

June 18, 2012

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 STATEMENT IN RESPONSE TO THE ATOMIC
SAFETY AND LICENSING BOARD'S ORDER OF JUNE 7, 2012

In accordance with the Atomic Safety and Licensing Board's ("Board") "Order (Ordering the NRC Staff to Address Board Questions)" ("Order") issued on June 7, 2012, the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith submits its response to the questions propounded in the Board's Order. In the following response, the Staff provides a brief discussion of the procedural background for these matters and then addresses, *seriatim*, each of the seven questions presented by the Board (Order at 3-5).

BACKGROUND

The Staff issued its Safety Evaluation Report for license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3") in November 2009, and issued Supplement 1 the SER in October 2011.¹ Separately, the Staff issued its Draft Supplemental Environmental Impact Statement for license renewal of IP2 and IP3 in December 2008,² and issued its Final Supplemental Environmental

¹ NUREG-1930, "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Units Nos. 2 and 3" (Nov. 2009) ("SER"); NUREG-1930, Supplement 1 (Oct. 2011) ("SER Supp. 1").

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

Impact Statement in December 2010.³ Following the publication of the Staff's final SER and FSEIS, the Staff became aware of new information on both safety and environmental matters, which the Staff has determined to address in supplements to the SER and the FSEIS. The Staff has periodically submitted information to the Board concerning the Staff's evaluation of the new information. These matters are discussed in greater detail below, in response to specific Board questions.

RESPONSE TO BOARD QUESTIONS

BOARD QUESTION 1

Why does the NRC Staff intend to publish the Draft Supplemental FEIS and make the document available for public comment in July 2012, when consultations with NMFS will not be completed until August 14, 2012 and a Biological Opinion will not be released until September 28, 2012?

STAFF RESPONSE

In brief summary, as the Staff has informed the Board, on October 14, 2011, the National Marine Fisheries Service ("NMFS") issued a Biological Opinion regarding the effects of license renewal of IP2 and IP3 on shortnose sturgeon (an endangered species).⁴ In November 2011, the Staff determined to include information concerning this development in a supplement to the FSEIS.⁵ Subsequently, on February 6, 2012, NMFS listed the Atlantic sturgeon as an endangered species under the Endangered Species Act ("ESA").⁶ In May 2012, the Staff

³ NUREG-1437, Supplement 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Dec. 2010) ("FSEIS").

⁴ See Letter from Sherwin E. Turk to the Board (Oct. 17, 2011); Letter from Sherwin E. Turk to the Board (Nov. 30, 2011).

⁵ Letter from Sherwin E. Turk to the Board (Nov. 30, 2011).

⁶ See "Final Rule, Endangered and Threatened Wildlife and Plants; Threatened and Endangered Status for Distinct Population Segments of Atlantic Sturgeon in the Northeast Region, Part II," 77 Fed. Reg. 5880 (Feb. 6, 2012) (<http://www.gpo.gov/fdsys/pkg/FR-2012-02-06/pdf/2012-1946.pdf>).

issued a Biological Assessment and requested the reinitiation of consultations with NMFS under Section 7 of the ESA concerning Atlantic sturgeon at IP2/IP3.⁷ As the Staff has stated, “[t]he Staff presently expects to conclude these consultations with NMFS by August 14, 2012, and to receive NMFS’s Biological Opinion on Atlantic sturgeon by September 28, 2012.”⁸ Finally, as the Board has noted, the Staff plans to issue its draft Supplement to the FSEIS for license renewal of IP2 and IP3 by July 6, 2012⁹ -- i.e., prior to concluding its consultations with NMFS regarding the endangered Atlantic sturgeon.

Board Question 1 suggests that the Board may believe consultations with NMFS ought to be concluded before the Staff issues the Draft FSEIS Supplement. The Staff is aware of no reason why the draft FSEIS supplement should be withheld to await the conclusion of its consultations with NMFS.¹⁰ In this regard, it should be noted that the Staff had announced its plan to issue an FSEIS supplement in November 2011, several months before NMFS published its listing of Atlantic sturgeon as an endangered species.¹¹ As noted in the Staff’s letter to the

⁷ See (1) Letter from Sherwin E. Turk to the Board (May 17, 2012), attaching letter from Jeremy J. Susco (NRC) to Patricia A. Kurkul (NMFS) (May 16, 2012); and (2) “NRC Staff’s Fourth Status Report in Response to the [Board’s] Order of February 16, 2012” (June 1, 2012) (“Fourth Status Report”), at 2.

