

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

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

ENERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

November 10, 2014

ORDER

(Dismissing Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4)

I. Background

Hudson River Sloop Clearwater, New York State, and Riverkeeper, Inc. moved for leave to file two new contentions challenging the on-site storage of nuclear waste at Indian Point.¹ In accordance with the Commission's direction in CLI-12-16,² the Board ordered the motions held in abeyance.³ Based on the Commission's action discussed below, we now address these contentions.

In view of its adoption of a revised rule codifying the NRC's generic determinations regarding the pertinent environmental impacts associated with continued storage of spent nuclear fuel, the Commission issued a memorandum and order (CLI-14-08) directing that, 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

¹ See 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) and 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). [hereinafter CW-SC-4].

² CLI-12-16, 76 NRC 63, 68-69 (2012).

³ See Licensing Board Order (Holding Waste Confidence Contentions in Abeyance) (Aug. 9, 2012) (unpublished).

(CSR), the Indian Point Board dismiss them and, if issues raised in those contentions remain unresolved by the Commission's actions, the Board was directed to rule on the admissibility of those challenges.⁴ Subsequently, the Board directed the parties to submit briefs expressing their views regarding the extent to which Contentions CW-SC-4 and NYS-39/RK-EC-9/CW-EC-10 raise issues not resolved by the CSR.⁵

Meanwhile, following its receipt of a number of substantively identical petitions seeking the suspension of licensing decisions and presenting motions requesting the admission of new contentions relating to disposal of spent nuclear fuel, the Commission issued a memorandum and order in which it exercised its inherent supervisory authority over agency adjudications to review the petitions and motions itself.⁶ Accordingly, no challenge related to spent fuel disposal is before this board.

II. NYS-39/RK-EC-9/CW-EC-10

After reviewing the parties' briefs, the Board has concluded that Contention NYS-39/RK-EC-9/CW-EC-10 was resolved in its entirety by the final CSR and associated generic environmental impact statement (GEIS).⁷ In their brief responding to the Board's September 17th Order, the Intervenors stated that the only basis for their contention was that the "[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."⁸ However, the Commission expressly stated, in the GEIS, that it considered addressing the environmental impacts of continued storage in site-specific reviews,

⁴ CLI-14-08, 80 NRC __, __, (slip op. at 10) (Aug. 26, 2014).

⁵ Order (Requesting Briefs on NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4) at 2 (Sept. 17, 2014).

⁶ CLI-14-09, 80 NRC __, __. (slip op. at 2) (Oct. 7, 2014).

⁷ See 79 Fed. Reg. 56238 (Sept. 19, 2014) [hereinafter CSR]. Staff Requirements—SECY-14-0072—Final Rule, Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 26, 2014) (ML14237A092); see "Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20)," Commission Paper SECY-14-0072 (July 21, 2014) (attaching the GEIS and the draft Final Rule, Continued Storage of Spent Nuclear Fuel). The Commission paper and its attachments may be found at ML14177A482 (package).

⁸ State of New York, Riverkeeper, and Clearwater Brief Concerning Contention NYS-39/RK-EC-9/CW-EC-10 at 7 (Oct. 1, 2014).

but concluded that the impacts of continued storage will not vary significantly across sites.⁹ With the Commission having determined that site-specific environmental aspects of continued storage should not be considered in individual licensing proceedings, the Board dismisses Contention NYS-39/RK-EC-9/CW-EC-10.

III. CW-SC-4

The Board has determined that Clearwater Contention CW-SC-4 raises two distinct issues: (1) the adequacy of Entergy's aging management program (AMP) for spent fuel pools at Indian Point during the period of extended operations (PEO), and (2) the safety of long-term storage of spent fuel under the Atomic Energy Act.¹⁰

A. Part 1 – Entergy's AMP

As for the first part of the contention, the Board finds that it is not admissible. Specifically, as discussed below, CW-SC-4 does not meet the standards for contention admissibility because it is not timely, is not adequately supported by alleged facts or expert opinion, and does not raise a genuine dispute on a material issue with the application.

i. Timeliness

In judging the timeliness of CW-SC-4, the Board looks to the first time this challenge was raised by Clearwater.¹¹ In this case, CW-SC-1 is substantially the same as the current contention and so, in conducting its timeliness analysis, the Board looks to 2009, when Clearwater first brought forward this issue in CW-SC-1.¹² Although at that time Clearwater stated that CW-SC-1 was based on new information regarding the Waste Confidence Decision (WCD),¹³ there was no new information available

⁹ CLI-14-08, 80 NRC __, __, (slip op. at 9) (Aug. 26, 2014).

¹⁰ Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add a New Contention Based Upon New Information and Petition to Add New Contention at 7 (July 9, 2012).

¹¹ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

¹² See Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add New Contentions Based Upon New Information (Oct. 26, 2009).

