

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos.
	)	50-247-LR
Entergy Nuclear Operations, Inc.	)	and 50-286-LR
(Indian Point Nuclear Generating	)	
Units 2 and 3)	)	July 6, 2012
	)	

**RIVERKEEPER RESPONSES TO NRC STAFF ANSWERS TO ASLB QUESTIONS**

On June 7, 2012, the Atomic Safety and Licensing Board (“ASLB”) issued an order directing the U.S. Nuclear Regulatory Commission (“NRC”) Staff to respond to various questions, which, in general, concerned the impact of ongoing NRC Staff safety and environmental reviews on the timing of the adjudicatory hearing in above-referenced proceeding.<sup>1</sup> Thereafter, on June 18, 2012, the NRC Staff filed responses to the ASLB’s questions.<sup>2</sup> In accordance with the ASLB’s June 7, 2012 Order, which permitted “[r]esponses to or comments on any NRC Staff answer,” as well as the ASLB’s June 26, 2012 Order extending the time in which to do so, Riverkeeper, Inc. (“Riverkeeper”) hereby submits the following responses to NRC Staff’s answers.

*NRC Staff Response to Board Question 1: Publication of a Supplemental FSEIS While Consultation with NMFS is Ongoing and Prior to Release of NMFS’ Biological Opinion*

The ASLB’s first question to NRC Staff inquired about why the NRC Staff intended to publish a draft supplemental FEIS for public comment in July 2012, “when consultations with NMFS will not be completed until August 14, 2012 and a Biological Opinion [“BO”] will not be

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<sup>1</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Ordering the NRC Staff to Address Board Questions), June 7, 2012 (hereinafter “ASLB June 7, 2012 Order”).

<sup>2</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, NRC Staff’s Statement in Response to the Atomic Safety and Licensing Board’s Order of June 7, 2012 (June 18, 2012) (hereinafter “NRC Staff Response to ASLB June 7, 2012 Order”).

released until September 28, 2012.”<sup>3</sup> In response, NRC Staff explained that in light of the recent listing of Atlantic sturgeon as an endangered species under the Endangered Species Act (“ESA”), the NRC Staff had reinitiated formal ESA § 7 consultation, and expected to issue a draft supplement to the FSEIS concerning the license renewal of Indian point in July 2012, i.e., “prior to concluding its consultations with NMFS regarding the endangered Atlantic sturgeon.”<sup>4</sup> By NRC Staff’s estimation, a final supplemental EIS will be published “several months after it concludes its consultations with NMFS on Atlantic sturgeon.”<sup>5</sup> NRC Staff further indicates that “[i]f 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.”<sup>6</sup> NRC Staff takes the position that there is “no reason why the draft FSEIS supplement should be withheld to await the conclusion of its consultations with NMFS” since issuing an EIS, draft or final, “does not represent an ‘irreversible or irretrievable commitment of resources.’”<sup>7</sup>

Riverkeeper disagrees with NRC Staff’s response to ASLB question 1 to the extent it takes the position that the ESA § 7 consultation regarding Atlantic sturgeon need not be fully considered in the context of NRC Staff’s environmental impact review pursuant to the National Environmental Policy Act (“NEPA”), that is, without full consideration in a final supplemental FSEIS.<sup>8</sup> As discussed at length in the pleadings related to Riverkeeper Contention EC-8,

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<sup>3</sup> ASLB June 7, 2012 Order at 3.

<sup>4</sup> NRC Staff Response to ASLB June 7, 2012 Order at 2-3.

<sup>5</sup> *Id.* at 4 (fn.13).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3, 4, 5.

<sup>8</sup> *See, e.g., id.* at 5 (issuance of a draft *or final* . . . EIS . . . does not constitute an agency action that is ‘likely to jeopardize the continued existence of any endangered species.’); *see, e.g., id.* at fn.16 (restating NRC Staff position articulated in response to RK-EC-8 that NRC Staff is not required “to complete its consultation with NMFS before issuance of the FSEIS”).

Riverkeeper disagrees with NRC Staff's position regarding the adequacy of NRC Staff's environmental impact review pursuant to NEPA in the absence of a complete ESA § 7 consultation process.<sup>9</sup>

To briefly reiterate, applicable regulations and guidance make it explicitly clear that “[a]t the time the Final EIS is issued, *section 7 consultation should be completed*” and that “[t]he Record of Decision should *address the results of section 7 consultation*.”<sup>10</sup> Indeed, only *after* the issuance of a BO can the Federal agency “determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service’s biological opinion.”<sup>11</sup> In other words, NRC Staff must address how NMFS’ BO factors into the NRC Staff’s FSEIS and the determinations made therein concerning the environmental impacts associated with relicensing Indian Point.<sup>12</sup> NRC Staff cannot make final conclusions regarding impacts to endangered species and, ultimately whether to recommend license renewal of Indian Point, without satisfying its ESA § 7 obligations and fully considering NFMS’ BO.

