

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))	

**RIVERKEEPER INC. COMBINED REPLY TO NRC STAFF AND ENTERGY
ANSWERS TO RIVERKEEPER'S MOTION FOR LEAVE TO FILE AMENDED
CONTENTION RK-EC-8A AND AMENDED CONTENTION RK-EC-8A**

Filed October 8, 2013

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(2),¹ the Atomic Safety and Licensing Board’s (“ASLB”) July 1, 2010 Scheduling Order,² and the ASLB’s September 13, 2013 Order,³ Riverkeeper, Inc. (“Riverkeeper”) hereby respectfully submits this combined reply to the two separate Answers filed by the U.S. Nuclear Regulatory Commission (“NRC”) Staff⁴ and Entergy Nuclear Operations, Inc.⁵ (“Entergy”) on October 1, 2013 in response to Riverkeeper’s Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A, dated August 20, 2013 (hereinafter referred to as “Amended Contention RK-EC-8A”).

¹ 10 C.F.R. § 2.309(h)(2) (“the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.”).

² 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, Scheduling Order (July 1, 2010), at ¶ F.1 (“Within seven (7) days of service of the answer [to a new/amended contention], the movant may file a reply”).

³ 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 (Granting Staff’s Motion for an Extension of Time) (Sept. 13, 2013) (“Riverkeeper’s reply to the Staff’s and Entergy’s answers will be considered timely if filed on or before October 8, 2013”).

⁴ NRC Staff’s Answer to Riverkeeper, Inc.’s Consolidated Motion for Leave to File Amended Contention RK-EC-8A, and Amended Contention RK-EC-8A (October 1, 2013) (hereinafter “NRC Staff’s Answer”).

⁵ Entergy’s Answer to Riverkeeper, Inc.’s Consolidated Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A (Endangered Aquatic Species) (October 1, 2013) (hereinafter “Entergy’s Answer”).

Riverkeeper Amended Contention RK-EC-8A states that NRC Staff's Supplement 1 to the Final Supplemental Environmental Impact Statement regarding the proposed license renewal of Indian Point Units 2 and 3 ("FSEIS supplement")⁶ is deficient since it (1) fails to properly consider or address critical, substantive, and credible public comments related to endangered species impacts posed by the proposed continued operation of Indian Point, and, (2) fails to include any revised analysis and/or recommendation to the Commission relating to the appropriateness of license renewal in light of the NRC Staff's revised environmental assessment. NRC Staff and Entergy object to Riverkeeper Amended Contention EC-8A on a variety of grounds. As described below, NRC Staff's and Entergy's arguments are unconvincing and the contention should be admitted.

ARGUMENTS IN REPLY

I. Riverkeeper Amended Contention RK-EC-8A Contains the Requisite Amount of Specificity and Factual Support Demonstrating the Inadequacy of NRC Staff's FSEIS Supplement

NRC Staff hollowly claims that Amended Contention RK-EC-8A "Fails to State with Specificity Any Facts Showing that the FSEIS Supplement is Inadequate."⁷ NRC Staff claims that Riverkeeper provided "only broad assertions that its (or New York's) comment submittals were not considered by the Staff or NMFS – but it fails to point to any specific facts or statements in those submittals that it believes were overlooked."⁸ Entergy makes similar

⁶ Letter from S. Turk (Counsel for NRC Staff) to ASLB (June 21, 2013); Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 - Final Report Supplemental Report and Comment Responses (NUREG-1437, Supplement 38, Volume 4), available at, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/v4/>.

⁷ NRC Staff's Answer at 10.

⁸ *Id.*; see *id.* at 10-11.

claims.⁹ However, NRC Staff and Entergy blatantly ignore the specific factual support that Riverkeeper included in Amended Contention RK-EC-8A.

In particular, Riverkeeper discussed at length, and even explicitly listed, various factual issues raised in Riverkeeper's comment submissions to NRC Staff, which NRC Staff clearly, indeed, completely, "overlooked."¹⁰ So, in relation to Riverkeeper's first comment submission to NRC related to NRC Staff's draft FSEIS supplement, dated August 20, 2012, Riverkeeper pointed out NRC Staff's failure to consider specific concerns articulated by Riverkeeper's expert consultant, Pisces Conservation Ltd ("Pisces"), regarding NRC Staff's assessment of endangered species.¹¹ Riverkeeper specifically challenged NRC Staff's pithy and non-substantive "response" to these comments.¹²

Further, in relation to Riverkeeper's second comment submission to NRC related to NRC Staff's draft FSEIS supplement, dated April 29, 2013, Riverkeeper listed numerous specific issues that NRC Staff completely failed to address in the FSEIS supplement, including, *inter alia*, NRC Staff's failure to appropriately assess the significance of prospective sturgeon losses that would occur as a result of relicensing Indian Point, cumulative impacts, impacts of radionuclides from Indian Point on endangered sturgeon, or the efficacy of available mitigation measures.¹³ Similarly, Riverkeeper described with specificity comments submitted to NRC by the New York State Department of Environmental Conservation ("NYSDEC") dated March 25, 2013, that NRC wholly ignored as well.¹⁴ Furthermore, even if Riverkeeper had only pointed

⁹ See Entergy's Answer at 29.

¹⁰ See Amended Contention RK-EC-8A at 9-15, 21.

¹¹ *Id.* at 8-9.

¹² *Id.* at 12-13.

¹³ *Id.* at 10-11.

