

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)		
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 3, 2014
_____)		

**PETITION TO SUSPEND FINAL DECISION IN INDIAN
POINT RELICENSING PROCEEDING PENDING ISSUANCE OF
WASTE CONFIDENCE SAFETY FINDINGS**

I. INTRODUCTION

On September 19, 2014, the U.S. Nuclear Regulation Commission (“NRC” or “Commission”) issued the final Continued Storage Rule (the “Rule”) and supporting Generic Environmental Impact Statement (the “GEIS”).¹ This Rule and GEIS fail to include Waste Confidence safety findings regarding spent fuel disposal. As explained in the accompanying Contention, RK-10, the NRC lacks a lawful basis under the Atomic Energy Act (“AEA”) to issue a license renewal determination in the above-captioned proceeding until it makes valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during the proposed extended operating terms of Indian Point Units 2 and 3 can be safely disposed of in a repository.² In the absence of such findings, the NRC fails to satisfy the AEA’s mandate to protect public health and safety from the risks posed by irradiated

¹ 79 Fed. Reg. 56,238 (Sept. 19, 2014) and 79 Fed. Reg. 56,263 (Sept. 19, 2014).

² The Contention, entitled “Failure to Make Atomic Energy Act-Required Safety Findings Regarding Spent Fuel Disposal Feasibility and Capacity,” is presented in Section III of the attached Motion for Leave to File a New Contention. The contention is incorporated by reference herein.

reactor fuel. Therefore, pursuant to the AEA, petitioner Riverkeeper (“petitioner”) respectfully requests the Commission to suspend any final relicensing decision in the Indian Point license renewal proceeding pending completion of the required safety findings regarding spent fuel disposal.

The instant pleading is essentially identical to a petition that was filed recently by a number of other petitioners in various other pending licensing and relicensing proceedings across the United States.³ As the same legal requirements discussed in that petition are applicable to the Indian Point license renewal proceeding, Riverkeeper herein and by this filing joins in the request for the suspension of licensing decisions, with particular respect to any decision regarding the license renewal Indian Point Units 2 and 3.

Petitioner recognizes that historically the Commission has addressed the issue of waste confidence generically. Given that spent fuel disposal safety issues are common to all reactors, Petitioner believe that generic approach was appropriate. In the Continued Storage rulemaking, however, the Commission distinguished between generic findings under the National Environmental Policy Act (“NEPA”) and site-specific findings under the AEA, and stated that it would make AEA safety findings in individual reactor licensing proceedings.⁴ Therefore, while Petitioner’s concerns are generic in nature, Riverkeeper is raising those concerns by contemporaneously filing a contention in the Indian Point license renewal proceeding,⁵ similar to other petitioners’ filing of similar contentions in other proceedings. The filing of contentions in individual proceedings, such as the filing of RK-10 in the Indian Point license renewal

³ Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (September 29, 2014), as amended by Errata to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (October 1, 2014).

⁴ 79 Fed. Reg. at 56,243-44; Continued Storage GEIS at D-9.

⁵ Riverkeeper Consolidated Motion for Leave to File a New Contention and New Contention Concerning the Absence of Required Waste Confidence Safety Findings (October 3, 2014).

proceeding, is also consistent with the U.S. Court of Appeals' holding in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), that waste confidence findings apply to every reactor licensing decisions and indeed "enable" those decisions. *Id.* at 477.

II. DESCRIPTION OF PETITIONER

Petitioner is an organization dedicated to the protection of the Hudson River. Petitioner is concerned about the environmental and public health risks posed by the storage and ultimate disposal of spent fuel that has been and will continue to be generated at the Indian Point nuclear power plant, which sits on the banks of the Hudson River in Buchanan, NY. Riverkeeper's offices are located in Ossining, NY, within 10 miles of the Indian Point plant. Riverkeeper is currently an intervenor in the Indian Point license renewal proceeding, and has actively raised concerns about spent fuel throughout that process.

Petitioner now seeks to protect the health of its members, the health of future generations, and the health of the environment, by ensuring that the NRC does not make any final relicensing decision in the Indian Point license renewal proceeding unless and until the requisite safety findings regarding the technical feasibility of spent fuel disposal and repository capacity have been made.

III. FACTUAL BACKGROUND

As discussed in greater detail in the accompanying Contention RK-10, the NRC has consistently interpreted the AEA to require that at the time of reactor licensing, the NRC must make Waste Confidence safety findings regarding the safety of ultimate spent fuel disposal. As the NRC stated in 1977, it "would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely."⁶ Since 1984, the

⁶ Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977).

NRC also has repeatedly issued technical safety findings regarding the feasibility and capacity of spent fuel repositories.⁷ These findings were supported by a technical analysis of the feasibility and capacity of a repository, including geologic characteristics, waste packaging, and engineered safety barriers.⁸ In compliance with a U.S. Court of Appeals ruling in *Minnesota v. NRC*, 602 F.2d 412, 418-19 (D.C. Cir. 1979), the NRC used notice and comment rulemaking procedures to promulgate the Waste Confidence Decision (“WCD”) and its revisions.

As stated most recently in the 2010 WCD Update, the NRC’s relevant safety findings were as follows:

Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.⁹

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.¹⁰

The 2010 WCD Update, however, was vacated by the U.S. Court of Appeals in *New York* for failure to comply with NEPA.¹¹ In the final Rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings.¹²

⁷ Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) (“2010 WCD Update”). The 2010 WCD Update was vacated by the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

⁸ See, e.g., 2010 WCD, 75 Fed. Reg. at 81,058-59.