⁸ Fourth Status Report at 2-3.

⁹ *Id.* at 3.

¹⁰ The ESA permits agencies to incorporate their ESA reviews into their NEPA documents, but does not require such incorporation. See 16 U.S.C. § 1536(c)(1) (the biological assessment, conducted for the purpose of identifying any endangered or threatened species which is likely to be affected by the action “may be undertaken as part of a Federal agency’s compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).”). NMFS’s regulations similarly allow, but do not require, consolidation of the ESA and NEPA reviews. See 50 C.F.R. § 402.06(a) (“Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as [NEPA.]”). The courts have also recognized that consolidating NEPA and ESA reviews is voluntary. See, e.g., *Sierra Forest Legacy v. U.S. Forest Service*, 652 F. Supp. 2d 1065, 1071 (N.D. Cal. 2009) (“The [biological assessment] may be conducted as part of the agency’s NEPA-compliant [environmental impact statement or environmental assessment.]”). In light of these authorities, the Board in *Pilgrim* recently concluded, “[N]o provision of NEPA, nor any regulation of the NRC, requires that an agency complete a consultation required by another statute as a condition of complying with NEPA.” *Entergy Nuclear Generation Co. and Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC ___, ___ (May 24, 2012) (slip op. at 13).

¹¹ See Letter from Sherwin E. Turk to the Board (Nov. 30, 2011).

Board of November 30, 2011, the Draft FSEIS Supplement will address “new information which the Staff has received regarding aquatic impacts, including information received from NMFS and other interested parties.” *Id.*¹² At that time, the Staff had received information from NMFS regarding shortnose sturgeon; in February 2012, after NMFS listed Atlantic sturgeon as an endangered species, the Staff determined to include information in the Draft FSEIS Supplement concerning NMFS’s listing of Atlantic sturgeon and the Staff’s reinitiation of consultations with NMFS regarding endangered species.¹³

The Staff is not aware of any reason why it should withhold issuance of the Draft FSEIS Supplement until its recently reinitiated consultations with NMFS on endangered species have concluded. As the Board observed in its decision admitting Contention RK-EC8 (Endangered Species) for litigation, Section 7 of the ESA requires that:

[E]ach Federal agency shall, in consultation with and with the assistance of [NMFS], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.¹⁴

¹² Aquatic impacts and impacts to threatened and endangered species were addressed in the Staff’s FSEIS for license renewal of IP2 and IP3. See, e.g., FSEIS §§ 2.2.5 (Aquatic Resources), 4.1 (Cooling System), 4.6 (Threatened or Endangered Species), 4.8.1 (Cumulative Impacts on Aquatic Resources), and Appendices H and I thereto. Both the shortnose and Atlantic sturgeon were addressed in the FSEIS discussion of threatened and endangered species. See, e.g., FSEIS § 4.6 at 4-57 – 4-60.

¹³ Given the ongoing nature of the Staff’s consultations with NMFS, the Staff expects that the Draft FSEIS Supplement will include current information regarding (a) NMFS’s October 14, 2011, issuance of a Biological Opinion and “Incidental Take Statement” for shortnose sturgeon, and the effect of that action on license renewal for IP2 and IP3, and (b) the status of the Staff’s consultations with NMFS on Atlantic sturgeon. The Staff currently expects to close the period for public comments on the FSEIS Supplement on or about September 28, 2012, and to issue the final FSEIS supplement approximately three months thereafter – unless the comments received on the draft FSEIS Supplement require additional time for consideration. Accordingly, the Staff currently expects to issue the Final FSEIS Supplement several months after it concludes its consultations with NMFS on Atlantic sturgeon (although this outcome cannot be assured at this time, before consultations have concluded and NMFS has completed its evaluation). If the Staff’s consultations with NMFS conclude prior to issuance of the Final FSEIS Supplement, that document will likely include updated information regarding those consultations.