¹⁴ *Id.* at 11-12.

out generally that NRC Staff had failed to address these comment letters, it is illogical for NRC Staff to complain that Riverkeeper allegedly failed to specify the details that NRC Staff “overlooked” when it was NRC Staff that made the decision to completely and wholly disregard and exclude these comments from its supplemental environmental review process. Clearly all of the comments contained in these comment submissions were “overlooked” and based on the detail contained in Amended Contention RK-EC-8A describing this omission, NRC Staff is well aware of the “precise facts [and] issues” that Riverkeeper asserts needed to be addressed in the FSEIS.

Notably, and as described further below, NRC Staff and Entergy cannot simply defer to an unfounded position that NMFS’ allegedly considered Riverkeeper and NYSDEC’s concerns in order to argue that Riverkeeper has allegedly not pointed to any specific facts or statements that were overlooked in the FSEIS supplement. As described in more detail below, Amended Contention RK-EC-8A challenges *NRC Staff’s* failure to address various critical, valid, and expert-supported comments in its FSEIS supplement.

Thus, Riverkeeper’s Amended Contention RK-EC-8A contains adequate specificity and facts demonstrating the inadequacy of NRC Staff’s FSEIS supplement. Moreover, based on the specificity and facts contained in Amended Contention RK-EC-8A, there is absolutely no basis for NRC Staff’s statement that “Riverkeeper points to no factual information whatsoever that would call [NRC Staff’s] conclusion [that the impacts of license renewal on endangered species is SMALL] into question.”¹⁵ As is clear from the initial filing of Amended Contention RK-EC-8A, and as clarified above, Riverkeeper’s amended contention raises a variety of factual issues

¹⁵ NRC Staff’s Answer at 32.

that NRC Staff refused to adequately consider, which clearly calls NRC Staff's conclusions related to endangered species impacts in the FSEIS supplement into question.

II. Riverkeeper Amended Contention RK-EC-8A has Adequate Legal Basis and Raises Genuine Disputes on Material Issues of Law and/or Fact

A. NRC Staff's Reliance on NMFS' Final Biological Opinion was Arbitrary and Capricious

Both NRC Staff and Entergy assert that Riverkeeper Amended Contention RK-EC-8A lacks adequate basis and fails to raise a genuine dispute on a material issue of law or fact because NRC allegedly properly relied upon NMFS' final BiOp pertaining to the proposed license renewal of Indian Point.¹⁶ That is, in attempting to rebut Riverkeeper's position that NRC Staff blindly relied upon NMFS' final BiOp in the FSEIS supplement without addressing significant concerns raised in various comment submissions from Riverkeeper, NRC Staff and Entergy argue that NRC Staff's reliance on NMFS' BiOp was proper since it was allegedly not 'arbitrary and capricious.'¹⁷ However, NRC Staff's acceptance and reliance on NMFS' BiOp can, in fact, "reasonably be challenged as arbitrary and capricious."¹⁸

NRC Staff and Entergy argue that the ESA § 7 consultation process was "extensive," that NMFS considered Riverkeeper's concerns during that consultation process,¹⁹ and that, as a

¹⁶ NRC Staff's Answer at 31; Entergy's Answer at 30.

¹⁷ NRC Staff's Answer at 29; Entergy's Answer at 30. , NRC Staff and Entergy dispute Riverkeeper's statement that NRC Staff "blindly" relied upon NMFS final BiOp in its FSEIS supplement, citing to alleged "extensive" consultations between NRC Staff, Entergy, and NMFS. See NRC Staff Answer at 27-30, Entergy Answer at 30-31. However, notwithstanding the communications that occurred between NRC Staff, Entergy, and NMFS, Riverkeeper's statement that NRC Staff blindly relied upon NMFS' final BiOp refers to the fact that, as more fully explained below, NRC Staff improperly failed to mention, let alone fully consider and assess, the comments raised to NRC Staff by Riverkeeper notwithstanding NMFS' deficient BiOp.

¹⁸ NRC Staff's Answer at 29.

¹⁹ As an initial matter, Entergy repeatedly claims that Riverkeeper was never authorized to comment upon NMFS' draft BiOp or otherwise participate in the ESA section 7 consultation process. See Entergy's Answer at 6, 9, 18, 33. This mischaracterization warrants clarification. In the course of corresponding with representatives of NMFS in

result, NRC Staff's reliance on NMFS final BiOp resulting from that consultation process was appropriate and not "arbitrary and capricious."²⁰ However, NRC Staff and Entergy's arguments are unpersuasive. Both NRC Staff and Entergy point to inter-agency correspondence dated January 29, 2013, the day prior to NMFS' issuance of the final BiOp related to the proposed relicensing of Indian Point, in which NMFS allegedly considered concerns raised by Riverkeeper via a comment submission directly to NMFS on November 23, 2012, in order to argue that NMFS adequately addressed Riverkeeper's concerns.²¹

