

October 15, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/286-LR
)
(Indian Point Nuclear Generating)
 Units 2 and 3)

NRC STAFF'S RESPONSE TO STATE OF NEW YORK,
RIVERKEEPER, AND CLEARWATER'S BRIEF CONCERNING
CONTENTION NYS-39/RK-EC-9/CW-EC-10 AND THE
ON-SITE STORAGE OF NUCLEAR WASTE AT INDIAN POINT"

INTRODUCTION

In accordance with the Atomic Safety and Licensing Board's ("Board") "Order (Requesting Briefs on NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4)" ("Order"), issued on September 17, 2014, the NRC Staff ("Staff") hereby responds to the "State of New York, Riverkeeper, and Clearwater's Brief Concerning Contention NYS-39/RK-EC-9/CW/EC-10 and the On-Site Storage of Nuclear Waste at Indian Point" ("Intervenors' Brief"), filed on October 1, 2014. For the reasons set forth below, the Staff submits that the Intervenors' Brief fails to demonstrate any reason why Contention NYS-39/RK-EC-9/CW-EC-10 should not be dismissed at this time;¹ further, the Staff submits that dismissal of Contention NYS-39/RK-EC-9/CW-EC-10 is now appropriate in accordance with the Commission's decision in CLI-14-08² and established NRC jurisprudence.

¹ Simultaneously herewith, the Staff is filing its response to the separate brief filed by Hudson River Sloop Clearwater, Inc. ("Clearwater") concerning the admissibility of Contention CW-SC-4. See "NRC Staff's Response to Hudson River Sloop Clearwater, Inc.'s Brief Regarding Contention SC-4" (Oct. 15, 2014) ("Staff's Brief on CW-SC-4").

² *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC ___ (Aug. 26, 2014) (slip op.).

BACKGROUND³

On August 31, 1984, the Commission issued its Waste Confidence Decision (“WCD”).⁴

Therein, the Commission made five central determinations, finding “reasonable assurance” that:

- (1) Safe disposal of HLW [High Level Waste] and SNF [Spent Nuclear Fuel] in a mined geologic repository is technically feasible;
- (2) One or more mined geologic repositories for commercial HLW and SNF will be available by the years 2007-2009, and sufficient repository capacity will be available within 30 years beyond the expiration of any reactor operating license to dispose of existing commercial HLW and SNF originating in such reactor and generated up to that time;
- (3) HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF;
- (4) If necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating license at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations (ISFSIs); and
- (5) Safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed.⁵

In 1990, the Commission issued an update to the WCD, in which it revised Findings (2) and (4), finding reasonable assurance that:

- (2) At least one mined geologic repository will be available within the first quarter of the 21st century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time;

³ This background summary is identical to the “Background” section contained in the Staff’s Brief on CW-SC-4, at 2-6. It is included in both briefs for ease of reference by the reader.

⁴ Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984).

⁵ *Id.* at 34,659-60; emphasis added.

(4) If necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years 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 ISFSIs.⁶

In 1999, the Commission again reviewed the WCD, and left it in place without revision.⁷

In 2010, following its consideration of public comments on a proposed rule, the Commission adopted a second update to the WCD.⁸ Therein, the Commission (a) reaffirmed three of its previous WCD Findings, and (b) updated WCD Findings (2) and (4), finding reasonable assurance that:

(2) 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.

(4) If necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.⁹

Based on these determinations, the Commission then amended 10 C.F.R. § 51.23(a) in the Temporary Storage Rule (“TSR”).¹⁰

The Commission’s 2010 revision of 10 C.F.R. § 51.23(a) was challenged by New York and other petitioners, in a petition filed before the U.S. Court of Appeals for the District of Columbia Circuit. On June 8, 2012, the court rendered its decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), in which it held, *inter alia*, that the Commission’s 2010 WCD

⁶ Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,505 (Sept. 18, 1990); emphasis added.

⁷ Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,006-07 (Dec. 6, 1999).

⁸ Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

⁹ *Id.* at 81,038; emphasis added.

¹⁰ Final Rule, “Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation,” 75 Fed. Reg. 81,032 (Dec. 23, 2010).