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<sup>9</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, Riverkeeper Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff’s Final Supplemental Environmental Impact Statement (February 3, 2011), ADAMS Accession No. ML110410362 (hereinafter “Riverkeeper ESA Contention”).

<sup>10</sup> Endangered Species Consultation Handbook, *Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, U.S. Fish & Wildlife Service, National Marine Fisheries Service (March 1998), at 4-11, available at [http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf) (emphasis added) (hereinafter “NMFS Consultation Handbook”); see 50 C.F.R. § 402.06(b) (“Where the consultation . . . has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA . . . , the results should be included in the documents required by those statutes.”); Interagency Cooperation – Endangered Species Act of 1973, as Amended, Final Rule, 51 Fed. Reg. 19926 (1986) (NMFS and the U.S. Fish and Wildlife Service (“FWS”) jointly enacting regulations implementing the ESA, explaining that “the biological opinion *should be stated in the final environmental impact statement*” (emphasis added); *Id.* (The final rule explains that “[a] statement of the opinion may be a summary of its findings and conclusions” although “[t]he Service does feel that the entire opinion should be attached as an exhibit to the NEPA document if completion time permits.”). See generally Riverkeeper ESA Contention at 5-14.

<sup>11</sup> See Riverkeeper ESA Contention at 10-14 (citing 50 C.F.R. § 402.15; see also ESA § 7(d), 16 U.S.C. § 1536(d) (prohibiting agency action that forecloses formulation of reasonable measures/alternatives while consultation is ongoing)).

<sup>12</sup> See Riverkeeper ESA Contention at 5-14.

As the ASLB explained in admitting Contention RK-EC-8, “the FSEIS’s essential ‘final analysis and a final recommendation on the action to be taken’ must play a fundamental role in the agency’s decision in this proceeding on Entergy’s LRA.”<sup>13</sup> Indeed, a fundamental purpose of NEPA is to ensure a fully informed and well-considered ultimate decision about the proposed activity.”<sup>14</sup> It will be impossible to conclude that NRC Staff’s final determinations in its FSEIS and supplemental FSEIS are searching and rigorous, and provide the requisite “hard look” at the environmental consequences of relicensing Indian Point,<sup>15</sup> if it is not informed by *any* feedback from the ESA § 7 consultation process concerning Atlantic sturgeon. Closing the NEPA review process without the benefit of NMFS’ assessment regarding Atlantic sturgeon effectively ensures that NRC Staff’s determinations regarding impacts to this critical species and the license renewal of Indian Point will not take into account any conclusions, findings, or recommendations of the consulting agency. This completely flouts the purpose of ESA § 7, which requires consultation with NMFS so as to *inform* the Federal agency’s decision on the action to make certain that such action will not jeopardize any endangered species.<sup>16</sup> Indeed, the ASLB has agreed with Riverkeeper’ understanding of the relevant regulatory framework:

It is this Board’s view that completion of that consultation process is necessary to the NRC Staff’s fulfillment of its obligations under the ESA and NEPA. NMFS’s BiOp will aid the agency in making its licensing decision in this proceeding. Without receipt and

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<sup>13</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions), July 6, 2011, at 70 (citing 10 C.F.R. § 51.91(d); 10 C.F.R. § 51.94) (hereinafter “ASLB July 6, 2011 Memorandum and Order”).

<sup>14</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *see* Riverkeeper ESA Contention at 10-14.

<sup>15</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989); *see also generally* Riverkeeper ESA Contention at 10-14.

<sup>16</sup> *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g); *see also generally* Riverkeeper ESA Contention at 10-14.

consideration of that input from NMFS, the NRC Staff arguably has not taken the requisite hard look at this issue.<sup>17</sup>

Thus, NRC Staff's FSEIS must meaningfully consider NMFS' prospective analysis and conclusions regarding Atlantic sturgeon *in* the environmental review process concerning the relicensing of Indian Point. In light of the procedural posture of the case (i.e., the fact that Atlantic sturgeon was classified as endangered, and ESA § 7 consultation was initiated *after* the issuance of the FSEIS in the proceeding), the required consideration of NMFS' analysis concerning Atlantic sturgeon could occur in the context of the NRC Staff's ongoing supplemental environmental review process, or, in the alternative, in a separate supplemental environmental review process upon the completion of NMFS' BO. In contrast, it is NRC Staff's position that including a mere update about the "status" of the consultations with NMFS regarding Atlantic sturgeon in its final FSEIS supplement is sufficient.<sup>18</sup> NRC Staff further indicates (in a footnote) that *if* § 7 consultations with NMFS conclude before "the final FSEIS Supplement" is issued, "that document will likely include updated information regarding those consultations."<sup>19</sup> Such a purely opportunistic, ostensibly passing, mention of § 7 consultation is not appropriate, or contemplated by NEPA.