As an initial matter, Riverkeeper was unaware of the fact that NMFS discussed and commented upon Riverkeeper's November 23, 2012 comments until NRC Staff's disclosure of the aforementioned January 29, 2013 memorandum on September 30, 2013, approximately one week ago and the day before NRC Staff filed its answer to Riverkeeper's Amended Contention RK-EC-8A.²² As such, it was clearly not possible for Riverkeeper to address this correspondence in the initial filing of Amended Contention RK-EC-8A. Having reviewed the document, it remains clear that, while NMFS *discussed* Riverkeeper's comment submission, NMFS clearly failed to adequately *address*, let alone dispose of, all of the concerns articulated in Riverkeeper's comment submission. That is, Riverkeeper raised valid and justified concerns

order to obtain a copy of NMFS' draft BiOp, NMFS indicated and conceded verbally that while NMFS does not as a matter of course provide draft BiOps to members of the public, doing so is *not prohibited by the Endangered Species Act or applicable regulations*. Moreover, there are instances of other proceedings where NMFS has provided draft BiOps for the purpose of allowing public comments. *See, e.g., Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 263 (4th Cir. 2011) ("[s]hortly after issuing the draft BiOp [on July 31, 2008], the Fisheries Service opened an online docket to enable persons to comment on the draft until September 15, 2008"). Entergy's attempt to mischaracterize the framework of the ESA § 7 consultation process as one that prohibits public involvement is clearly misleading and wrong. Notably, NRC Staff attempts to make similarly wrong arguments regarding the appropriateness of Riverkeeper's participation in the ESA § 7 consultation process. *See* NRC Staff's Answer at footnote 52. Such arguments are similarly unconvincing.

²⁰ *See* NRC Staff's Answer at 29; Entergy's Answer at 30-32.

²¹ *See* NRC Staff's Answer at 17; Entergy's Answer at footnote 8.

²² It is unclear why NRC Staff never disclosed this clearly relevant and non-privileged document previously in accordance with the disclosure obligations of 10 C.F.R. § 2.336(b).

regarding NMFS' analysis, and NMFS' January 29, 2013 memorandum fails to alleviate and *address* all of those concerns.

For example, in NMFS' January 29, 2013 memorandum, NMFS dismisses Riverkeeper's comments regarding the significance of NMFS' proposed incidental take of sturgeon by Indian Point. NMFS largely relies upon semantics (e.g., Riverkeeper's statement that NMFS found prospective losses of sturgeon by Indian Point to be "not significant" and Riverkeeper's disagreement with NMFS' apparent finding that the loss of hundreds of endangered sturgeon was "acceptable") to reject and not meaningfully address valid expert-supported concerns.²³ Further, while NMFS states that Riverkeeper's expert, Dr. Peter Henderson of Pisces, allegedly provided "no citations to support his claim[s]," NMFS incorrectly fails to recognize that Dr. Henderson's statements were, in and of themselves, adequate support for his "claims." That is, Dr. Henderson is a renowned fisheries biologist with decades of experience, and, based on his background, experience, and expertise, he articulated concerns regarding NMFS' proposed "take" of endangered sturgeon in the Hudson River. Yet, NMFS improperly failed to address various of the substantive concerns raised by Dr. Henderson due to an alleged lack of citations.

Similarly, in NMFS' January 29, 2013 memorandum, NMFS claims that it adequately considered cumulative impacts to endangered species in the Hudson River.²⁴ However, as opposed to squarely addressing Riverkeeper's concerns about the impacts of other power plant cooling water intakes on endangered sturgeon, as well as other projects known to have impacts on endangered sturgeon in the vicinity of Indian Point (such as the Tappan Zee Bridge Replacement Project) NMFS points to the limited scope of its analysis and its simple

²³ NRC Attachment 18 at 23-24.

²⁴ *Id.* at 24-25.

acknowledgement of other Hudson River power plants in its final BiOp.²⁵ NMFS relied upon an alleged limited definition of “cumulative impacts” and, once again, semantics to justify its lack of adequate analysis as criticized by Riverkeeper’s expert biologist, Pisces.²⁶ Thus, NMFS’ January 29, 2013 memorandum demonstrably fails to address the “dearth of analysis of the cumulative impacts over the geographical range of [the sturgeon] population” identified in Riverkeeper’s expert-supported comments to NMFS.²⁷

Likewise, in NMFS’ January 29, 2013 memorandum, NMFS claims to have adequately addressed radiological impacts from Indian Point on endangered sturgeon the Hudson River.²⁸ In dismissing Riverkeeper’s concerns, NMFS simply pointed to how its final BiOp included a modified description of the sources of radionuclides and relied upon past documentation from NRC and a one-time fish study conducted in 2007 by the NYSDEC.²⁹ However, Riverkeeper’s comments to NMFS expressly discussed NMFS’ failure to consider the cumulative and ongoing nature of inadvertent radiological releases at Indian Point, and the complete insufficiency of relying upon past documentation.³⁰ Thus, the pithy comments contained in NMFS’ January 29, 2013 memorandum are clearly inadequate, since they fail to adequately address all of the forward-looking, longer-term concerns related to the potential impact of the radiological releases from Indian Point on endangered resources in the Hudson River. Moreover, while NMFS touts the fact that its final BiOp included a Conservation Recommendation that any contaminant analysis of dead sturgeon include radionuclide sampling, it is wholly unclear that such a limited

²⁵ *Id.*

²⁶ *See generally* Amended Contention RK-EC-8A at Attachment 5 at 8-10.

²⁷ Amended Contention RK-EC-8A at Attachment 5 at 9.

²⁸ NRC Attachment 18 at 25-26.

²⁹ *Id.*

³⁰ *See* Amended Contention RK-EC-8A at Attachment 5 at 10-12.

measure, (which, importantly, is merely advisory and does not carry *any* “binding legal force”³¹), would meaningfully and fully alleviate the concerns raised by Riverkeeper.

