id.* at 24-26.

⁸⁴ *Id.* at 26-27.

⁸⁵ *Id.* at 29-32.

particularity unless the contention is amended in accordance with NRC regulations.⁸⁶ Not only are these issues not part of the admitted bases of the contention, but the Board specifically rejected an earlier attempt by Clearwater to litigate similar issues.⁸⁷ Therefore, for this additional reason, Ms. Greene's testimony is irrelevant.

D. Dr. Larsen's Testimony Should Be Excluded In Its Entirety Because Issues Concerning Non-EJ Populations Are Outside the Scope of CW-EC-3A, and Because It Challenges Emergency Plans

Clearwater seeks to have Dr. Erik A. Larsen, Associate Medical Director at White Plains Hospital Emergency Department, testify in his individual capacity "as a physician and as a concerned citizen with expertise in emergency medical response."⁸⁸ Dr. Larsen's testimony describes a single experience treating a worker from Indian Point and local emergency medical response capabilities. As discussed below, the Board should exclude his testimony in its entirety.

The Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.⁸⁹ Dr. Larsen's testimony does not address this issue. Instead, Dr. Larsen's testimony focuses on hospital patients in general.⁹⁰ The only discussion of potential EJ populations in his testimony relates to potential disparities the uninsured may have in obtaining follow-up medical care.⁹¹ But Dr. Larsen fails to provide any connection between the uninsured and the scope of this contention. Therefore, Dr. Larsen's testimony is irrelevant.

⁸⁶ *Vogle*, CLI-10-05, 71 NRC at 100.

⁸⁷ *Indian Point*, LBP-08-13, 68 NRC at 200 (rejecting argument concerning ingestion of radionuclides and toxins due to subsistence fishing).

⁸⁸ Exh. CLE000005, Larsen Testimony at 1.

⁸⁹ *See Indian Point*, LBP-08-13, 68 NRC at 200-01.

⁹⁰ Exh. CLE000005, Larsen Testimony at 2-3.

⁹¹ *Id.* at 3.

Furthermore, Dr. Larsen’s testimony directly challenges the adequacy of current emergency plans. For example, Dr. Larsen asserts that local hospitals would be unprepared in the event of an accident at Indian Point, that current emergency plans are not “viable for either ambulatory or non-ambulatory patients,” and that “it is essential to create a more robust and comprehensive plan.”⁹² Accordingly, Dr. Larsen’s testimony regarding the adequacy of emergency plans should be excluded as irrelevant.

E. Portions of Mr. Mair’s Testimony Should Be Excluded Because Issues Concerning Non-Institutional Populations Are Outside the Scope of CW-EC-3A and For Challenging the Adequacy of Emergency Plans

Clearwater seeks to have Mr. Aaron Mair, a radio talk show host and staff member of the New York State Department of Health, testify in his personal capacity and based on his general experience in EJ and geographic information systems. Mr. Mair provides background on the EJ movement and focuses on the City of Peekskill, including its demographics, impacts from landfills and other industrial facilities, and emergency planning issues related to automobile ownership rates and local terrain and roads. As discussed below, the Board should exclude irrelevant portions of Mr. Mair’s testimony identified in Attachment 1.

The Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.⁹³ Mr. Mair’s testimony does not address this issue. Instead, it concerns: (1) the demographics of the City of Peekskill, with no discussion of institutional populations; (2) impacts from industrial facilities in Peekskill; and (3) the potential for disparate impacts due to the asserted low rate of automobile ownership in

⁹² *Id.* at 2-3. In addition, Dr. Larsen provides no basis on which to conclude that he has the expertise to assess likely medical demand if an accident were to occur, or to quantify existing medical capacity, much less to compare the two. Thus, Dr. Larsen’s opinion on such issues is not reliable evidence.

⁹³ *See Indian Point*, LBP-08-13, 68 NRC at 200-01.

Peekskill and the rugged terrain and limited road access.⁹⁴ Because none of this testimony directly relates to the scope of the admitted contention, none of it is relevant.

Furthermore, portions of Mr. Mair's testimony amount to a challenge to current emergency plans. For example, Mr. Mair asserts that there would be evacuation difficulties for EJ populations that do not have access to automobiles.⁹⁵ Because the adequacy of evacuation plans is not subject to challenge in this proceeding, none of this testimony is relevant.