In sum, in maintaining the position that it is acceptable for the NEPA review process concerning the license renewal of Indian Point to conclude prior to the completion of, or without meaningful consideration of, ESA § 7 consultation procedures regarding Atlantic sturgeon, NRC Staff's answer to ASLB question 1 incorrectly ignores relevant regulatory standards, as well as the ASLB's own interpretation of such standards. At a minimum, NRC Staff's response is inconsistent with the ASLB's finding of a genuine dispute of law relating to NRC Staff and

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<sup>17</sup> ASLB July 6, 2011 Memorandum and Order at 69-70.

<sup>18</sup> NRC Staff Response to ASLB June 7, 2012 Order at 4 (fn.13).

<sup>19</sup> *Id.*

Riverkeeper’s respective positions on this matter.<sup>20</sup> NRC Staff’s response to ASLB question 1 is insufficient and mischaracterizes relevant legal requirements and obligations.

*NRC Staff Response to Board Question 2: the Impact of the Supplemental NEPA Review Process on Other Admitted Contentions*

The ASLB next asks NRC Staff whether it expects that the draft supplemental FSEIS will impact contentions other than RK-EC-8.<sup>21</sup> NRC Staff responds that it is “very confident” that the draft EIS supplement will not impact any other admitted contentions in the proceeding.<sup>22</sup>

Riverkeeper disagrees with NRC Staff’s characterization that “[n]one of the admitted contentions in this proceeding raise concerns regarding” “Staff’s consultations with NMFS regarding endangered species” aside from RK-EC-8. Riverkeeper respectfully disagrees that NRC Staff’s supplemental NEPA review process will not necessarily impact any other admitted environmental contentions. For example, as noted during the pre-hearing conference call held among the parties on December 6, 2011, Riverkeeper is concerned that the discussion and findings made in the supplemental FSEIS concerning impacts to the aquatic ecology of the Hudson River and endangered species present therein, may be relevant to issues raised in Riverkeeper and Clearwater’s consolidated contention RK-EC-3/CW-EC-1:

[contention RK-EC-3/CW-EC-1] does implicate aquatic impacts in a broad sense, and it does implicate the impact of radiological water leaks on the Hudson River ecosystem . . . . an element of our, of Contention EC 3 has to do with radiological impacts on aquatic species. . . . But it is an element of the contention that deals with radiological impacts, and that overlaps with the Biological Opinion . . . . It potentially could . . . require us to revise the Contention or revise our testimony.<sup>23</sup>

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<sup>20</sup> *Id.* at 70-71.

<sup>21</sup> ASLB June 7, 2012 Order at 3.

<sup>22</sup> NRC Staff Response to ASLB June 7, 2012 Order at 6.

<sup>23</sup> Official Transcript of Proceedings, Entergy Nuclear Operations, Indian Point Nuclear Generating Plant, 50-247-LR and 50-286-LR, 07-858-03-LR-BDO1, Work Order No.: NRC-1336, Tuesday, December 6, 2011, Pages 987-1053, at 1013, 1017-18.

Riverkeeper continues to believe that NRC Staff's supplemental NEPA review process may be relevant to contention RK-EC-3/CW-EC-1. For example, contention RK-EC-3/CW-EC-1 raised an issue with regard to the impact of accidental radiological spent fuel pool leaks on endangered species in the Hudson River.<sup>24</sup> Thus, NRC Staff's consideration of such impacts, or *lack* of consideration of such impacts, in relation to the ESA § 7 consultation process and the discussion of NMFS' BO relating to shortnose sturgeon (and, looking ahead, also relating to Atlantic sturgeon), is relevant to contention RK-EC-3/CW-EC-1. Riverkeeper's initial (though still ongoing) review of NRC Staff's recently published draft supplemental EIS (published on or about June 26, 2012) indicates that NRC Staff has not discussed NMFS' observations with respect to the impact of radiological leaks on endangered shortnose sturgeon in the Hudson River.<sup>25</sup> This omission is certainly an aspect of the draft FSEIS that Riverkeeper will likely comment upon, and that may, as a result, be addressed differently in the final FSEIS supplement. That is to say, the issues discussed in the draft FSEIS supplement continue to touch upon and relate to at least some aspects of contention RK-EC-3/CW-EC-1.

Thus, while the issues analyzed and raised in NRC Staff's supplemental NEPA review process may not concern the majority of contention RK-EC-3/CW-EC-1, it, nonetheless may well impact the contention. It is Riverkeeper's ongoing position that there is at least some degree of overlap between the issues raised in contention RK-EC-3/CW-EC-1 and the

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<sup>24</sup> See Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceedings for the Indian Point Nuclear Power Plant (November 30, 2007), ADAMS Accession No. ML073410093, at 74-86; *See also* Riverkeeper and Hudson River Sloop Clearwater Initial Statement of Position Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), December 22, 2011 (RIV000059), at 11, 3, 62.