And by final way of example, in NMFS’ January 29, 2013 memorandum, NMFS essentially ignores Riverkeeper’s comment that NMFS should have analyzed the efficacy of closed cycle cooling as a reasonable and prudent mitigation measure, by stating that NMFS does not have the authority to require anything more than a “minor change to the basic design of the proposed action.”³² However, NMFS’ apparent lack of authority should not alleviate NMFS’ obligation to appropriately analyze measures available to mitigate impacts to endangered species. In fact, Riverkeeper properly raised concerns about NMFS’ failure to consider any and all available measures that would reduce impacts, which NMFS failed to properly address. For example, plant outages during the times of year when endangered sturgeon are known to be in the vicinity of Indian Point could achieve significant reductions in prospective impacts to such species, and clearly would result in only minor, i.e. zero, plant design changes, yet NMFS failed to consider such a measure.

In sum, NMFS’ apparent “response” to Riverkeeper’s November 23, 2012 comment letter fails to adequately address numerous valid and expert-supported concerns. Contrary to Entergy’s claims,³³ the concerns Riverkeeper identified to NMFS were far from conclusory and unsupported, as they specifically articulated a number of expert-supported concerns, and NRC Staff and Entergy’s identical positions that NMFS took these concerns sufficiently into consideration during the ESA § 7 consultation process is unsupported and untenable. Moreover, correspondence from the NYS DEC dated March 25, 2013, after NMFS’ publication of the final

³¹ NRC Attachment 18 at 27.

³² *Id.* 26-27.

³³ *See* Entergy’s Answer at 2-3, 37.

BiOp related to the proposed license renewal of Indian Point, corroborates many of the concerns raised by Riverkeeper related to NMFS' BiOp and confirms the deficiency of the final BiOp.³⁴

Thus, NRC Staff's reliance on NMFS' final BiOp can properly be characterized as "arbitrary and capricious." NRC Staff cites to precedent that states that "another agency's reliance on [a biological] opinion will satisfy its obligations under the [Endangered Species Act] if a challenging party can point to no 'new' information -- i.e., information the [consultant agency -- NMFS] did not take into account -- which challenges the opinion's conclusions."³⁵ In this case, as the foregoing demonstrates, Riverkeeper has pointed to such information, i.e. information that NMFS did not properly take into account and which challenges and calls into question NMFS' conclusions. As a result, NRC Staff's reliance *is* arbitrary and capricious, and does *not* satisfy the agency's obligations under the ESA.

Based on the foregoing, it is clear that, contrary to NRC Staff and Entergy's claims, NRC Staff's reliance on NMFS' final BiOp was improper. This raises a genuine dispute on clearly material issues of law and fact.

B. Riverkeeper's NEPA Comments were Not Properly Considered in NRC Staff's FSEIS Supplement

While NRC Staff and Entergy spend a great amount of time arguing about the sufficiency of NMFS' final BiOp related to the license renewal of Indian Point³⁶ the crux of Amended Contention RK-EC-8A is the inadequacy of NRC Staff's assessment *in the FSEIS supplement*.

³⁴ See Amended Contention RK-EC-8A at Attachment 9. Notably, both NRC Staff and Entergy attempt to argue that NRC Staff and NMFS "addressed" the concerns raised in NYSDEC's March 25 letter. See NRC Staff's Answer at 19-21; Entergy's Answer at 26-27. However, NRC Staff and NMFS' correspondence back to NYSDEC in relation to NYSDEC's March 25, 2013 letter did not adequately address, and certainly did not resolve, various of the concerns raised by NYSDEC.

³⁵ See NRC Staff's Answer at 26 (citing *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006)).

³⁶ This is a large focus of NRC Staff and Entergy's Answers, notwithstanding NRC Staff and Entergy's argument that it is improper to challenge the adequacy of the merits of NMFS' final BiOp. See NRC Staff's Answer at 31; Entergy Answer at 9, 12. In any event, Riverkeeper addresses this argument further herein, see *infra* § III.

NRC Staff and Entergy have failed to address or resolve the concerns articulated in the amended contention about NRC Staff's patent failure to fully consider all of the comments Riverkeeper, as well as NYSDEC, submitted to NRC. Thus, NRC Staff and Entergy's assertions that Riverkeeper Amended Contention RK-EC-8A lacks adequate basis and fails to raise a genuine dispute on a material issue of law or fact because NRC Staff allegedly addressed the comments submitted by Riverkeeper and NYSDEC are unpersuasive.

NRC Staff and Entergy make unconvincing arguments that all of Riverkeeper's comments were adequately considered:³⁷

i. Riverkeeper's August 20, 2012 NEPA Comments

First, in relation to Riverkeeper's August 20, 2012 comments, NRC Staff speciously complains that Riverkeeper did not "point to or demonstrate any specific deficiency in the Staff's substantive response to its comments."³⁸ This is simply wrong. Amended Contention RK-EC-8 *specifically* described several issues raised in these comments submitted by Riverkeeper and Riverkeeper's experts at Pisces that were left unaddressed in NRC Staff's FSEIS supplement.³⁹ For example, Amended Contention RK-EC-8A pointed out that Riverkeeper's NEPA comments to NRC Staff relating to the validity of NRC Staff's draft conclusion on Indian Point's alleged "small" impacts on endangered shortnose sturgeon, were left insufficiently addressed in the final FSEIS supplement.⁴⁰ Riverkeeper clearly identified a "specific error in the Staff's analysis" of Riverkeeper's August 20, 2012 comments by pointing out that NRC Staff's wholly dismissed

³⁷ Generally, Entergy attempts to minimize NRC Staff's clear obligation to respond to NEPA comments. *See* Entergy's Answer at 10, 32-33. However, applicable regulations plainly establish NRC Staff's obligation to consider public comments in the context of a NEPA review process, and clearly a reviewing agency cannot completely ignore comment submissions, which is exactly what NRC Staff has done, as explained more fully below. *See* Amended Contention RK-EC-8A at 15.