¹⁴ “Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions)” (July 6, 2011) (“Memorandum and Order”), at 65; footnote omitted.

Simply stated, the issuance of a draft or final environmental impact statement (“EIS”), or a draft supplement to an EIS, does not constitute an agency action that is “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”

Moreover, as the Board observed in ruling on the admissibility of Contention RK-EC8:

[O]nce consultation has commenced, the federal agency and the license applicant are prohibited from “mak[ing] 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 alternative measures which would not violate” ESA § 7(a)(2).¹⁵

The Staff has previously stated its view that the issuance of an EIS does not represent an “irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.”¹⁶ That principle applies, as well, to the issuance of a draft supplement to an FSEIS. In sum, there is no reason why the Staff must await the conclusion of consultations with NMFS on endangered species before it issues its draft FSEIS supplement.

¹⁵ *Id.* at 65-66; footnote omitted; emphasis added.

¹⁶ In its Memorandum and Order, the Board summarized the Staff’s position as follows:

[T]he NRC Staff represents that it has complied with the ESA even though it issued the FSEIS before completion of consultation with NMFS because “[i]ssuance of the FSEIS does not cause or amount to an ‘irreversible or irretrievable commitment of resources,’” and the procedure of issuing the FSEIS before completion of ESA § 7 consultation has been followed by the NRC Staff in another license renewal proceeding. Thus, the NRC Staff, like Entergy, reasons that RK-EC-8 raises no genuine dispute because there is nothing in the ESA or NEPA expressly requiring the NRC Staff to complete its consultation with NMFS before issuance of the FSEIS.

Id. at 62; footnotes omitted.

BOARD QUESTION 2

How confident is the NRC Staff that it “expects” the Draft Supplemental FEIS will not impact contentions other than Riverkeeper Contention EC-8? At what point will the NRC Staff be able to answer with certainty that there will be no impacts on other admitted contentions? Specifically explain any uncertainties regarding the scope of the Draft Supplemental FEIS and the process for the resolution of those uncertainties.

STAFF RESPONSE

The Staff is very confident that the Draft Supplemental FEIS will not impact any admitted contentions other than Riverkeeper Contention EC-8 (Endangered Species). As stated above in response to Board Question 1, the Draft FSEIS Supplement will address new information the Staff has received concerning entrainment, impingement and the thermal impacts of once-through cooling at IP2 and IP3, as well as the Staff’s consultations with NMFS regarding endangered species. None of the admitted contentions in this proceeding raise concerns regarding such matters, other than Contention RK-EC8 (challenging the Staff’s issuance of the FSEIS prior to completion of consultations with NMFS). Accordingly, no contention, with the exception of Contention RK-EC8, will be impacted by issuance of the Draft FSEIS Supplement.

BOARD QUESTION 3

In light of the fact that Entergy RAI answers are not expected until June 14, 2012, by when will the NRC Staff review those answers and determine whether the SER Supplement will be issued in August 2012?

STAFF RESPONSE

On May 15, 2012, the Staff transmitted Requests for Additional Information (“RAIs”) to Entergy regarding the IP2/IP3 Reactor Vessel Internals (“RVI”) Program.¹⁷ On June 14, 2012,

¹⁷ See Fourth Status Report at 1-2 and n.3, *citing* Letter from Robert F. Kuntz (NRC) to Vice President, Operations (Entergy), Subject: “Request for Additional Information for the Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3 (“IP2” and “IP3”), License Renewal Application” (May 15, 2012) (ADAMS Accession No. ML12125A3422011).