Accordingly, the evidence identified in Attachment 1 should be excluded.

F. Portions of Mr. Filler's Testimony Should Be Excluded Because It Challenges the Adequacy of Emergency Plans and Issues Concerning Non-Institutional Populations Are Outside the Scope of CW-EC-3A

Clearwater seeks to have Mr. Stephen Filler testify in his personal capacity and as a Clearwater Board Member regarding Indian Point emergency planning documents. As discussed below, the Board should exclude the irrelevant portions of Mr. Filler's testimony identified in Attachment 1.

As the Board and Commission case law have made clear, challenges to Indian Point emergency plans are outside the scope of CW-EC-3A.⁹⁶ Mr. Filler, however, ignores this directive and includes several challenges to the adequacy of emergency plans. For example, he voices his concerns regarding planning for food and water supplies at certain medical facilities that might shelter-in-place rather than evacuate, transit-dependent individuals, and maintenance of an "up-to-date list of the location of non-institutionalized mobility-impaired individuals."⁹⁷ Because the adequacy of emergency plans is not subject to challenge, this testimony is irrelevant.

⁹⁴ Exh. CLE000007, Mair Testimony at 6-11.

⁹⁵ *Id.* at 7-11.

⁹⁶ *Indian Point*, LBP-08-13, 68 NRC at 201; *see also Pilgrim*, CLI-10-11, 71 NRC at 302.

⁹⁷ Exh. CLE000009, Filler Testimony at 2-3.

Furthermore, the Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.⁹⁸ Portions of Mr. Filler’s testimony, however, focus on non-institutional or non-EJ populations.⁹⁹ Because this testimony is irrelevant, the Board should exclude the evidence identified in Attachment 1.

G. Mr. Papa’s Testimony Should Be Excluded In Its Entirety Because It Challenges the Adequacy of Emergency Plans and Issues Related to U.S. Drug Policy Are Irrelevant to CW-EC-3A

Clearwater seeks to have Mr. Anthony Papa, the manager of media relations at the Drug Policy Alliance and a former inmate at Sing Sing, testify in his individual capacity. Mr. Papa’s testimony discusses his incarceration and release from Sing Sing, U.S. drug policy, his work for the Drug Policy Alliance, and his personal views concerning emergency planning at Sing Sing. As discussed below, the Board should exclude Mr. Papa’s testimony in its entirety.

Essentially all of Mr. Papa’s testimony amounts to a challenge to current emergency planning related to Sing Sing. For example, Mr. Papa asserts that “it would be extremely difficult to evacuate Sing Sing in a reasonable amount of time” and that Sing Sing is not “a very good building for sheltering in place.”¹⁰⁰ Because the adequacy of existing emergency plans is not subject to challenge in this proceeding, none of this testimony is relevant. Furthermore, Mr. Papa’s opinions about U.S. drug policy and his work at the Drug Policy Alliance¹⁰¹ are irrelevant and have no bearing on resolution of CW-EC-3A. Accordingly, none of this testimony is relevant.¹⁰²

⁹⁸ See *Indian Point*, LBP-08-13, 68 NRC at 200-01; see also *Pilgrim*, CLI-10-11, 71 NRC at 302.

⁹⁹ Exh. CLE000009, Filler Testimony at 2-3.

¹⁰⁰ Exh. CLE000004, Papa Testimony at 3, 4.

¹⁰¹ *Id.* at 2-3 (Q5 to Q8).

¹⁰² Although not admissible as evidence, 10 C.F.R. § 2.315(a) provides the option for limited appearance statements.

H. Mr. Simms' Testimony Should Be Excluded In Its Entirety Because Mr. Simms (1) Raises Issues Concerning Non-EJ Populations, (2) Lacks Relevant First-Hand Knowledge, and (3) Challenges the Adequacy of Emergency Plans

Clearwater seeks to have Mr. John Simms, a retiree living in Bethel Springvale Inn, testify in his individual capacity regarding demographics and emergency planning at Bethel Springvale Inn. As discussed below, the Board should exclude this testimony in its entirety.

As an initial matter, the Board should exclude Mr. Simms' testimony because it is beyond the scope of CW-EC-3A. The Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.¹⁰³ Mr. Simms' testimony does not address this issue. In fact, when asked about Springvale Inn residents, Mr. Simms opines that "the average person here is *at least* middle class."¹⁰⁴ Thus, Mr. Simms testimony is not relevant.

