UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	**Docket Nos. 50-247-LR & 50-286-LR**
License Renewal Application Submitted by	**ASLBP No. 07-858-03-LR-BD01**
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	**DPR-26, DPR-64**
	July 8, 2012

STATE OF NEW YORK, RIVERKEEPER, AND CLEARWATER'S JOINT MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE ON-SITE STORAGE OF NUCLEAR WASTE AT INDIAN POINT

A. Introduction

Pursuant to 10 C.F.R. § 2.309(f)(2) the State of New York, Riverkeeper, Inc., and the Hudson River Sloop Clearwater seek leave to file the accompanying Contention NYS-39/RK-EC-9/CW-EC-10. The Contention is based on the United States Court of Appeals for the District of Columbia Circuit's recent decision in the matter of *State of New York v. Nuclear Regulatory Commission*, No. 11-1045 (June 8, 2012), which invalidated the NRC's Waste Confidence Decision Update and Temporary Storage Rule.

B. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(2)

The accompanying contention fully meets 10 C.F.R. § 2.309(f)(2), which requires for admissibility, in pertinent part, a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is

materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

1. The Information Was Not Previously Available

Since this contention is based upon the United States Court of Appeals for the District of Columbia Circuit's recent decision in the matter of *New York v. NRC*, No. 11-1045, which was decided on June 8, 2012, the contention relies on information not previously available and thus meets the first prong of the test set forth in 10 C.F.R. § 2.309(f)(2)(i). Earlier efforts by New York and Clearwater to raise concerns about the environmental impacts of spent fuel storage following the end of the license were rejected by this Board and by the Commission as either in violation of 10 C.F.R. § 51.23 or filed prematurely.[1] The D.C. Circuit decision has now eliminated both of those bases since it has invalidated the portions of § 51.23 that were relied upon to bar the earlier contentions and thus, for the first time, a contention based on the absence of an adequate environmental analysis of the environmental impacts of storage of spent fuel at Indian Point after the end of plant operation and alternatives to mitigate those impacts is ripe for consideration.

[1] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Memorandum and Order (Ruling on New York State's New and Amended Contentions), slip op. (June 16, 2009); Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), CLI-10-19, 72 N.R.C. 98 (July 8, 2010).

2. The Information Is Materially Different Than Previously Available Information

Until June 8, 2012, 10 C.F.R. § 51.23(a) provided that NRC had confidence that a mined geologic disposal site for spent fuel would be available when necessary and that no significant environmental impacts would be associated with the continued storage of spent fuel at power reactor sites for 60 years after cessation of operation. *See* 10 C.F.R. § 51.23(a); 75 Fed. Reg. 81037 (Dec. 23, 2010). Based on that confidence, memorialized in five "Waste Confidence Findings," the NRC promulgated 10 C.F.R. § 51.23(b), which stated that

> as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95 and 51.97(a), and *within the scope of the generic determination in paragraph (a)* of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor.

10 C.F.R. § 51.23(b)(emphasis added). The predecessor of the current version of § 51.23(a) and the limitations on the scope of environmental impact statements in § 51.23(b) are reflected in the 1996 Generic Environmental Impact Statement NUREG-1437 ("GEIS") and 10 C.F.R. Part 51, Appendix B, Table B-1 and in the Final Supplemental Environmental Impact Statement NUREG-1437, Supp. 38 ("FSEIS") previously issued in this proceeding.

On October 9, 2008, the Commission issued a draft rule revising the waste confidence findings. With respect to Waste Confidence Finding Two, the Commission proposed "remov[ing] its expectation that a repository will be available by 2025" and acknowledged that

its previous finding that sufficient disposal capacity would be available within 30 years after any reactor's licensed life "is not supportable." *See* 73 Fed. Reg. 59551, 59558, and 59561 (Oct. 9, 2008)("Waste Confidence Decision Update"). The Commission proposed revising Waste Confidence Finding Four to state that waste could be safely stored on-site for 60 years beyond the licensed operating life of a facility. 73 Fed. Reg. at 59551.