Entergy submitted its initial answers to those RAIs.¹⁸ Therein, Entergy stated, in pertinent part, as follows:

As an initial matter, with regard to the RAIs on the RVI Program, Entergy notes that Indian Point is in a unique position with respect to the timing and implementation of the generic industry guidance for reactor vessel internals aging management (MRP-227-A). The Electric Power Research Institute (EPRI) just issued the NRC-approved version of MRP-227-A in January of this year, and the industry is working, through EPRI and the Pressurized Water Reactor Owners' Group (PWROG), to develop guidance on the required, plant-specific evaluations referenced in the RAIs. As a result of Indian Point's unique position, however, Entergy must prepare the requested evaluations in advance of this guidance which will require additional time beyond the requested 30-day response period. Nevertheless, in this letter Entergy provides responses to RAIs 1-5, 8, and 12. Entergy will develop the required evaluations and submit responses to the remaining RAIs by 09/28/2012.

Initial RAI Response at 1; emphasis added.

Thus, Entergy has submitted partial responses to the Staff's RAIs, and has indicated that it expects to complete its responses to those RAIs by September 28, 2012. Accordingly, inasmuch as Entergy's RAI responses are not yet complete, the Staff does not plan to issue a Supplement to the Safety Evaluation Report in August 2012; rather, the SER Supplement will be issued after the Staff completes its review of this issue.

The Staff has commenced its review of Entergy's Initial RAI Response, and will continue its review while it awaits receipt of Entergy's further responses on September 28, 2012. Assuming that Entergy's further responses are complete and do not require supplementation or trigger the issuance of any additional RAIs, the Staff presently expects to complete its review of Entergy's RVI Program and to issue an SER Supplement on or about December 28, 2012 (*i.e.*,

¹⁸ Letter from Fred Dacimo (Entergy) to NRC Document Control Desk (June 14, 2012) (Subject: Reply to Request for Additional Information Regarding the License Renewal Application, (NL-12-089) ("Initial RAI Response").

approximately three months after receipt of Entergy's September 28 RAI responses).¹⁹ If Entergy's further responses of September 28, 2012 are incomplete or require the Staff to issue additional RAIs, the SER Supplement will be deferred to await completion of the Staff's review.

BOARD QUESTION 4

How confident is the NRC Staff that the SER Supplement "should not affect" any other contention except the known portions of NYS-38/RK-TC-5 and NYS-25? At what point will the NRC Staff be able to answer with certainty that no other contentions will be impacted?

STAFF RESPONSE

The Staff is very confident that the planned SER Supplement will not affect any admitted contention other than NYS-25 and portions of NYS-38/RK-TC-5. The sole purpose of the SER Supplement is to address the adequacy of Entergy's RVI Program at IP2 and IP3. The only admitted contentions that challenge the adequacy of the RVI Program are Contention NYS-25 and portions of Contention NYS-38/RK-TC-5. Inasmuch as none of the other admitted contentions in this proceeding address the adequacy of the RVI Program, the Staff does not believe that any other contentions will be impacted by the SER Supplement.

BOARD QUESTION 5

In light of 10 C.F.R. § 2.332(d), CLI-01-20, and CLI-07-17, is the Board obligated to suspend current proceedings on environmental issues until the NRC Staff has completed its environmental review and issued the FEIS Supplement or, in the NRC Staff's view, may we proceed to hearing at this time on all environmental contentions except Riverkeeper EC-8 and why?

¹⁹ The Staff notes that it is presently difficult to project a firm completion date for its review, prior to the Staff's receipt of Entergy's anticipated response of September 28, 2012. The Staff will provide further information concerning its anticipated review completion date after it receives that response.

STAFF RESPONSE

The Staff is aware of no reason that the Board is obligated to suspend the currently scheduled hearings on environmental issues until the Staff completes its current, limited environmental review and issues the planned FEIS Supplement.

First, under 10 C.F.R. § 2.332(d), “hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS.” Here, the Staff has, in fact, already “completed its environmental review,” and it has, in fact, issued its final EIS (the FSEIS) in December 2010, in accordance with 10 C.F.R. § 51.90. The fact that new information has come to the Staff’s attention after issuance of the FSEIS in December 2010 – some 18 months ago – which the Staff has decided to address in a Supplement to the FSEIS, does not alter the fact that the final EIS has been issued. Thus, section 2.332(d) does not bar the commencement of evidentiary hearings, at least with respect to issues that will not be addressed in the Supplement, since the Staff’s evaluation of those issues is “final.”