Update and its revision of 10 C.F.R. § 51.23(a) were invalid. Specifically, the court found that the Commission's evaluation of the risks of spent nuclear fuel was deficient in that: (a) the Commission's conclusion that permanent storage will be available when necessary "did not calculate the environmental effects of failing to secure permanent storage,"¹¹ and (b) its determination that spent fuel can safely be stored at nuclear plant sites for sixty years after the expiration of the plant's license "failed to properly examine future dangers and key consequences,"¹² by not properly examining "the risk of [spent fuel pool] leaks" and "the potential consequences of pool fires."¹³ On this basis, the court vacated the Commission's WCD Update and Temporary Storage Rule, and remanded the matter to the Commission.¹⁴

The court's ruling in *New York v. NRC* prompted the filing of new contentions in various NRC proceedings. As pertinent here, on July 8 and 9, 2012, the Intervenors in this proceeding filed two new contentions (Contentions NYS-39/RK-EC-9/CW-EC-10¹⁵ and CW-SC-4¹⁶); answers to those contentions were filed by the Staff and Entergy Nuclear Operations, Inc. ("Entergy") on August 2¹⁷ and August 3, 2012.¹⁸

¹¹ *New York v. NRC*, 681 F.3d at 473; *cf. id.* at 478-79.

¹² *Id.* at 473; *cf. id.* at 478-79.

¹³ *Id.* at 479; *cf. id.* at 481-82.

¹⁴ *Id.* at 483.

¹⁵ See "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" (July 8, 2012); and "State of New York, Riverkeeper, Inc., and Hudson River Sloop Clearwater's Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the On-Site Storage of Nuclear Waste at Indian Point" (July 8, 2012).

¹⁶ See "Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add A New Contention Based Upon New Information and Petition to Add New Contention" (July 9, 2012) ("Motion"); Clearwater attached to its Motion the, "Expert Witness Declaration of Arnold Gundersen Regarding Aging Management of Nuclear Fuel Racks" (Feb. 25, 2011) ("Gundersen Declaration"), and the "Prefiled Direct Testimony of Arnold Gundersen Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" (Dec. 22, 2011) (Exh. RIV000060) ("Gundersen Testimony").

¹⁷ See (1) "NRC Staff's Response to Intervenors' [] Joint Motion for Leave to File A New Contention Concerning the Onsite Storage of Nuclear Waste at Indian Point and [] Joint Contention NYS-39/RK-EC-9/CW-EC-10" (Aug. 2, 2012); and (2) "Entergy's Answer to New York State, Riverkeeper,

On August 7, 2012, the Commission issued CLI-12-16, in which it announced that it “will not issue licenses dependent upon the [WCD] or Temporary Storage Rule until the court’s remand is appropriately addressed.”¹⁹ Further, the Commission stated that “[t]o the extent that [it] takes action with respect to waste confidence on a case-by-case basis, litigants can challenge such site-specific agency actions” in NRC adjudications; and it directed the Boards to hold all of the newly filed waste confidence/temporary storage contentions in abeyance pending further Commission order.²⁰ In accordance with CLI-12-16, on August 8, 2012, this Board ordered that all pleadings concerning Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4 be held in abeyance pending further order.²¹

On August 26, 2014, the Commission issued its decision in CLI-14-08.²² Therein, the Commission lifted its suspension of final licensing decisions, based on its issuance of a generic environmental impact statement (“GEIS”) and a revised rule codifying its generic determinations regarding the environmental impacts of continued spent fuel storage beyond a reactor’s licensed operating life.²³ In addition, the Commission dismissed the long term storage/waste

and Clearwater’s Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning On-Site Storage of Nuclear Waste at Indian Point” (Aug. 2, 2012).

¹⁸ See (1) “NRC Staff’s Answer to ‘Hudson River Sloop Clearwater, Inc.’s Motion for Leave to Add A New Contention Based Upon New Information and Petition to Add New Contention’ (Contention CW-SC-4 (Safety of Long-Term Storage))” (Aug. 3, 2012) (“Staff Answer”); and (2) “Entergy’s Answer to Hudson River Sloop Clearwater, Inc.’s New Safety Contention Concerning the Waste Confidence Rule” (Aug. 3, 2012).

¹⁹ *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 (Aug. 7, 2012).

²⁰ *Id.* at 67-69.

²¹ “Order (Holding Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4 in Abeyance)” (Aug. 8, 2012).

²² *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC ____ (Aug. 26, 2014) (slip op.).

²³ See NUREG-2157, “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” (Aug. 2014) (“GEIS”) (ADAMS Accession No. ML14188B749); “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” 79 Fed. Reg. 56,263 (Sept. 19, 2014); Final Rule, “Continued Storage of Spent Nuclear Fuel,” 79 Fed. Reg. 56,238 (Sept. 19, 2014).

confidence-related contentions in seven combined license (“COL”) and license renewal proceedings and terminated those proceedings, and it directed the Boards in all proceedings other than *Indian Point* to reject the spent fuel storage/waste confidence contentions pending before them. Finally, the Commission directed the Board in *Indian Point* to proceed as follows:

To the extent that Contentions CW-SC-4 and NYS-39/RK-EC-9/ CW-EC-10 raise issues resolved by the Continued Storage Rule, the Board is directed to dismiss them consistent with our opinion today. To the extent that these contentions raise other matters, the Board should assess their admissibility under our generally applicable rules of practice.³²