The Commission also proposed amending 10 C.F.R. § 51.23 to reflect these revised policies, stating in an open-ended fashion and without a date certain (*i.e.*, without even the 60-year reference from its proposed Finding Four revision) that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations until a disposal facility can reasonably be expected to be available." 73 Fed. Reg. 59547 (Oct. 9, 2008)("Temporary Storage Rule").

Following the release of these draft rules, the movants submitted or supported new contentions regarding the storage of waste on-site, which were ultimately rejected by the Board and the Commission. During its consideration of Clearwater's new contentions, on February 10, 2010, the Board issued a decision certifying a question to the Commissioners concerning the continued viability of the Temporary Storage Rule. *Entergy Nuclear Operations, Inc.*, (Indian Point Generating Units 2 and 3), Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater's Motion for Leave to Admit New Contentions) (Feb. 12, 2010). Specifically, the Board

> ask[ed] the Commission to advise the Board whether we should: (1) defer ruling on Clearwater's Motion until the Commission undertakes an evaluation of the impact, if any, that these recent developments will have on the viability of the Commission's Waste Confidence Rule; (2) rule on Clearwater's pending motion consistent with the current language of Section 51.23; (3) admit Clearwater's new contentions notwithstanding Section 51.23; or (4) take some other action to be specified by the Commission.

Slip op. at 2.

On July 8, 2010, in response to the Board's certified question, the Commissioners issued a decision CLI-10-19 that directed the ASLB to reject the Clearwater contentions. *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), 72 N.R.C. 98, CLI-10-19, Memorandum and Order, (July 8, 2010).[2] The Commissioners stated:

> We are continuing our deliberations on the waste confidence update, and in any event will not conclude action on the Indian Point license renewal application until the rulemaking is resolved.

72 N.R.C. at 100; CLI-10-19, slip op. at 3.

NRC issued the final Waste Confidence Decision Update and Temporary Storage Rule on December 23, 2010. 75 Fed. Reg. 80132-37 (Dec. 23, 2010); 75 Fed. Reg. 80137-76 (Dec. 23, 2010). On February 15, 2011, a coalition of states led by New York and a coalition of environmental organizations including Riverkeeper challenged the Temporary Storage Rule and the Waste Confidence Decision Update respectively, in the D.C. Circuit. Those legal challenges were consolidated and heard together. On June 8, 2012, the D.C. Circuit vacated the Waste Confidence Decision Update and the Temporary Storage Rule.

[2] NRC Commissioner Apostolakis did not participate in the ruling on this matter.

This information is clearly materially different than previously available information: previously, a regulation was in place barring consideration of the impacts of on-site storage of nuclear waste in the post-operation period, and now that regulation is no longer effective. As such, the Staff's NEPA analysis must include a discussion of the impacts of on-site storage of nuclear waste in the post-operation period and alternatives to mitigate those impacts.

2. The Amended Or New Contention Has Been Submitted In A Timely Fashion Based On The Availability Of The Subsequent Information.

This new contention has been submitted in a timely fashion based on the availability of the subsequent information. As discussed above, the D.C. Circuit filed its decision in the matter of *State of New York v. Nuclear Reg. Comm'n* on June 8, 2012. In its July 1, 2010 scheduling order, the Board stated that:

> A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously.
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> ***
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> A motion and proposed new contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available.

Scheduling Order (July 1, 2010) at 4. This contention was submitted within 30 days from the date of the D.C. Circuit's decision. Accordingly, this motion and the accompanying contention should be deemed timely filed.

The movants are aware of Entergy and Staff's position that this contention is premature, because the Circuit Court's mandate has not yet issued.[3] However, given that Entergy and Staff often raise timeliness objections to intervenor contentions in this proceeding, the movants submit that today's filings obviate any timeliness issues. Moreover, given the Court's decision, NRC Staff and Entergy can no longer rely on the Waste Confidence Decision and the Temporary Storage Rule to preclude review of the environmental impacts associated with the on-site storage of spent nuclear fuel and the potential alternatives to mitigate such impact.[4]

Thus, the proposed contention meets all the requirements of 10 C.F.R. § 2.309(f)(2).

C. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(1)

1. The Contention Is Within the Scope of License Renewal

The NRC must comply with NEPA, and the NRC's own NEPA regulations, before it can issue a renewed operating license. *See* 10 C.F.R. § 51.95(c). This contention speaks directly to the adequacy of the Staff's NEPA compliance, asserting that Staff has yet to perform the adequate NEPA analysis of the long term, post-operation on-site storage of nuclear waste that the D.C. Circuit Court of Appeals required NRC to do in its June 8, 2012 decision and in its previous decision in *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). Whereas the time period

[3] Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is the order that makes the decision effective. Under the Rules, the Court's mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying a petition for rehearing is issued, whichever is later. Fed. R. App. P. 41(b).

[4] In the event that the Board agrees with Entergy and Staff, the movants request that the Board hold this motion and contention in abeyance pending the issuance of the mandate, of which the State will notify the Board upon its occurrence.

for analysis of the storage of waste was limited only to the operating period under 10 C.F.R. 51.23 prior to the rule being vacated, the time period for consideration in Staff's NEPA analysis now includes the post-operating period as well including the possibility that a permanent repository never exists. *New York v. NRC*, No. 11-1045 (June 8, 2012) Slip op. at 13 ("the Commission can and must assess the effects" of the failure to establish a repository). As such, this contention is squarely within the scope of license renewal

2. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

Similarly, the issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. The storage of nuclear waste generated during license renewal is within the scope of license renewal. *See* 51.23(c), which was not challenged by the petitioners in *State of New York v. NRC* and which therefore remains valid. Thus, but for the now invalidated 10 C.F.R. § 51.23(a), it is clear that this license renewal proceeding cannot be concluded until the legally required environmental analysis has been completed and its results have been integrated into the decision making process regarding the Indian Point license renewal application. *See* 10 C.F.R. §§ 51.20(b)(2), 51.95(c) and 51.101(a). This contention addresses a material omission in the Staff's environmental review that must be corrected before a decision can be reached on license renewal.

The FSEIS for Indian Point relies on the now-vacated § 51.23 in multiple places. In the Executive Summary, Staff states that "the supplemental environmental impact statement

prepared at the license renewal stage need not discuss … any aspect of the storage of spent fuel for the facility within the scope of the generic determination in 10 CFR 51.23(a) ['Temporary storage of spent fuel after cessation of reactor operation–generic determination of no significant environmental impact'] and in accordance with 10 CFR 51.23(b)." FSEIS at xvi. The FSEIS also relies on § 51.23 in finding that neither the Applicant's ER (FSEIS at 1-5) nor the Staff's SEIS (FSEIS at 9-1) needs to discuss "any aspect of the storage of spent fuel within the scope of the generic determination in 10 CFR 51.23(a) in accordance with 10 CFR 51.23(b)." The Staff reiterated this in response to the State's comment that the SEIS does not analyze offsite land use impacts of continued operations and the additional storage of spent fuel on real estate values in the surrounding areas (FSEIS, Appendix A, at A-22) and in response to a comment indicating that the GEIS does not adequately evaluate the long term impacts and safety of the generation and long-term storage of radioactive waste (FSEIS at Appendix A, A-138) ("*Accordingly, no discussion of the environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installation is required for an environmental impact statement associated with license renewal.*")(emphasis in original). Staff also raised § 51.23 in response to comments indicating that storage of spent fuel in dry casks, while safer than spent fuel pool storage, will not reduce the amount of spent fuel in the pools (*id*. at A-147); questioning the adequacy of decommissioning process regarding spent fuel (*id*. at A-160).

Staff also relied on the now-vacated Waste Confidence Decision in concluding that there are "no offsite radiological impacts (collective effects) from the uranium fuel cycle during the renewal term beyond those discussed in the GEIS." FSEIS at 6-4.

The Staff's environmental review pursuant to NEPA must incorporate the D.C. Circuit's decision in order to comply with the NRC's own regulations. *See, e.g.,* 10 C.F.R. §§ 51.20(b)(2), 51.71(d), 51.90, 51.91(c), 51.92, 51.95(c)(1), 51.95(c)(2) and 51.101(a).