In addition, Mr. Simms states that he has never been given information or prepared for a radiological emergency, and thus his testimony "is definitely not an 'official' answer" about Indian Point emergency plans.¹⁰⁵ Nonetheless, Clearwater asked Mr. Simms to speculate about local emergency plans despite his admitted lack of knowledge about such issues. Clearwater does nothing to establish that Mr. Simms' personal opinions have any relevance to existing Indian Point emergency plans or how such plans would be applied at Springvale Inn or any other facility. Therefore, Mr. Simms' testimony is not reliable or relevant evidence.

Furthermore, portions of Mr. Simms' testimony challenges the adequacy of current emergency plans. For example, Mr. Simms' testimony asserts that "[a]n evacuation would be

¹⁰³ See *Indian Point*, LBP-08-13, 68 NRC at 200-01.

¹⁰⁴ Exh. CLE000006, Simms Testimony at 2 (emphasis added).

¹⁰⁵ *Id.* at 2-3.

extremely difficult for people at [Bethel Springvale Inn].”¹⁰⁶ Accordingly, Mr. Simms’ testimony should be excluded as irrelevant for this reason as well.

I. Ms. Guardado’s Testimony Should Be Excluded In Its Entirety Because (1) Issues Concerning Non-Institutional Populations Are Outside the Scope of CW-EC-3A, (2) It Challenges the Adequacy of Emergency Plans, and (3) Ms. Guardado Lacks Relevant First-Hand Knowledge

Clearwater seeks to have Ms. Dolores Guardado, a resident of Peekskill and member of its Hispanic community, testify in her personal capacity regarding the Hispanic community in Peekskill and Indian Point emergency plans, including KI distribution and evacuations. As discussed below, the Board should exclude Ms. Guardado’s testimony in its entirety as set forth in Attachment 1.

The Board admitted CW-EC-3A only with respect to the potential for disparate impacts on institutional EJ populations in the event of a severe accident.¹⁰⁷ Ms. Guardado’s testimony does not address this issue. Instead, Ms. Guardado’s testimony concerns alleged challenges in evacuating non-institutional members of the general Hispanic community.¹⁰⁸ Therefore, none of this testimony is relevant.

Ms. Guardado’s testimony also challenges current emergency plans. For example, Ms. Guardado asserts that Spanish translations of emergency planning information are not distributed appropriately, and that the “language barrier” will result in evacuation difficulties.¹⁰⁹ Because the adequacy of evacuation and emergency plans is not subject to challenge in this proceeding, this testimony should be excluded.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *See Indian Point*, LBP-08-13, 68 NRC at 200-01.

¹⁰⁸ Exh. CLE000008, Guardado Testimony at 4-6.

¹⁰⁹ *Id.* at 4-5.

The Board should also exclude Ms. Guardado's testimony because Clearwater has failed to demonstrate that Ms. Guardado has sufficient knowledge in the areas on which she offers an opinion. For example, she testifies based only on her own personal experience and admittedly has no specific knowledge of Indian Point emergency plans. Nonetheless, Clearwater offers her opinions about the general adequacy of those plans. Accordingly, given her lack of personal knowledge about, or expertise in, emergency planning, Ms. Guardado's opinion is not reliable evidence.¹¹⁰

J. Portions of Clearwater's Position Statement Addressing Excluded Evidence Should Also Be Excluded and Accorded No Weight

Clearwater also discusses the preceding testimony and supporting evidence in its Position Statement on this contention.¹¹¹ Those portions of Clearwater's Position Statement that rely on inadmissible evidence or otherwise raise excluded issues may be stricken.¹¹² Therefore, to the extent the Board grants this Motion and excludes evidence identified in Attachment 1 to this Motion, the associated discussions in the Position Statement should be excluded and accorded no weight in the Board's decision on CW-EC-3A.

IV. CONCLUSION

For the foregoing reasons, the Board should exclude the portions of Clearwater's pre-filed testimony and exhibits discussed above and identified in Attachment 1 to this Motion.

¹¹⁰ See, e.g., *Georgia Tech*, LBP-96-10, 43 NRC at 231; see also *Turkey Point*, ALAB-950, 33 NRC at 501 (non-expert's submission considered as argument, not evidence).