³⁸ NRC Staff's Answer at 13 (emphasis in original).

³⁹ *See* Amended Contention RK-EC-8A at 9, 13.

⁴⁰ *See id.*

Riverkeeper's substantive and lengthy comments with one stock, non-substantive sentence.⁴¹

That is, Riverkeeper identified NRC Staff's superficial, at best, consideration of Riverkeeper's comments.

Entergy similarly argues that Riverkeeper "does not assert that any responses that the [NRC] Staff did provide were insufficient in some way."⁴² This constitutes a complete mischaracterization of Amended Contention RK-EC-8A. While Entergy correctly identifies that the amended contention challenges NRC Staff's failure to address and consider various of Riverkeeper's comments, such a challenge is not tantamount to a concession regarding NRC Staff's "responses" in the FSEIS supplement. In fact, the amended contention specifically did challenge NRC Staff's pithy and stock comment response as wholly insufficient.⁴³

Entergy, like NRC Staff, otherwise fails to establish that NRC Staff adequately considered Riverkeeper's August 20, 2012 comments in the FSEIS supplement. For example, Entergy argues that NRC Staff adequately addressed Riverkeeper's expert comment that the impacts to endangered shortnose sturgeon should be verified by someone with local knowledge, since NRC Staff allegedly "checked with" NMFS, which has such "local knowledge."⁴⁴

However, Pisces' comment, which notably post-dates NMFS' final BiOp related to shortnose

⁴¹ See *id.* at 13.

⁴² Entergy's Answer at 32.

⁴³ See Amended Contention RK-EC-8A at 13. Similarly, Entergy attempts to characterize Amended Contention RK-EC-8A as a contention that "only challenges whether Staff addressed its comments—and not whether it appropriately addressed their substance." Entergy's Answer at 33. This unusual and nonsensical distinction is yet another mischaracterization of Riverkeeper's amended contention. Riverkeeper's challenge of NRC Staff's failure to address Riverkeeper's NEPA comments is clearly a criticism of the *substance* of NRC Staff's response. Entergy has drawn a completely false and unhelpful distinction.

⁴⁴ Entergy's Answer at 35. Notably, Entergy repeatedly mischaracterizes Pisces' statement that NRC Staff's initial conclusion regarding the SMALL level of impact on endangered shortnose sturgeon posed by the proposed relicensing of Indian Point was "not unreasonable." See, e.g., Entergy's Answer at 22. In fact, Pisces' statement was a qualified statement, contingent upon verification with local independent expertise. See Amended Contention RK-EC-8A at Attachment 7 at Att. A at 3. Entergy's attempt to repeatedly mischaracterize Pisces' comments as a blanket agreement with NRC Staff's assessment and conclusions related to endangered species impacts at Indian Point in the FSEIS supplement is misleading and incorrect.

sturgeon, clearly implies Pisces' recommendation that someone with *independent* and *local* knowledge, i.e., *not* NMFS, conduct an analysis and provide an opinion. Notably, NMFS is a Federal agency with regional and national expertise, and has not demonstrated that it has *local* expertise. Thus, despite Entergy's attempt to manipulate and distort Riverkeeper's comments and NRC Staff's "responses" thereto, Amended Contention RK-EC-8A establishes NRC Staff's failure to adequately address the comments raised in Riverkeeper's August 20, 2012 comment submission to NRC.

ii. Riverkeeper's April 29, 2013 NEPA Comments

NRC Staff and Entergy dispute the timeliness of Riverkeeper's April 29, 2013 NEPA comments to NRC, and otherwise claim that NRC Staff adequately considered these comments. However, these positions are baseless, and the fact remains that NRC Staff improperly failed to address the critical concerns articulated in Riverkeeper's April 29, 2013 comments.

NRC Staff concedes that it "did not address [Riverkeeper's] April 29, 2013 comments in the FSEIS Supplement."⁴⁵ NRC Staff attempts to justify this lapse by arguing that Riverkeeper's comments were not submitted in a timely manner and that it was, therefore, allegedly not "practical" for NRC Staff to consider them.⁴⁶ Entergy parrots this position.⁴⁷ However, in Amended Contention RK-EC-8A, Riverkeeper clearly explained why it was highly "practical" and, indeed, necessary for NRC Staff to consider Riverkeeper's post-comment deadline comments.⁴⁸ To reiterate and clarify, Riverkeeper's April 29, 2013 comments were filed after the comment deadline on NRC Staff's draft FSEIS supplement because they related to NMFS'

⁴⁵ NRC Staff's Answer at 15.

⁴⁶ *Id.* at 16, 19.

⁴⁷ *See* Entergy's Answer at 26, 36, 46.

⁴⁸ Amended Contention RK-EC-8A at 13-15.

final BiOp, which was issued *after* the comment deadline had already passed. Riverkeeper filed the comments in a manner that can properly be characterized as timely given the relative nature of the Indian Point license renewal proceeding and NRC Staff's environmental review process.