³² See 10 C.F.R. § 2.309(c), (f).²⁴

In accordance with CLI-14-08, on September 17, 2014, the Board directed the Intervenors to provide their views, on or before October 1, 2014, “regarding the extent to which Contentions CW-SC-4 and NYS-39/RK-EC-9/ CW-EC-10 raise issues that have not been resolved by the Continued Storage Rule,” and directed Entergy and the Staff to respond to those statements on or before October 15, 2014.²⁵ On October 1, 2014, the Intervenors filed two separate briefs regarding the admissibility of Contentions SC-4 and NYS-39/RK-EC-9/ CW-EC-10.

DISCUSSION

The Intervenors filed Contention NYS-39/RK-EC-9/ CW EC-10 based upon the Court of Appeals’ decision in *New York v. NRC*, vacating the NRC’s Waste Confidence Decision Update and Temporary Storage Rule. The proposed contention stated as follows:

²⁴ CLI-14-08, slip op. at 10. The Commission’s Continued Storage Rule was recently challenged by the intervenors in this and other proceedings, with the filing of new contentions and petitions to suspend those proceedings; the Commission has undertaken to rule upon those filings and established a schedule for the filing of responses thereto. *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3)*, CLI-14-09, 80 NRC __ (Oct. 7, 2014) (slip op.).

²⁵ “Order (Requesting Briefs on NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4)” (Sept. 17, 2014), at 2; emphasis in original.

The Final Supplemental Environmental Impact Statement for Indian Point fails to comply with the requirements of Sections 102(c) and (e) of the National Environmental Policy Act and 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), because it fails to include or incorporate a legally sufficient analysis of the environmental impacts of on-site storage of nuclear waste after the conclusion of the extended operating period, including the impacts in the event that no permanent repository is ever established, and fails to consider alternatives to mitigate those impacts; because there is no valid analysis of these issues, NRC may not reach a final decision on whether to renew Indian Point's operating licenses until such a valid analysis has been completed in compliance with applicable federal law and regulations.

Contention at 2. The Intervenors further claimed that because the generic findings in the WCD Update rulemaking were vacated by the court, "NRC may no longer rely on the Temporary Storage Rule and Waste Confidence Decision to meet its obligation under NEPA to analyze the potential environmental impacts of the on-site storage of spent fuel at Indian Point following the end of extended operating licenses." Contention at 5.

In response to the Intervenors' filing, the Staff presented its views that this contention should be dismissed because, *inter alia*, the challenged regulation (10 C.F.R. § 51.23(b)) remained in effect pending issuance of the court's mandate, and the rule could not be challenged in the absence of a petition for waiver filed under 10 C.F.R. § 2.335(a).²⁶ Further, the Staff acknowledged that once the court's mandate had issued, the contention would be admissible, provided its claims do not become the subject of a generic rulemaking²⁷ -- although this conclusion was "subject to any direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court's ruling are to be addressed in individual NRC proceedings."²⁸ In this regard, the Staff noted that if the

²⁶ See Staff Answer to NYS-39 (Aug. 2, 2012) at 6-8.

²⁷ *Id.* at 8.

²⁸ *Id.* at 8-9.

Commission undertakes a generic rulemaking to address these issues, the contention “may need to be dismissed.”²⁹

Finally, the Staff’s answer to this contention noted that many of the contention’s claims “go beyond the holding in *New York v. NRC*” and should be rejected on the grounds that they are “outside the scope of this proceeding, lack adequate basis and/or are immaterial.”³⁰ In this regard, the Staff pointed to “a litany of additional issues” in the contention, including (a) “offsite land use impacts of continued operations and the [impacts of] additional storage of spent fuel on real estate values in the surrounding areas;”³¹ (b) the “safety of the generation and long-term storage of radioactive waste”;³² (c) “the comparative impacts of spent fuel storage in pools versus in dry casks”;³³ (d) “alternatives to mitigate these impacts, among others”;³⁴ and (e) “the implications of on-site storage of waste for decommissioning.”³⁵ The Staff concluded as follows:

[T]he court’s decision in *New York v. NRC* does not provide a basis for the introduction of these issues as part of Contention NYS-39; further, these claims are outside the scope of this proceeding, impermissibly vague and lack an adequate factual basis, and/or are not material in contravention of 10 C.F.R. § 2.309(f)(1). Accordingly, if Contention NYS-39 is admitted, these issues nonetheless should be excluded.

²⁹ *Id.* at 9, citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (“Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’ ”).

³⁰ *Id.* at 9-12.