¹¹¹ Exh. CLE000002, Initial Statement of Position for Clearwater's Contention EC-3A Regarding Environmental Justice at 22-32 (Dec. 22, 2011) ("Position Statement").

¹¹² See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 2 (Aug. 9, 2007) (unpublished); *Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), Licensing Board Order (Ruling on Motions to Strike and Motions in Limine) at 2-3 (July 16, 2008) (unpublished). But see *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), Licensing Board Order (Granting in Part and Denying in Part NRC Staff's Motion in Limine) at 5 (Jan. 17, 2012) (unpublished) ("We need not rule on the admissibility of statements of position because they will not be admitted as evidence, but will only be considered by the Board in its merits ruling to the extent they are based on admitted evidence.").

Respectfully submitted,

Signed (electronically) by Paul M. Bessette

Kathryn M. Sutton, Esq.

Paul M. Bessette, Esq.

Martin J. O'Neill, Esq.

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: (202) 739-3000

Fax: (202) 739-3001

E-mail: ksutton@morganlewis.com

E-mail: pbessette@morganlewis.com

E-mail: martin.oneill@morganlewis.com

William C. Dennis, Esq.

ENTERGY NUCLEAR OPERATIONS, INC.

440 Hamilton Avenue

White Plains, NY 10601

Phone: (914) 272-3202

Fax: (914) 272-3205

E-mail: wdennis@entergy.com

Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.
this 30th day of January 2012

Entergy Attachment 1 to Motion In Limine to Exclude Portions of Clearwater’s Pre-Filed Testimony and Exhibits for Contention CW-EC-3A (Environmental Justice)

Location of Information to Be Excluded	Basis for Exclusion
<i>CLE000003: Edelstein Testimony</i>	
Page 3, A11, exclude the sentence beginning “Second, even if there . . .” through the end of the sentence ending “. . . social disruption and violence.”	These portions of the Edelstein Testimony challenge the adequacy of emergency plans.
Page 4, A14, exclude entirety.	
Page 5, A16, first paragraph, exclude the sentence beginning “Sheltering in place would result in . . .” through the end of the sentence ending “. . . if sufficient transport were available.”	
Page 3, A11, exclude the sentence beginning “Second, even if there . . .” through “inability to seal the building.”	Edelstein has not demonstrated requisite qualifications to offer an opinion on the effectiveness of emergency plans and associated protective actions at preventing health effects from radiological exposure in the event of a severe accident.
Pages 3-4, A11, exclude entire sentence beginning “Overall . . .”	
Page 4, A15, exclude the sentence beginning “The accident at Fukushima. . .” through the end of the sentence ending “. . . close to the reactor.”	Edelstein has not demonstrated requisite qualifications to offer an opinion on the likelihood and consequences of a severe accident.
Page 5, A16, exclude the entire paragraph beginning “Yes.”	This portion of the Edelstein Testimony relies on unreliable interviews.
Page 4, Q15 & A15, exclude entirety.	This portion of the Edelstein Testimony raises issues that are likely to become the subject of rulemaking.
<i>CLE00012A: Edelstein Report Part 1</i>	
Pages 16-18, exclude the section beginning “4. The Conditions created by a nuclear accident represent a unique type of disaster” through the end of the sentence ending “. . . nothing to be done.”	Edelstein has not demonstrated requisite qualifications to offer an opinion on the effectiveness of emergency plans and associated protective actions at preventing health effects from radiological exposure in the event of severe accidents.
Pages 18-19, exclude the sentence beginning “The range of ‘what could happen’ . . .” through the end of the sentence ending “. . . worst case event occur.”	
Page 9, exclude the sentence beginning “In this Dantesque situation . . .” through the end of the sentence ending “‘left to die.’”	These portions of the Edelstein report concern psychological issues that do not warrant consideration under NEPA.
Pages 14-15, exclude the sentence beginning “A failure to be protective. . .” through the end of the sentence ending “. . . inmate prison culture.”	
Pages 7-11, exclude the section beginning “1.	This portion of the Edelstein report