Indeed, the “finality” of an EIS is subject to reexamination at any time prior to final agency action on an application. Thus, in accordance with 10 C.F.R. § 51.92 (“Supplement to the final environmental impact statement”), the Staff could determine to prepare a supplement to a final EIS at any time prior to the Commission’s taking action – even during or following the conclusion of evidentiary hearings – upon its discovery of “new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” or “when, in its [the Staff’s] opinion, preparation of a supplement will further the purposes of NEPA.” 10 C.F.R. §§ 50.92(a)(2) and (c). Given the potential for new information to be discovered at any time during the course of a proceeding, it would be highly inefficient and inconsistent with sound case management principles to require the suspension of all evidentiary hearings on environmental issues whenever new information comes to the Staff’s attention concerning a single issue. Certainly, 10 C.F.R. § 2.332(d) does not require that outcome.

Here, the Staff has completed its review of all of the six environmental issues that are scheduled to be addressed in evidentiary hearings this coming October and December.²⁰ The Draft FSEIS Supplement will not address or affect any of the issues to be heard in October and December; further, given the limited scope of the Draft FSEIS Supplement, it will have no effect on the Staff's ability to participate in the scheduled hearings. Accordingly, there is no reason why hearings on other issues should be deferred to await the FSEIS Supplement.

Second, nothing in the National Environmental Policy Act of 1969 ("NEPA" or "the Act") requires that evidentiary hearings be deferred until the Staff issues an FSEIS Supplement. Rather, Section 102 of the Act requires that, in taking a major federal action significantly affecting the environment, an agency must consider the environmental impacts of that action;²¹

²⁰ The October and December hearings in will consider the following environmental contentions: (1) NYS-12C (SAMAs); (2) NYS-16B (SAMAs); (3) NYS-17B (property values); (4) NYS-37 (no-action alternative); (5) CW-EC-3A (environmental justice); and (6) RK-EC-3/CW-EC-1 (spent fuel pool leaks). Hearings on the remaining environmental contention (Contention RK-EC-8 (endangered species)) have been deferred.

²¹ Section 102 of NEPA, 42 U.S.C. § 4332, provides, in pertinent part, as follows:

The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment; a detailed statement by the responsible official 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.

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. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on

(continued. . .)

NEPA does not mandate that evidentiary hearings be held on the issues considered in an EIS, and does not require that hearings be suspended whenever an agency determines to issue a supplement to an EIS.

Third, neither of the decisions cited by the Board (CLI-01-20 and CLI-07-17) requires the suspension of evidentiary hearings to await the issuance of the planned FSEIS Supplement.

Thus, in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001), the Commission referred certain requests for hearing regarding the McGuire and Catawba license renewal applications, to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. The Commission instructed that if an adjudicatory proceeding is commenced, the designated Board should, *inter alia*, suspend discovery against the Staff on safety and environmental issues until after issuance of the final SER and the “final Supplemental Environmental Impact Statement,” unless the Board “in its discretion finds that starting discovery against the Staff on safety issues before the final SER is issued will expedite the hearing without adversely impacting the Staff’s ability to complete its evaluations in a timely manner.” *Id.* at 214.²² Further, the Commission instructed:

The evidentiary hearing should not commence until after completion of the final SER and FES, unless the Licensing Board in its discretion finds that starting the hearing with respect to safety issues prior to issuance of the final SER will expedite the proceeding without adversely impacting the Staff’s ability to complete its evaluations in a timely manner.

The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final SER is issued will serve to further the Commission’s objective, as reflected in the *Statement of Policy on Conduct of Adjudicatory*

(. . .continued)

Environmental Quality and to the public as provided by section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes

²² Substantially similar provisions are contained in 10 C.F.R. § 2.332(d).

Proceedings, CLI-98-12, 48 NRC 18, 21, 24 (1998), to ensure a fair, prompt, and efficient resolution of contested issues.² . . .

² For example, it may be appropriate for the Licensing Board to permit discovery against the staff and/or the commencement of an evidentiary hearing with respect to safety issues prior to the issuance of the final SER in cases where the applicant has responded to the Staff's "open items" and there is an appreciable lag time until the issuance of the final SER, or in cases where the initial SER identifies only a few open items.