⁹ Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,058 (Dec. 23, 2010) (“2010 WCD Update”) (vacated, *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)).

¹⁰ *Id.*, 75 Fed. Reg. at 81,037. The 2010 WCD Update also contained three other Findings related to the safety of spent fuel storage pending disposal (as opposed to the safety of spent fuel disposal itself). Without conceding the validity of these storage-related findings, they are not challenged in the attached Contention or this Petition to Suspend.

¹¹ 42 U.S.C. §§ 4321-4370h.

¹² 79 Fed. Reg. at 56,254. See also NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel Rule at D-30 (Sept. 2014).

IV. ARGUMENT: THE COMMISSION MUST SUSPEND ALL LICENSING DECISIONS, INCLUDING IN THE INDIAN POINT LICENSE RENEWAL PROCEEDING, PENDING COMPLETION OF AEA-REQUIRED WASTE CONFIDENCE SAFETY FINDINGS.

As set forth in detail in the attached Contention RK-10 and summarized below, under the plain language of the AEA, the NRC's own precedents, and applicable case law, the AEA requires the Commission to issue predictive safety findings regarding the safety of disposing of spent nuclear fuel prior to issuing any reactor licensing decision. By failing to re-promulgate generic Waste Confidence safety findings or to make them in individual reactor licensing and re-licensing proceedings, the NRC now lacks any legal basis for licensing or re-licensing any reactor, including relicensing Indian Point Units 2 and 3. Therefore, it must suspend making final licensing decisions, including in the Indian Point license renewal proceeding, until it completes such findings.

First, the plain language of the AEA requires the NRC to provide reasonable assurances that the public's health and safety will not be unreasonably endangered by spent nuclear fuel. Section 182 of the AEA compels the Commission to ensure that "the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). Furthermore, the statute requires the NRC to demonstrate this reasonable assurance prior to issuing reactor licenses. The Commission is explicitly prohibited from licensing a reactor if "the issuance of a license . . . would be inimical to . . . the health and safety of the public." 42 U.S.C. § 2133(d). The Act, thus, mandates that NRC condition the issuance of reactor licenses or license renewals on a predictive finding of confidence that spent fuel will not endanger public health and safety. Having omitted these required safety findings from the Rule and having failed to make them in any individual licensing proceeding, the NRC

has no lawful basis under the AEA to issue licensing decisions, including in the Indian Point license renewal proceeding.

The NRC's failure to make Waste Confidence safety findings is also inconsistent with the Commission's own precedents. As discussed above, historically, the NRC interpreted the AEA to mandate such safety findings, and assured the public that it would not issue reactor licenses unless it was confident that spent fuel could be safely disposed of. After the U.S. Court of Appeals for the D.C. Circuit vacated the Waste Confidence findings for failure to comply with NEPA, however, the NRC dropped the generic Waste Confidence findings. Petitioner respectfully submits that the agency's prior interpretation requiring safety findings more accurately complies with the statutory mandate of the AEA.

Judicial opinions have also interpreted the AEA as mandating predictive safety findings prior to reactor licensing. In vacating the 2010 WCD, the D.C. Circuit cited approvingly to the NRC's historical reliance on generalized findings of reasonable confidence prior to reactor licensing. *New York*, 681 F.3d at 474. The *New York* decision quoted language from the court's 1979 opinion in *Minnesota v. NRC*, which directed the Commission to consider the reasonable assurance of safety of spent fuel storage. *Id.* ("In *Minnesota*, we directed the Commission to consider whether 'there is reasonable assurance . . . that fuel can be stored safely.'") (citing *Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979)).

Accordingly, the NRC's failure to make safety findings regarding the technical feasibility of spent fuel disposal and the adequacy of future repository capacity violates the AEA's mandate, the agency's own historical interpretations of the AEA, and judicial precedent. The NRC must either issue new generic Waste Confidence safety findings or it must address the same issues in individual reactor licensing proceedings. New Waste Confidence findings must

be subject to a hearing or promulgated with notice and comment, as required by *Minnesota*. And they must be supported by an environmental impact statement or environmental assessment, as required in *New York*. 681 F.3d at 476.

V. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)

Pursuant to 10 C.F.R. § 2.323(b), Riverkeeper certifies that it made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in accompanying contention RK-10 and Riverkeeper's request for licensing decision suspension, and to resolve those issues, and that those efforts have been unsuccessful. While the State of New York does not oppose this filing and Clearwater supports the filing, counsel for NRC Staff has indicated that NRC Staff is likely to oppose the filing, and counsel for Entergy has indicated that Entergy opposes the filing.

VI. CONCLUSION

For the foregoing reasons, this Petition should be granted. The Commission should issue an order that suspends all final nuclear licensing decisions, including any final decision in the Indian Point license renewal proceeding pending completion of AEA-required safety findings regarding spent fuel disposal.

Respectfully submitted,

Signed (electronically) by
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October 3, 2014

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NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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(Indian Point Nuclear Generating)	
Units 2 and 3))	October 3, 2014
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CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 (as revised), I hereby certify that copies of the foregoing “Petition to Suspend Final Decision in Indian Point Relicensing Proceeding Pending Issuance of Waste Confidence Findings,” dated October 3, 2014, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

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