That is, given NRC Staff's lengthy supplemental environmental review process, which lasted over a year and a half and entailed numerous extensions of the contemplated date for the issuance of the final FSEIS supplement, it was not unreasonable to assume that the date NRC Staff "expected" to publish the final FSEIS supplement could or would shift, especially in order to accommodate relevant and critical public comments. Indeed, while NRC Staff complains that Riverkeeper filed its comments on April 29, 2013, a day before an earlier NRC Staff representation that the final FSEIS supplement would be published on April 30, 2013, NRC Staff conveniently minimizes the fact that, as had occurred numerous times already, that "expected" publication date was not met, and that the final FSEIS was not published until mid-June 2013. Given NRC Staff's unpredictable and cavalier approach to managing the timelines of its Indian Point license renewal reviews, it was not unreasonable at all to fully expect NRC Staff to consider Riverkeeper's April 29, 2013 comments. Moreover, given that Riverkeeper's comments pertained directly to the limited subject matter of the FSEIS supplement, i.e., endangered species impacts, as a matter of practicality and sound process, NRC Staff clearly should have considered Riverkeeper's comments.

In addition, NRC Staff complains that Riverkeeper should have advised NRC Staff that NRC Staff should have reviewed the November 23, 2013 comments to NMFS that Riverkeeper appended to its April 29, 2013 NEPA submission, at the time of Riverkeeper's submission to NMFS.⁴⁹ However, those comments to NMFS were on NMFS' *draft* BiOp related to the

⁴⁹ See NRC Staff's Answer at footnote 53 and pp. 18-19.

proposed license renewal of Indian Point. It only became apparent that NMFS had improperly considered Riverkeeper's comments once NMFS issued its final BiOp on January 30, 2013. It was, thus, only at that time necessary for NRC Staff to consider those comments, which is precisely why Riverkeeper submitted supplemental NEPA comments to NRC Staff in April 2013.

In sum, NRC Staff and Entergy's arguments about the timeliness of Riverkeeper's April 29, 2013 NEPA comments to NRC Staff are unconvincing, and it was entirely "practical" for NRC Staff to consider these comments in the FSEIS supplement.

However, NRC Staff and Entergy go on to argue that, even though NRC Staff failed to even acknowledge, let alone address, Riverkeeper's April 29, 2013 NEPA comments to NRC, that its obligation was somehow satisfied by virtue of the fact that NMFS allegedly considered Riverkeeper's comments "prior to the issuance of its final BiOp."⁵⁰ NRC Staff and Entergy argue that because NMFS allegedly considered Riverkeeper's concerns, NRC Staff was not required to "'undertake a separate, independent analysis' of the issues" raised by Riverkeeper.⁵¹ This is simply not correct.

A critical basis of Amended Contention RK-EC-8A is the fact that NMFS failed to adequately address Riverkeeper's comments, which resulted in a deficient final BiOp relating to the proposed license renewal of Indian Point.⁵² The insufficiency of NMFS' final BiOp was apparent based upon the text of the final BiOp, which patently failed to adequately address Riverkeeper's concerns. Riverkeeper was first alerted only approximately one week ago to the fact that NMFS actually discussed Riverkeeper's concerns via a previously non-public

⁵⁰ NRC Staff's Answer at 17; *see also id.* at 19; Entergy's Answer at 3, 8, 9-10, 11, 19, 30, 32.

⁵¹ NRC Staff's Answer at 17-18, 26 (citing *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006)).

⁵² *See* Amended Contention RK-EC-8A at 10-11.

memorandum dated January 29, 2013.⁵³ However, for the reasons already discussed above, NMFS' January 29, 2013 memorandum failed to sufficiently address Riverkeeper's comments.⁵⁴ Put simply, the assertion that Riverkeeper's comments were "reasonably considered"⁵⁵ rings hollow since Riverkeeper raised valid, expert-supported concerns that were, in most respects disregarded and/or inadequately addressed.⁵⁶

In light of the insufficiency of NMFS' final BiOp, Riverkeeper submitted its April 29, 2013 comments to NRC Staff, which appended and incorporated by reference Riverkeeper's prior comments to NMFS.⁵⁷ Riverkeeper did not actually ask for NRC Staff to weigh in specifically on NMFS' consideration of Riverkeeper's comments, but rather, indicated to NRC Staff that "the issuance of NMFS' Final BiOp is [not] dispositive for purposes of NRC's conclusions regarding impacts to endangered species in the Indian Point FSEIS."⁵⁸ Thus, Riverkeeper was essentially requesting, pursuant to *NEPA*, that NRC Staff consider and address, *in the FSEIS supplement*, the substantive concerns raised in Riverkeeper's previous comment letter to NMFS, notwithstanding NMFS' treatment of those concerns. This is consistent with the fact that Amended Contention RK-EC-8A is a contention challenging the adequacy of *NRC Staff's NEPA* review of Riverkeeper's comments, as discussed further below.⁵⁹

Because, as discussed above, NMFS did *not* adequately consider and address Riverkeeper's concerns, NRC Staff's reliance on NMFS' final BiOp was improper and arbitrary

⁵³ See NRC Attachment 18.

⁵⁴ See *supra* § II.A.

⁵⁵ See Entergy's Answer at 3, 11, 30, 32.

⁵⁶ See *supra* § II.A.

⁵⁷ See Riverkeeper Amended Contention RK-EC-8A at Attachment 8.