Id. at 214-15; emphasis added. In sum, while the Commission directed that evidentiary hearings be deferred "until after completion of the final SER and FES," it nowhere addressed the circumstances present here – *viz*, where a Final SEIS has been issued, and the Staff later decides to issue a supplement to the final EIS to address limited new information that is unrelated to the issues scheduled for hearing. Thus, the Commission's decision in CLI-01-20 does not require the Board to suspend all evidentiary hearings on environmental issues that will not be addressed in the FSEIS Supplement.

Similarly, the Commission's decision in *Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, CLI-07-17, 65 NRC 392 (2007) does not require the suspension of evidentiary hearings until the FSEIS Supplement has been issued. In that decision, the Commission addressed a question which had been certified to it by the Board, as follows:

May the Vogtle [Early Site Permit] Licensing Board go forward with merits litigation on admitted environmental contentions in the proceeding such that any evidentiary hearing could be conducted following issuance of the Staff's [draft environmental impact statement], as opposed to the [final environmental impact statement]?

Id. at 393. In its decision, the Commission declined to authorize a hearing on environmental issues prior to issuance of the final EIS, citing the explicit requirements of 10 C.F.R. § 2.332(d).

*Id.*²³ Moreover, the Commission observed that under 10 C.F.R. § 51.104(a)(1), the Staff "may

²³ The Commission noted that § 2.332(d) affords the Board the discretion to commence safety hearings prior to issuance of the SER, but affords no such discretion for hearings on environmental issues prior to issuance of the final EIS. *Vogtle*, 65 NRC at 393.

not offer the final environmental impact statement into evidence or present the position of the NRC staff on matters within the scope of NEPA . . . and [Part 51, Subpart A] *until* the final environmental impact statement is filed with the Environmental Protection Agency ["EPA"], furnished to commenting agencies and made available to the public." *Id.* at 394; emphasis in original. The Commission then observed as follows:

The Board lacks discretion to proceed to hearing on an accelerated basis on environmental issues because -- unlike the Staff's work on safety issues -- its work on environmental issues requires compliance with the public participation and public comment processes of NEPA and associated regulations. In addition, whereas NRC hearings on safety issues concern the adequacy of the license application, not the NRC Staff's work, NRC hearings on NEPA issues focus entirely on the adequacy of the NRC Staff's work. A premature hearing on a *draft* Staff document has the potential to distract the Staff from tasks it otherwise would be performing, or to force the Staff to take legal positions on environmental issues before public comments have been filed and before the Staff has had a full opportunity to consider its draft environmental impact statement -- to the possible detriment of the quality of Staff's analysis.

Id. at 395; emphasis in original.

The Commission's decision in CLI-07-17 does not obligate the Board to suspend hearings on environmental issues in this proceeding, pending the issuance of the Staff's FSEIS Supplement. Here, unlike the situation considered in *Vogtle*, the Staff has already considered the public comments that were submitted on the draft EIS, has already completed the final EIS, and has already submitted its final EIS to the EPA and other agencies in compliance with 10 C.F.R. § 51.104(a)(1). Further, the Staff has identified new information concerning only a few limited issues on aquatic impacts that it will address in its Draft FSEIS Supplement -- none of which are to be addressed in evidentiary hearings this coming October and December. Finally, given the limited scope of the issues to be addressed in the draft FSEIS Supplement, the Staff's work on that document will not "distract the Staff from tasks it otherwise would be performing" or "force the Staff to take legal positions on [contested] environmental issues

before public comments have been filed and before the Staff has had a full opportunity to consider its draft environmental impact statement -- to the possible detriment of the quality of Staff's analysis.”

In sum, under 10 C.F.R. § 2.332(d), CLI-01-20, and CLI-07-17, the Board is not required to suspend current proceedings on environmental issues until the Staff has issued its draft (or final) FSEIS Supplement. Moreover, proceeding to hearing on the environmental contentions scheduled to be heard in October-December 2012 will serve to further the Commission's objective, reflected in its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21, 24 (1998), to ensure a fair, prompt, and efficient resolution of contested issues. Accordingly, the Board may, and should, proceed to hearing at this time on all environmental contentions except Riverkeeper EC-8.