Location of Information to Be Excluded	Basis for Exclusion
Lessons of Katrina about Prison Disaster Response” through the end of the sentence ending “. . . what symptoms do prisoners have?”	challenges impacts too attenuated to warrant consideration under NEPA: prison conditions.
Pages 18-19, exclude entire section beginning “Lessons of Fukushima”	This portion of the Edelstein report raises issues likely to become the subject of rulemaking.
CLE00012B: Edelstein Report Part 2	
Pages 20-21, exclude entire sections beginning “Protective Options for Radiation Exposure” and “Evacuation Trigger---Two Guidances”.	These portions of the Edelstein report challenge the adequacy of emergency plans.
Pages 21-23, exclude entire section beginning “Summary... 1. Lessons of Katrina for Sing Sing.” Particularly irrelevant are bullets beginning “First,” “Sixth,” “Seventh,” and “Finally.”	
Pages 23-28, exclude entire section beginning “2. An inmate perspective on protective mitigation”.	
Pages 28-36, exclude entire section beginning “3. Is ‘shelter-in-place’ a viable mitigation for the Sing Sing inmate population?” through the end of the sentence ending “even more challenging possibilities.”	
Pages 36-38, exclude entire section beginning “4. Is evacuation a viable mitigation for the Sing Sing inmate population?”	
Pages 28-31, exclude the section beginning “3. Is ‘shelter-in-place’ a viable mitigation for the Sing Sing inmate population?” through the end of the bullet ending “and for how long?”	Edelstein has not demonstrated requisite qualifications to offer an opinion on the effectiveness of emergency plans and associated protective actions at preventing health effects from radiological exposure in the event of a severe accident.
Pages 32-33, exclude the section beginning “Shadow Evacuations” through the end of the sentence ending “strategy for Sing Sing.”	
Pages 36-38, exclude entire section beginning “4. Is evacuation a viable mitigation for the Sing Sing inmate population?”	
Page 37, exclude entire sentence beginning “Should sheltering not prove viable . . .”	
Pages 21-23, exclude the sentence beginning “Psychological and social threats. . .” through the end of the sentence ending “. . . perceptions, expectations and behavior.”	Edelstein has not demonstrated requisite qualifications to offer an opinion on the likelihood and consequences of severe accidents.
Pages 31-32, exclude the section beginning “Psycho-Social Impacts” through the end of the sentence ending “. . . inmate anger would be a near certainty.”	These portions of the Edelstein report concern the <i>potential</i> for psychological and mental impacts, which is irrelevant to the NRC’s NEPA evaluation.

Location of Information to Be Excluded	Basis for Exclusion
Page 36, exclude entire paragraph beginning “Given the plan to shelter-in-place”.	
Page 16, exclude the words “failures to consider terrorism”	These portions of the Edelstein report concern the <i>potential</i> for terrorism, which is irrelevant to the NRC’s NEPA evaluation.
Page 18, exclude the sentence beginning “As a result, the full range of events . . .” through the end of the sentence ending “. . . terrorism and other potential yet undefined calamities.”	
Pages 21-23, exclude the sentence beginning “Of course, the Louisiana disaster. . .” through the end of the sentence ending “. . . perceptions, expectations and behavior.”	
Pages 31-32, exclude the section beginning “Psycho-Social Impacts” through the end of the sentence ending “. . . pre-decision to shelter-in-place.”	These portions of the Edelstein report challenge conditions over which neither Entergy nor the NRC has any control or authority, which are irrelevant to the NRC’s NEPA evaluation.
Pages 33-35, exclude the section beginning “The ETS experience at Sing Sing” through the end of the sentence ending “. . . requests for help.”	
Page 38, exclude entire paragraph beginning “The latter point . . .”	This portion of the Edelstein report raises issues likely to become the subject of rulemaking.
CLE00012C: Edelstein Report Part 3	
Pages 39-40, exclude entire section beginning “Moving a high security prison population is problematic” through the end of the sentence ending “. . . protect this EJ population.”	This portion of the Edelstein report challenges the adequacy of emergency plans.
Pages 40-44, exclude entire section beginning “5. Proposals to strengthen mitigation,” through conclusion.	Edelstein has not demonstrated requisite qualifications to offer an opinion on the effectiveness of emergency plans and associated protective actions at preventing health effects from radiological exposure in the event of a severe accident.
Pages 39-43, exclude section beginning “Moving a high security prison population is problematic” through the end of the sentence ending “meeting inmate needs.”	This portion of the Edelstein report challenges conditions over which neither Entergy nor the NRC has any control or authority, which are irrelevant to the NRC’s NEPA evaluation.
CLE000010: Greene Testimony	
Exclude entirety.	Greene has not demonstrated requisite