All of the above-listed findings have now been invalidated along with the D.C. Circuit's invalidation of both the Waste Confidence Findings and the Temporary Storage Rule, and must now be evaluated in their absence. By invalidating the findings in § 51.23(a) the Court has effectively invalidated the restrictions on addressing spent fuel storage impacts imposed by § 51.23(b) since those restrictions are limited to only preventing consideration of issues that are "within the scope of the generic determination in paragraph (a) of this section." 10 C.F.R. § 51.23(b). Federal agencies cannot take major federal actions without complying with NEPA. *New York v. NRC*, No. 11-1045 (June 8, 2012), slip op. at 8 (citing *Calvert Cliffs' Coordinating Comm., Inc., v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971); *see also* 10 C.F.R. § 51.101(a)("Until a record of decision or finding of no significant impact is issued, (1) the NRC can take no action which would have an adverse environmental impact or limit the choice of reasonable alternatives, and (2) any such actions taken by the applicant are grounds for denial of the license.").

3. Adequate Bases Have Been Provided For the Contention

The bases for this contention are detailed and meet the regulatory requirement for a "brief explanation" which can be summarized as follows: (1) NEPA requires an analysis of environmental impacts of spent fuel storage after plant shutdown; (2) 10 C.F.R. § 51.23 precluded consideration of those impacts and alternatives in relicensing; (3) the relevant parts of

§ 51.23 have been invalidated by the D.C. Circuit; and (4) therefore, until the required analysis of impacts and alternatives has been completed, no decision can be reached on license renewal for Indian Point. Movants have detailed the history of the waste confidence findings and the temporary storage rule, including both their regulatory history and the history of the issue as presented to the Board and the Commission in the context of the Indian Point relicensing proceeding, including statements made by the Commission regarding its intention to issue a renewed license in Indian Point only once the waste confidence and temporary storage rulemaking had been concluded. Movants have also included in their bases and supporting evidence a discussion of the challenge to the waste confidence findings and the temporary storage rule, and the resulting federal appellate court ruling invalidating it. Movants have also included a discussion of the numerous places where the FSEIS relies on the now-vacated 10 C.F.R. § 51.23, indicating the regulatory requirements for thorough NEPA reviews and had previously relied on 10 C.F.R. § 51.23 to avoid an environmental review of spent fuel storage following cessation of operations.

4. A Concise Statement of Facts Support the Contention, and No Expert Opinion Is Necessary Here Since the D.C. Circuit Court of Appeals Has Spoken on the Issue

Movants have supplied a concise statement of facts, together with references to the specific sources and documents on which movants currently intend to rely to support their position on the issue, in support of the contention. Essentially the facts that support this Contention are that the D.C. Circuit has concluded that NRC's analysis of the environmental impacts of spent fuel storage at reactors after operations have ceased is legally deficient. Since

that flawed analysis formed the basis for NRC's restriction on addressing spent fuel storage impacts in license renewal and that restriction is specifically limited to the findings now rejected by the D.C. Circuit as legally deficient, there is no legally sufficient analysis of the environmental impacts of spent fuel storage after cessation of plant operations and thus, pursuant to well-established law, NRC cannot proceed to decide whether to take the major federal action of relicensing the Indian Point facilities. Movants have included a detailed history of the waste confidence findings and the temporary storage rule, including both their regulatory history and the history of the issue as presented to the Board and the Commission in the context of the Indian Point relicensing proceeding, including citations to regulations, Board and Commission decisions, court cases, and statements made by the Commission regarding its intention to issue a renewed license in Indian Point only once the waste confidence and temporary storage rulemaking had been concluded. Movants also have included in their bases a discussion of the challenge to the waste confidence findings and the temporary storage rule, and the resulting federal appellate court ruling invalidating those findings and rule.

Movants submit that no expert opinion is necessary to support this contention, which is a contention of omission and asserts that the review of the license applications does not comply with the National Environmental Policy Act and related regulations. No expert witness is required to support this contention because the United States Circuit Court for the District of Columbia Circuit has already determined that the current analysis of environmental impacts of spent fuel storage is legally deficient. The question presented by the accompanying contention is the legal question of whether this Board can decide whether to renew the operating licenses for

Indian Point without having a completed and legally required NEPA analysis and without providing the parties with an opportunity to propose contentions based upon that analysis.