BOARD QUESTION 6

In light of 10 C.F.R. § 2.332(d) and CLI-07-17, and the recent delays, does the NRC Staff believe that moving forward on safety issues is “not adversely impacting the staff's ability to complete its reviews in a timely manner?”¹²

¹² 10 C.F.R. § 2.332(d).

STAFF RESPONSE

As stated in response to Board Question 4, *supra* at 7, the sole purpose of the SER Supplement is to address the adequacy of Entergy's Reactor Vessel Internals (RVI) Program at IP2 and IP3. The only admitted contentions that challenge the adequacy of the RVI Program are Contention NYS-25 and certain portions of Contention NYS-38/RK-TC-5; hearings on those contentions have been deferred.²⁴ During the coming evidentiary hearings, the Staff expects to call a total of 18 witnesses on the 10 contentions scheduled for hearing; of these witnesses,

²⁴ “Notice of Hearing (Application for License Renewal)” (June 8, 2012), at 4-5 and n.14.

only one person is expected to be involved in the Staff's review of Entergy's RVI Program.²⁵ The Staff has held internal discussions regarding the potential for conflicting demands to be placed upon its witnesses and technical experts, and has concluded that (1) the Staff's review of Entergy's RVI Program at IP2/IP3 and preparation of the related SER Supplement will not affect the Staff's ability to proceed to hearing on other issues, and (2) proceeding to hearing on other issues at this time will not adversely impact the Staff's ability to complete its reviews in a timely manner.

BOARD QUESTION 7

If 10 C.F.R. § 2.332(d), CLI-01-20, and CLI-07-17 require the Board to suspend proceedings at this point, in light of the fact that this proceeding began in 2007 and that we are now on the critical path to the evidentiary hearing, by when will the NRC Staff definitively finalize its environmental and safety reviews?

STAFF RESPONSE

As stated in response to Board Question 5, *supra* at 7-12, neither 10 C.F.R. § 2.332(d), CLI-01-20, nor CLI-07-17 require the Board to suspend proceedings at this time. Further, the Staff is well aware of the facts that this proceeding began in 2007 (upon the docketing of Entergy's license renewal application), and that evidentiary hearings have been scheduled. While Board Question 7 suggests that the Board may believe the Staff has not yet "definitively finalize[d] its environmental and safety reviews," there is no basis for that view.

In fact, the Staff completed its environmental review in late 2010, leading to issuance of the FSEIS in December 2010. As discussed above, after the FSEIS was published, the Staff learned of new information that may affect statements or conclusions reached in the FSEIS; this led the Staff to determine, in accordance with 10 C.F.R. § 51.92, that a Supplement to the

²⁵ In particular, Staff witness Allen Hiser is expected to testify as part of four separate witness panels, with respect to Contentions NY-25 (RVI Program), NY-26B/RK-TC-1A (metal fatigue), NY-38/RK-TC-5 (licensee commitments) and RK-TC-2 (flow accelerated corrosion). Evidentiary hearings on all but one of these contentions (RK-TC-2) have been deferred.

FSEIS should be issued. The fact that new information came to the attention of the Staff following the completion of its environmental review and publication of the FSEIS does not support a suggestion that the Staff had not “definitively finalize[d]” its environmental review when it published the FSEIS in December 2010. Indeed, the Staff cannot “definitively” rule out the possibility that significant new information may yet arise that requires the issuance of a further FSEIS Supplement, in accordance with 10 C.F.R. § 51.92.

Similarly, the Staff completed its safety review in August 2009, leading to publication of the SER in November 2009. Subsequently, Entergy submitted new information concerning its license renewal application,²⁶ requiring that the Staff consider that information and issue an SER Supplement in October 2011.²⁷ In the same manner, in February 2012, Entergy submitted new information concerning its Reactor Vessel Internals Program, which the Staff is obliged to consider and which will be addressed in a further SER supplement. The fact that Entergy submitted new information to the NRC regarding its RVI Program does not support the view that the Staff had not “definitively finalize[d]” its safety review upon publication of the SER in November 2009, or Supplement 1 to the SER in August 2011.²⁸ Moreover, the Staff cannot “definitively” rule out the possibility that significant new information may become known in the future regarding other issues that may impact the hearing schedule on contested issues.