Location of Information to Be Excluded	Basis for Exclusion
	expertise, relies on unreliable interviews, challenges the adequacy of emergency plans, raises issues concerning non-institutional and non-EJ populations, and raises other issues outside the scope of CW-EC-3A.
CLE000005: Larsen Testimony	
Exclude entirety.	The Larsen Testimony challenges the adequacy of emergency plans and raises issues concerning non-EJ populations.
CLE000007: Mair Testimony	
Pages 6-11, Q6 through A16, exclude entirety.	This portion of the Mair Testimony is beyond the scope of CW-EC-3A (does not concern impacts associated with severe accidents on low-income or minority populations residing in institutions).
Pages 8-11, exclude from sentence beginning “The higher proportion . . .” through end of A16.	This portion of the Mair Testimony challenges the adequacy of emergency plans.
CLE000009: Filler Testimony	
Page 2, A3, exclude the sentence “It is unclear how replacement supplies of water and food would be provided.”	These portions of the Filler Testimony challenge the adequacy of emergency plans.
Page 2, A3, exclude the sentence “Further, there is no plan . . . safely ventilated.”	
Page 2, A4, exclude the sentence “Although those people are supposed to shelter-in-place prior to arrival of the bus, it is unclear how this is possible.”	
Page 2, A4, exclude the sentence “It is again unclear how this groups will shelter in place . . . will be maintained.”	
Page 3, A4, exclude entire sentence “In addition . . .”	
Page 2, A3, exclude entire sentence “Thus the Westchester. . .exposed to.”	
Page 2-3, Q4 & A4, exclude entirety.	
Page 3, Q5 & A5, exclude entirety.	
CLE000004: Papa Testimony	
Exclude entirety.	The Papa Testimony challenges the adequacy of emergency plans, and issues related to U.S. drug policy are irrelevant.
CLE000006: Simms Testimony	
Exclude entirety.	The Simms Testimony does not discuss disparate impacts on minority and low-

Location of Information to Be Excluded	Basis for Exclusion
	income populations in institutions, is based almost exclusively on speculation, and challenges the adequacy of emergency plans.
<i>CLE000008: Guardado Testimony</i>	
Exclude entirety.	The Guardado Testimony does not address impacts associated with institutional low-income or minority populations and challenges the adequacy of emergency plans. Ms. Guardado also lacks relevant first-hand knowledge of Indian Point emergency plans.
<i>CLE000013: Letter from Bates to DelBello (February 4, 1981)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Exh. CLE000003, Edelstein Testimony at 2, A9; Exh. CLE00012B, Edelstein Report Part 2 at 21.
<i>CLE000019: Tony Papa Artwork</i>	
Exclude entirety.	Irrelevant to CW-EC-3A.
<i>CLE000022: Brookings Institution Report: Alan Berube, Elizabeth Deakin and Steven Raphael, Socioeconomic Differences in Household Automobile Ownership Rates: Implications for Evacuation Policy (June 2006)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and concerns only non-institutional populations. <i>See</i> Exh. CLE000010, Greene Testimony at 6, A9; Exh. CLE000007, Mair Testimony at 9, A12.
<i>CLE000023: Patrick McGeehan, "Operators of Indian Point Say Changes are Likely" (NY Times, March 21, 2011)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Exh. CLE000007, Mair Testimony at 10, A16.
<i>CLE000026: NJ DEP Strategies For Addressing Cumulative Impacts In Environmental Justice Communities (March 2009)</i>	
Exclude entirety.	Irrelevant to CW-EC-3A. <i>See</i> Exh. CLE000010, Greene Testimony at 30, A165.
<i>CLE000027: Faber & Kreig, Unequal Exposure to Ecological Hazards: Environmental Injustices in the Commonwealth of Massachusetts (April 2002)</i>	
Exclude entirety.	Relied upon to raise an issue that is beyond the scope of CW-EC-3A: environmental