<sup>25</sup> See Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment, NUREG-1437, Supplement 38, Vol. 4 (June 2012); *see also* Endangered Species Act Section 7 Consultation, Biological Opinion, Relicensing - Indian Point Nuclear Generating Station, F/NER/2009t00619 (October 14, 2011), at 49-50 (discussing *Potential Discharge of Radionuclides to the Hudson River*).

discussions at issue in the draft FSEIS. Riverkeeper, thus, disagrees with NRC Staff's response to ASLB question 2, that, unequivocally "no contention" other than RK-EC-8 will be impacted by NRC Staff's FSEIS supplement.<sup>26</sup>

*NRC Staff Response to Board Question 5: the Appropriateness of Suspending Current Licensing Proceedings on Environmental Issues*

Next, the ASLB asks NRC Staff whether it believes that "the Board is obligated to suspend current licensing proceedings on environmental issues until the NRC Staff has completed its environmental review and issued the FEIS Supplement."<sup>27</sup> NRC Staff responds that the ALSB is "not required to suspend current licensing proceedings on environmental issues until the Staff has issued its draft (or final) FSEIS Supplement."<sup>28</sup>

Riverkeeper respectfully notes for the record that 10 C.F.R. § 2.332(d) states that "hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS" and that 10 C.F.R. § 51.104(a)(1) states that:

(a)(1) In any proceeding in which (i) a hearing is held on the proposed action, (ii) a final environmental impact statement has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA and this subpart are in issue, the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the *final* environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.<sup>29</sup>

Thus, the regulations contemplate that the environmental review process be complete prior to an evidentiary hearing on contested NEPA issues. This is also consistent with the model milestones

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<sup>26</sup> NRC Staff Response to ASLB June 7, 2012 Order at 6.

<sup>27</sup> ASLB June 7, 2012 Order at 4.

<sup>28</sup> NRC Staff Response to ASLB June 7, 2012 Order at 14.

<sup>29</sup> 10 C.F.R. § 2.332(d); 10 C.F.R. § 51.104(a)(1) (emphasis added).



for NRC adjudicatory hearings, which contemplate the issuance of *final* SER and NEPA documents *prior* to any evidentiary hearing.<sup>30</sup>

Riverkeeper respectfully disagrees with NRC Staff's position that a supplemental environmental review process does not render its previous FSEIS not "final." To the contrary, opening the NEPA process up to address "new" or previously unaddressed issues necessarily renders the process unfinished. Indeed, any new analyses should factor into the NRC Staff's broader determinations regarding the cumulative environmental impacts of relicensing Indian Point, and the appropriateness of relicensing the plant in light of such impacts.<sup>31</sup> Parsing out discrete issues into separate NEPA reviews, without regard for the broader review process, does not amount to a meaningful assessment. Indeed, the purpose of NEPA is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."<sup>32</sup> It seems unlikely that the NRC Staff would be able to reach meaningful and well-founded ultimate conclusions and decisions in its FSEIS without the benefit of completing, and determining the significance of, ongoing supplemental processes.

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<sup>30</sup> See Appendix B to Part 2--Model Milestones To Be Used By a Presiding Officer as a Guideline in Developing a Hearing Schedule for the Conduct of an Adjudicatory Proceeding in Accordance With 10 CFR 2.332 (II. Model Milestones for Hearings Conducted Under 10 CFR Part 2, Subpart L).

<sup>31</sup> See 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(a)(2), (c).

<sup>32</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 277 (2006) ("LBP-06-23") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (Explaining that NEPA requires federal agencies to examine the environmental consequences of their actions before taking those actions, in order to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (explaining that NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process."); *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9th Cir. 1998) ("NEPA was created to ensure that agencies will base decisions on detailed information regarding significant environmental impacts and that information will be available to a wide variety of concerned public and private actors.").

For these reasons, Riverkeeper respectfully disputes NRC Staff's position with respect to the appropriateness of moving forward on environmental contentions in this proceeding, and in particular, with contention RK-EC-3/CW-EC-1, which, as discussed above, may be affected by the outcome of NRC Staff's current, and potentially future supplemental environmental review processes.

Conclusion

For the foregoing reasons, Riverkeeper respectfully disagrees with the answers provided by NRC Staff in response to the ASLB's June 6, 2012 Order.

Respectfully submitted this 6th day of July 2012.

**Signed (electronically) by Deborah Brancato**

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**CERTIFICATE OF SERVICE**

I certify that on July 6, 2012, copies of Riverkeeper Responses to NRC Staff Answers to ASLB Questions, were served on the following by NRC’s Electronic Information Exchange:

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