²⁶ As noted in SER Supplement 1 (at 1-1), the new information addressed therein “includes [Entergy’s] annual updates required by 10 CFR 54.21(b), and updated information and commitments in response to staff requests for additional information (RAIs).”

²⁷ See, e.g., SER Supp. 1 at iii (“This SSER documents the staff’s review of supplemental information provided by the applicant since the issuance of the SER 3-1”); *id.* at 3-1 (citing Entergy’s letters of March 28, July 14, and July 21, 2011, supplementing the LRA to include revisions to its Buried Piping and Tanks Inspection Program).

²⁸ Nor does the Staff believe that Entergy should be faulted for submitting the new information in February 2012, or for needing additional time to respond to the Staff’s RAIs, given the recent occurrence of significant developments affecting its RVI Program which its new information seeks to address.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that evidentiary proceedings on the ten contested safety and environmental issues identified in the Board's Notice of Hearing of June 8, 2012, should proceed to hearing in October and December 2012, as scheduled.

Respectfully submitted,

/Signed (electronically) by/

Sherwin E. Turk
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1533
E-mail: Sherwin.Turk@nrc.gov

Dated at Rockville, Maryland
this 18th day of June 2012

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 the foregoing "NRC STAFF'S STATEMENT IN RESPONSE TO THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER OF JUNE 7, 2012," dated June 18, 2012, in the above-captioned proceeding have been filed and served by Electronic Information Exchange (EIE), with copies to be served by the EIE system on the following persons, this 18th day of June 2012.

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Lawrence.McDade@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL@nrc.gov

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Richard.Wardwell@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearingdocket@nrc.gov

Dr. Michael F. Kennedy
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Michael.Kennedy@nrc.gov

Anne Siarnacki, Esq.
Shelbie Lewman, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U. S, Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: Anne.Siarnacki@nrc.gov
E-Mail: Shelbie.Lewman@nrc.gov

Kathryn M. Sutton, Esq.*
Paul M. Bessette, Esq.
Jonathan Rund, Esq.
Raphael Kuyler, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: jrund@morganlewis.com
E-mail: rkuyler@moganlewis.com

Martin J. O'Neill, Esq.*
Morgan, Lewis & Bockius, LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
E-mail: martin.o'neill@morganlewis.com

Elise N. Zoli, Esq.*
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: ezoli@goodwinprocter.com

William C. Dennis, Esq.*
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
E-mail: wdennis@entergy.com

Manna Jo Greene*
Karla Raimundi, Esq.
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
E-mail: mannajo@clearwater.org
E-mail: karla@clearwater.org

John J. Sipos, Esq.*
Charlie Donaldson, Esq.
Assistants Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224
E-mail: John.Sipos@ag.ny.gov
Charlie.Donaldson@ag.ny.gov

Janice A. Dean, Esq.*
Assistant Attorney General,
Office of the Attorney General
of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
E-mail: Janice.Dean@ag.ny.gov

John Louis Parker, Esq.*
Office of General Counsel, Region 3
New York State Department of
Environmental Conservation
21 South Putt Corners Road
New Paltz, NY 12561-1620
E-mail: jlparker@gw.dec.state.ny.us

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

Robert Snook, Esq.*
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
E-mail: robert.snook@ct.gov

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

Michael J. Delaney, Esq.*
Director, Energy Regulatory Affairs
New York City Department of Environmental
Protection
59-17 Junction Boulevard
Flushing, NY 11373
E-mail: mdelaney@dep.nyc.gov

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.*
Thomas F. Wood, Esq.
Victoria S. Treanor, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
E-mail: driesel@sprlaw.com
E-mail: vtreanor@sprlaw.com

Sherwin E. Turk
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1533
E-mail: Sherwin.Turk@nrc.gov