³¹ *Id.* at 9-10. While the petitioners (including New York) alleged before the D.C. Circuit that the NRC did not adequately consider the impacts of on-site storage on land values, the court determined that those claims had not been raised before the agency. *New York v. NRC*, 681 F.3d at 482. The Court noted that the “Intervenors will have the opportunity to properly raise and clarify these concerns on remand.” *Id.* Nonetheless, Intervenors have not properly raised their land value claim here because it is not adequately supported. 10 C.F.R. § 2.309(f)(1)(v). See discussion *infra* at 10.

³² *Id.* at 10-11.

³³ *Id.* at 11.

³⁴ *Id.*

³⁵ *Id.* at 11-12.

The Staff reiterates and incorporates by reference herein each of its previously stated views regarding the inadmissibility of these portions of the contention.

Contention NYS-39/RK-EC-9/ CW EC-10 should now be dismissed to the extent that it rests upon the court's decision in *New York v. NRC*. The Commission's issuance of the Continued Storage Rule and GEIS effectively addressed the court's concerns and resolved all of the Intervenors' claims that were founded upon the court's vacation of the Commission's determinations in the WCD Update and Temporary Storage Rule. In accordance with the Commission's instructions in CLI-14-08, those portions of the contention must now be dismissed.

Further, all portions of the contention that were not addressed by the Commission in its Continued Storage Rule and GEIS should also be dismissed at this time. In CLI-14-08, the Commission instructed this Board to rule upon the admissibility of the Intervenors' contention, recognizing that the contention raised some matters that were not addressed in the Continued Storage Rule and GEIS.³⁶ The Board, in turn, offered the Intervenors an opportunity to present their views "regarding the extent to which Contentions CW-SC-4 and NYS-39/RK-EC-9/ CW-EC-10 raise issues that have not been resolved by the Continued Storage Rule."³⁷ Significantly, the Intervenors have not provided a specific response to the Board's inquiry. Rather, the Intervenors' Brief contains a seven-page discussion – which essentially recites the background for this contention and the Commission's recent Continued Storage Rule. The Intervenors presented only a single statement in response to the Board, in which they stated as follows:

³⁶ CLI-14-08, slip op. at 10 and 12.

³⁷ Order (Requesting Briefs on NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4)" (Sept. 17, 2014), at 2; emphasis in original.

The revised final Generic Environmental Impact Statement did not address site-specific environmental impacts from, and alternatives to, the continued storage of spent nuclear fuel at the Indian Point site. Accordingly, intervenors submit that Continued Storage Rule and its accompanying Generic Environmental Impact Statement did not resolve site-specific concerns included in Contention NYS-39/RK-EC-10/CW-EC-9.³⁸

The Intervenors' Brief fails to provide any specific information as to which issues they believe should be admitted for litigation in this proceeding. Nowhere do the Intervenors identify the "site-specific concerns" referred to in their Brief, and nowhere do they point to specific portions of the contention that they believe "raise issues that have not been resolved by the Continued Storage Rule." Further the Intervenors' vague reference to unidentified "site-specific environmental impacts from, and alternatives to, the continued storage of [SNF] at the Indian Point site" does not provide sufficient information for other parties or the Board to consider.

Further, to the extent that any site-specific issue remains to be litigated in this contention following the Commission's issuance of the Continued Storage Rule, any such issue must be dismissed under 10 C.F.R. § 2.309 as untimely and lacking in basis. This contention was filed on July 8, 2012, purportedly based upon the Court of Appeals' decision in *New York v. NRC*, vacating the Commission's previous generic determinations in the WCD Update and TSR. To whatever extent the Intervenors may have sought to raise a site-specific issue in this contention, they cannot argue that such issues were spawned by the Commission's generic determinations or the court's vacation of those determinations. Moreover, even if site-specific issues had been created by the court's vacation of the Commission's previous generic determinations, those issues have now been resolved by the Commission's August 2014 issuance of its new generic determinations in the Continued Storage Rule and GEIS. Accordingly, such issues should now be dismissed as lacking sufficient basis and specificity, as required by 10 C.F.R. § 2.309(f)(1).

³⁸ Intervenors' Brief, at 7; emphasis added.

CONCLUSION

For the reasons set forth above and in the Staff's Answer of August 2, 2012, Contention NYS-39/RK-EC-9/CW-EC-10 should now be dismissed in its entirety.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 15th day of October, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-247-LR/50-286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3)

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO STATE OF NEW YORK, RIVERKEEPER, AND CLEARWATER'S BRIEF CONCERNING CONTENTION NYS-39/RK-EC-9/CW-EC-10 AND THE ON-SITE STORAGE OF NUCLEAR WASTE AT INDIAN POINT," dated October 15, 2014, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 15th day of October, 2014.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 15th day of October, 2014