⁵⁸ See *id.*

⁵⁹ See *infra* § III.

and capricious,⁶⁰ and NRC Staff and Entergy cannot simply point to NMFS' final BiOp in lieu of considering Riverkeeper's April 29, 2013 NEPA comments in the FSEIS supplement. Because Riverkeeper raised information and concerns that NMFS did not adequately take into account, and such information undermined and called into question NMFS' assessment and conclusions,⁶¹ NRC Staff was obligated to address Riverkeeper's April 29, 2013 in its NEPA process. That is, contrary to NRC Staff and Entergy's arguments, a separate, independent analysis of Riverkeeper's April 29, 2013 comments by NRC Staff was, in fact, necessary. Despite NRC Staff and Entergy's protestations that Riverkeeper did not provide any "new" information via its April 29, 2013 comments that was not previously "considered,"⁶² as explained above, NMFS did *not* adequately consider Riverkeeper's concerns, and, thus, NRC Staff was obligated to address the information presented via Riverkeeper's April 2013 NEPA submission.

Notably, Entergy focuses a large portion of its Answer detailing NMFS' alleged responses to Riverkeeper's concerns.⁶³ This line of argument is misguided. As already discussed above, NMFS' discussion of Riverkeeper's concerns was clearly not dispositive since it did not address all of the expert-supported deficiencies Riverkeeper identified in NMFS' final BiOp.⁶⁴ Moreover, Amended Contention RK-EC-8A challenges *NRC Staff's* failure to address Riverkeeper's NEPA comments, not NMFS' treatment of Riverkeeper's concerns. Nothing in Entergy's Answer disturbs the fact that NRC Staff's FSEIS supplement is improperly devoid of a discussion of Riverkeeper's NEPA comments. After a lengthy discussion of *NMFS'* alleged responses to Riverkeeper's comments, Entergy jumps to the unsupported conclusion that such

⁶⁰ See *supra* § II.A.

⁶¹ See *id.*

⁶² See NRC Staff's Answer at 18-19, Entergy Answer at 26, 36, 46.

⁶³ See Entergy's Answer at 35-43

⁶⁴ See *supra* § II.A.

responses are somehow tantamount to NRC Staff directly addressing Riverkeeper's comments.⁶⁵ However, Entergy's drawn-out and flawed discussion of NMFS' "responses" to Riverkeeper's concerns simply fails to justify *NRC Staff's* failure to address Riverkeeper's concerns.

In light of NMFS' deficient final BiOp concerning the proposed license renewal of Indian Point, NRC Staff should have fully considered Riverkeeper's April 29, 2013 NEPA comments. However, NRC Staff admittedly did not address, or even acknowledge receipt of, Riverkeeper's April 29, 2013 NEPA comments in the FSEIS supplement. For this reason, the FSEIS supplement, and NRC Staff's NEPA review remains inadequate.

Based on the foregoing, it is clear that, contrary to NRC Staff and Entergy's claims, NRC Staff did not adequately consider Riverkeeper's various comment submissions in the FSEIS supplement. NRC Staff's failure to fully consider Riverkeeper's comments constitutes an adequate basis for Amended Contention RK-EC-8A and establishes genuine disputes on clearly material issues of law *and* fact.

In addition, Riverkeeper's position that NRC Staff also improperly failed to consider critical concerns raised by NYSDEC remains valid. That is, correspondence cited to by NRC Staff and Entergy from NRC Staff and NMFS to NYSDEC in alleged response to NYSDEC's March 25, 2013 comment letter, did not adequately address, and certainly did not resolve, various of the concerns raised by NYSDEC.⁶⁶ Moreover, given the validity of the concerns raised by NYSDEC and the critical relevance of NYSDEC letter to the NRC Staff's supplemental environmental review process, it was clearly practical, as well as a matter of sound process, for NRC Staff to consider NYSDEC's comments in the context of NRC Staff's NEPA

⁶⁵ See Entergy's Answer at 46.

⁶⁶ See NRC Staff's Answer at 19-21; Entergy's Answer at 26-27; Amended Contention RK-EC-8A at Attachment 9.

review. NRC Staff's failure to even acknowledge NYSDEC's concerns or address them, was clearly improper as well.

III. Amended Contention RK-EC-8A Does Not Constitute a Direct Challenge to the Merits of NMFS' Final Indian Point License Renewal BiOp

Both NRC Staff and Entergy attempt to characterize Amended Contention RK-EC-8A as an improper attack on "the merits of NMFS' final BiOp."⁶⁷ Entergy goes so far as to characterize Amended Contention RK-EC-8A as a contention that "fundamentally challenges whether the NRC Staff adequately implemented and participated in the ESA consultation process."⁶⁸ However, NRC Staff and Entergy mischaracterize Amended Contention RK-EC-8A, which only raises issues that are properly within the scope of the instant proceeding.

In particular, Amended Contention RK-EC-8A is simply *not* a direct challenge to the merits of NMFS' final BiOp. To be sure, the amended contention, and even more so the instant Reply, certainly discuss NMFS' failure to adequately address Riverkeeper expert-supported comments. However, this is only to put the issue that Riverkeeper is challenging into context. That is, Amended Contention RK-EC-8A squarely, and only, challenges the sufficiency of NRC Staff's FSEIS supplement, and whether or not NRC Staff adequately addressed Riverkeeper and NYS comment submissions in the context of NRC Staff's supplemental environmental review process pursuant to NEPA.

Notably, Riverkeeper's discussion above regarding NMFS' failure to address Riverkeeper's comments stems directly from NRC Staff and Entergy's positions that NRC Staff properly relied upon NMFS' final BiOp related to the proposed license renewal of Indian Point. As a result of NRC Staff and Entergy's positions that NRC Staff's reliance on NMFS' final BiOp

⁶⁷ See NRC Staff's Answer at 31-33; Entergy's Answer at 9, 12.