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact

The requirement in § 2.309(f)(1) requiring a statement that a genuine dispute exists with the Applicant on a material issue of law or fact is satisfied because the Entergy's License Renewal Application and the NRC Staff's review of that application does not now comply with NEPA and related regulations. 10 C.F.R. § 2.309(f)(2), which is specific to environmental contentions, provides:

> On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.

10 C.F.R. § 2.309(f)(2). Entergy's Environmental Report relied on 10 C.F.R. § 51.23. *See* 10 C.F.R. §§ 51.53(c)(2) and 51.23(b). The subsequent NRC Staff FSEIS also relied on 10 C.F.R. § 51.23. However, there is new and significant information that demonstrates that § 51.23 is no longer valid, and thus the FSEIS, which has supplanted the ER in this proceeding as the controlling environmental analysis document, is relying on a regulation that is no longer valid to excuse its failure to evaluate the environmental impacts of spent fuel storage after cessation of operation of Indian Point and alternatives to mitigate those impacts. Movants' dispute is essentially with the current FSEIS and its legal insufficiency. This legal insufficiency is the direct result of new and significant information – *i.e.*, the D.C. Circuit's decision – and obligates

Staff to prepare and circulate a draft supplement to the FSEIS to address the environmental impacts of spent fuel storage after cessation of operations at the Indian Point facilities and alternatives to mitigate those impacts. *See* 10 C.F.R. § 51.92(a)(2)(" If the proposed action has not been taken, the NRC staff will prepare a supplement to a final environmental impact statement . . . if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.)"

In addition, a genuine dispute does appear to exist with the Applicant on the issue of the impact of the D.C. Circuit's decision on the Indian Point license renewal proceeding. Entergy has stated publicly through a spokesperson its position that "[t]here is no reason to believe this issue will affect the current schedule for license renewal proceedings." Matthew Wald, Court Forces a Rethinking of Nuclear Fuel Storage, New York Times (June 8, 2012). As movants make clear in the contention, based on (1) the D.C. Circuit's June 8, 2012 decision and (2) statements made by the Commissioners in this very proceeding, no license can issue until an adequate analysis has been done of the potential environmental impacts of on-site storage of nuclear waste on-site in the post-licensing period. *New York v. NRC*, No. 11-1045 (June 8, 2012) ("the Commission's obligations under NEPA require a more thorough analysis than provided for in the WCD Update"); *Entergy Nuclear Operations, Inc.*, (Indian Point Generating Units 2 and 3), 72 N.R.C. 98, 100, CLI-10-19, Memorandum and Order, slip op. at 3 (July 8, 2010) ("we … will not conclude action on the Indian Point license renewal application until the [waste confidence update] rulemaking is resolved."). These statements unambiguously require completion of the analysis of the potential environmental impacts of on-site storage of nuclear

waste on-site in the post-licensing period and alternatives to mitigate those impacts, before a licensing decision can be made by the Board or the Commission. Entergy appears to be saying that it would be entitled to receive a decision on license renewal even if the required NEPA analysis were not completed or, alternatively is predicting that the required environmental analysis will be completed, new contentions, if any, based on that analysis will be considered and dispositioned, all before the Board would otherwise complete the hearings and its deliberations on the already admitted contentions. Petitioners are not able to make any predictions about how long the Commission will take to address the issues the D.C. Circuit has remanded to it, and neither is Staff (*see* NRC Staff's Fifth Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012 (July 2, 2012) at 4 ("The Staff is unable to state at this time whether the court's decision will affect future litigation in this proceeding."). In addition, if the thrust of Entergy's public statement is that a final decision can be made on its license renewal application even before the required environmental analysis and alternative considerations have been completed, Entergy is simply wrong, as movants will demonstrate, when the issue is joined on the merits on this Contention.

D. Conclusion

For the reasons stated, the State of New York, Riverkeeper, and Clearwater respectfully request that the Atomic Safety and Licensing Board grant leave to file the accompanying contention.

Respectfully submitted,

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July 8, 2012

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 scheduling order, I certify that I have made a sincere effort to contact counsel for NRC Staff and Entergy in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

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John J. Sipos
Assistant Attorney General
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dated: July 8, 2012