Location of Information to Be Excluded	Basis for Exclusion
	justice in Massachusetts. <i>See</i> Exh. CLE000010, Greene Testimony at 30, A165.
<i>CLE000032: MJ Wilson, Partial Inventory of Potential EJ Institutions Within 50 miles of Indian Point</i>	
Exclude entirety.	Does not necessarily address environmental justice populations within the scope of CW-EC-3A. <i>See</i> Exh. CLE000010, Greene Testimony at 3, A5, 13, A54.
<i>CLE000034: AJM Consulting, Inc. and Nelson\Nygaard Consulting Associates, Westchester County Bee-Line System On-Board Survey-2010 (April 2011)</i>	
Exclude entirety.	Relied upon to raise an issue that is beyond the scope of CW-EC-3A: transportation of non-institutional or non-environmental justice populations. <i>See</i> Exh. CLE000010, Greene Testimony at 4, A7; Exh. CLE000002, Position Statement at 30, x.
<i>CLE000035: Abby Luby, "Schools say Indian Point Evacuation Plan Unrealistic" (North Country News, Nov. 19, 2008)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Exh CLE000010, Greene Testimony at 11, A43.
<i>CLE000040: Pratt Center for Community Development, Public Housing in New York City: Building Communities of Opportunity (2009)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Exh. CLE000010, Greene Testimony at 5, A8.
<i>CLE000041: Federal Transit Administration, Transportation Equity in Emergencies (May 2007)</i>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Exh. CLE000010, Greene Testimony at 5, A8.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	January 30, 2012

MOTION CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and he certifies that his efforts have been unsuccessful. The NRC Staff does not oppose this Motion and anticipates filing an answer.

Signed (electronically) by Paul M. Bessette

Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-3000
Fax: (202) 739-3001
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

Sherwin E. Turk, Esq.
Edward L. Williamson, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Brian G. Harris, Esq.
Mary B. Spencer, Esq.
Anita Ghosh, Esq.
Brian Newell, Paralegal
Office of the General Counsel
Mail Stop: O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: Sherwin.Turk@nrc.gov)
(E-mail: Edward.Williamson@nrc.gov)
(E-mail: Beth.Mizuno@nrc.gov)
(E-mail: David.Roth@nrc.gov)
(E-mail: Brian.Harris@nrc.gov)
(E-mail: Mary.Spencer@nrc.gov)
(E-mail: Anita.Ghosh@nrc.gov)
(E-mail: Brian.Newell@nrc.gov)

Manna Jo Greene
Karla Raimundi
Hudson River Sloop Clearwater, Inc.
724 Wolcott Ave.
Beacon, NY 12508
(E-mail: mannaajo@clearwater.org)
(E-mail: karla@clearwater.org)
(E-mail: stephenfiller@gmail.com)

Joan Leary Matthews, Esq.
Associate Commissioner
Hearings and Mediation Services
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1500
(E-mail: jlmatthe@gw.dec.state.ny.us)

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of Robert F. Meehan, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(E-mail: MJR1@westchestergov.com)

Daniel Riesel, Esq.
Victoria Shiah, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
(E-mail: driesel@sprlaw.com)
(E-mail: vshiah@sprlaw.com)

John Louis Parker, Esq.
Office of General Counsel, Region 3
NYS Dept. of Environmental Conservation
21 S. Putt Corners Road
New Paltz, New York 12561-1620
(E-mail: jlparker@gw.dec.state.ny.us)

John J. Sipos, Esq.
Charlie Donaldson Esq.
Assistant Attorneys General
Office of the Attorney General
of the State of New York
The Capitol
Albany, NY 12224-0341
(E-mail: John.Sipos@ag.ny.gov)

Michael J. Delaney, Esq.
Vice President -Energy Department
New York City Economic Development
Corporation (NYCDEC)
110 William Street New York, NY 10038
mdelaney@nycedc.com

Phillip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(E-mail: phillip@riverkeeper.org)
(E-mail: dbrancato@riverkeeper.org)

Sean Murray, Mayor
Kevin Hay, Village Administrator
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298
(E-mail: vob@bestweb.net)
(E-mail: smurray@villageofbuchanan.com)

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(E-mail: Robert.Snook@po.state.ct.us)

Janice A. Dean, Esq.
Assistant Attorney General
Office of the Attorney General
of the State of New York
120 Broadway, 26th Floor
New York, New York 10271
(E-mail: Janice.Dean@ag.ny.gov)

Signed (electronically) by Paul M. Bessette

Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-3000
Fax: (202) 739-3001
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.