⁶⁸ Entergy's Answer at 12.

was not “arbitrary and capricious” and that, as a result, no review of Riverkeeper’s comments in the FSEIS supplement was required, it became necessary for Riverkeeper to engage in the details about why NMFS’ final BiOp was inadequate and deficient. However, this discussion simply explains the context of the contention, and does not change the fundamental fact that the actual basis for Amended Contention RK-EC-8A is the inadequacy of NRC Staff’s NEPA assessment.

NRC Staff and Entergy’s attempts to mischaracterize Amended Contention RK-EC-8A as an improper challenge to NMFS’ final BiOp is unfounded and incorrect.

IV. NRC Staff’s FSEIS Supplement is Deficient for Failing to Incorporate an Update to NRC Staff’s Recommendation to the Commission

NRC Staff and Entergy both dispute the second basis for Riverkeeper’s Amended Contention RK-EC-8A, which raised NRC Staff’s failure to include an articulation of or revision to NRC Staff’s recommendation to the Commission regarding the appropriateness of license renewal for Indian Point in light of NRC Staff’s consideration of new and significant information in its supplemental environmental review process.⁶⁹ Both NRC Staff and Entergy argue that NRC Staff’s supplemental review process did not implicate any changes in impact findings, and that as a result, no revised recommendation was necessary.⁷⁰ NRC Staff essentially says that it failed to update its recommendation to the Commission simply because the alleged and apparent ongoing applicability of NRC Staff’s previous recommendation was so “obvious.”⁷¹

However, NRC Staff and Entergy’s failure to formally adjust its recommendation to the Commission despite that fact that NRC Staff undertook a wholly supplemental NEPA review process, fails to heed the plain language, as well as intent and purpose, of NEPA and its implementing regulations. That is, NRC regulations clearly specify that the NRC Staff’s

⁶⁹ NRC Staff’s Answer at 33-35; Entergy’s Answer at 3-4, 10-11, 11-12, 30, 46-49.

⁷⁰ See NRC Staff’s Answer at 33-35; Entergy’s Answer at 3-4, 10-11, 11-12, 30, 46-49.

⁷¹ See NRC Staff’s Answer at 33.

recommendation to the Commission regarding the appropriateness of nuclear power plant license renewal must be based on the *integrated* analyses and conclusions of NRC Staff in its environmental impact statement(s), including any “new and significant information.”⁷²

Yet, NRC Staff and Entergy complain that there is not a “seriously different picture” to warrant an update to NRC Staff’s recommendation to the Commission.⁷³ This is completely belied by the fact that there was a “serious” enough of a different picture, i.e., new and significant information, so as to warrant an entirely supplemental and new environmental review process. If such information was so different from NRC Staff’s initial assessment so as to result in a supplemental environmental impact statement, it follows that an update to the conclusions stemming from that supplemental analysis is also warranted. For this reason, as explained more fully in Riverkeeper’s Amended Contention RK-EC-8A, NRC Staff’s failure to update its recommendation to the Commission is an appropriate and adequately supported basis for the amended contention.⁷⁴

Notably, Entergy attempts to refute this basis of Amended Contention RK-EC-8A by stating that Riverkeeper failed to provide factual and expert support.⁷⁵ In doing so, Entergy completely mischaracterizes and misconstrues Riverkeeper’s and Riverkeeper’s expert’s position.⁷⁶ As an initial matter, this basis of Amended Contention RK-EC-8A is based upon the plain language of NRC regulations and NRC Staff’s failure to incorporate an integrated and

⁷² See 10 C.F.R. § 51.95(c)(4); *see also generally* Amended Contention RK-EC-8A.

⁷³ See Entergy’s Answer at 10; *see also* NRC Staff’s Answer at 33-35.

⁷⁴ See *generally* Amended Contention RK-EC-8A at 16-19.

⁷⁵ See Entergy’s Answer at 48.

⁷⁶ *Id.*

revised final recommendation in its FSEIS supplement.⁷⁷ There is, thus, adequate support for this basis of Amended Contention RK-EC-8A.

Moreover, the ASLB must disregard Entergy's blatant mischaracterization of Riverkeeper's position regarding the adequacy of NRC Staff's conclusions in the FSEIS supplement. In particular, Entergy attempts to argue that Riverkeeper's expert consultant, Pisces, agreed with NRC Staff's conclusions in the FSEIS supplement.⁷⁸ This is simply not the case, and Riverkeeper Amended Contention RK-EC-8A plainly and repeatedly establishes Riverkeeper's expert-supported disagreement with NRC Staff's conclusions in the FSEIS.⁷⁹

In sum, there remains adequate support for the second basis of Riverkeeper's Amended Contention RK-EC-8A.

CONCLUSION

For the foregoing reasons, NRC Staff and Entergy's Answers to Riverkeeper's Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A are unpersuasive, and the ASLB should admit Riverkeeper's Amended Contention RK-EC-8A for adjudication in the Indian Point license renewal proceeding.

Respectfully submitted,

Signed (electronically) by Deborah Brancato

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⁷⁷ See generally Amended Contention RK-EC-8A at 16-19.

⁷⁸ See Entergy's Answer at 48.

⁷⁹ See generally Amended Contention RK-EC-8A; see also *supra* Note 44.

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))	October 8, 2013

CERTIFICATE OF SERVICE

I certify that on October 8, 2013 copies of Riverkeeper, Inc. Combined Reply to NRC Staff and Entergy Answers to Riverkeeper’s Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A, were served on the following by NRC’s Electronic Information Exchange:

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October 8, 2013