¹³ See 49 Fed. Reg. 34658, 34688 (Aug. 31, 1984). Modification of the WCD in subsequent years has updated the anticipated range of dates for the availability of a geologic repository for waste disposal

in 2009 regarding the Indian Point AMP upon which to base this contention. The lack of new information also pertains to the filing of CW-SC-4 in 2012. Absent a showing of new information, this portion of CW-SC-4 was not timely filed.

ii. Failure to Raise a Material Issue of Fact

Under 10 CFR § 2.309(f)(1)(v) and (vi), Intervenors must provide a concise statement of the alleged facts or expert opinions which support their position and identify a genuine dispute on a material issue of fact or law. In its motion relating to the Applicants' AMP, Clearwater listed several lengthy reports to show that degradation of spent fuel pools has occurred in nuclear plants, but did not explain how these documents provide support for the proposition that Entergy's AMP is deficient.¹⁴ Moreover, Dr. Gunderson's declaration, attached to Clearwater's Brief Regarding CW-SC-4, does not provide any specific information about the Indian Point facility that could tend to show the AMP is deficient.¹⁵

Thus, the Board finds that the proposed portion of the contention relating to Entergy's AMP does not provide a concise statement of alleged facts or expert opinions to support their position, and does not provide any information to demonstrate a material dispute with Entergy on Indian Point.¹⁶ The portion of contention CW-SC-4 challenging Entergy's AMP is therefore inadmissible.

B. Part 2 – Safety of Long-Term Spent Fuel Storage

Clearwater alleges that, as a result of the Court's vacating the WCD Update and the Temporary Storage Rule (TSR) in *New York v. NRC*,¹⁷ and the Commission decision not to address safety findings

and the estimated length of time that spent fuel can be stored safely and without environmental impacts prior to the completion of the disposal facility.

¹⁴ See, e.g., Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add A New Contention Based Upon New Information and Petition to Add New Contention at 12-14 (Jul. 9, 2012).

¹⁵ See Expert Witness Declaration of Arnold Gunderson Regarding Aging Management of Nuclear Fuel Racks (Feb. 25, 2011) (ADAMS Accession No. ML14274A545).

¹⁶ 10 C.F.R. § 2.309(f)(1)(v), (vi).

¹⁷ Hudson River Sloop Clearwater, Inc.'s Brief Regarding Contention SC-4 at 2 (Oct. 1, 2014) [hereinafter Clearwater Brief]; see *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

in its Continued Storage Rule,¹⁸ the Staff's SER "lacks sufficient safety analysis to provide a reasonable assurance of safety for the long-term fuel storage at IPEC."¹⁹ In 1984, the Commission's WCD presented safety and National Environmental Policy Act (NEPA) findings²⁰ relating to the storage and disposal of spent nuclear fuel.²¹ In its ruling on *New York v. NRC*, the Court vacated the Commission's safety conclusions and its assessment of environmental impacts in its WCD Update and TSR under NEPA and remanded the matter to the Commission to assess whether spent fuel can be indefinitely stored safely on-site.²²

Recently, the Commission codified its changes to the environmental impacts from indefinite spent fuel storage in its CSR and the associated GEIS.²³ In this rule making, the Commission stated that "the NRC is not making a safety determination under the AEA to allow for the continued storage of spent fuel"²⁴ because, *inter alia*, these safety issues are addressed in the specific licenses for facilities.²⁵

Therefore, the current status is as follows: the AEA safety findings and analysis of environmental impacts under NEPA originally addressed in the WCD Update and TSR were vacated by the Court of Appeals in *New York v. NRC*. Subsequently, the NEPA impacts were evaluated in the Commission's CSR, the safety of spent fuel storage during the PEO is addressed by the appropriate

¹⁸ Clearwater Brief at 15; see 79 Fed. Reg. 56238, 56252 (Sept. 19, 2014) [hereinafter Continued Storage Rule].

¹⁹ Clearwater Brief at 4.

²⁰ The Board notes that there are two distinct findings in the WCD, with the safety finding reaching a definitive conclusion on public health and safety from radiological exposure and the NEPA procedural finding defining the effects of environmental impacts to aid decision makers in their licensing actions. 49 Fed. Reg. at 34658.

²¹ See 49 Fed. Reg. at 34688.

²² *New York v. NRC*, 681 F.3d at 473, 483.

²³ Continued Storage Rule at 56238–56263.

²⁴ Id. at 56254-55.

²⁵ Id. at 56255.

AMP,²⁶ and a resolution of radiological safety of geologic disposal will result from the on-going Commission review of recently filed contentions.²⁷

Accordingly, what remains of CW-SC-4 is a safety challenge addressing the long-term or indefinite storage of spent fuel. In resolving this challenge, we must first determine whether this issue falls within the bounds of a license renewal proceeding. With regard to this question, we turn to 10 C.F.R. § 54.21(a)(3) which describes specific requirements for the technical information to be provided in a renewal application. This section requires that for each structure and component within the scope of this section, the applicant must "...demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the [Current Licensing Basis] for the period of extended operation."²⁸ As this applies to the second part of CW-SC-4, the Board finds that license renewal is limited to aging management during the PEO, and that the aging management of spent fuel pools through the PEO has been addressed by the Applicant. What remains is the safety of storage of spent fuel after the PEO, but this issue is not within the scope of license renewal proceedings. Accordingly, we find that CW-SC-4 is not admissible.

C. Conclusion

In summary, the Board finds that NYS-39/RK-EC-9/CW-EC-10 has not raised an issue left unresolved by the Commission in assessing continued storage of spent nuclear fuel and, as such, it is dismissed. We also find that the portion of CW-SC-4 challenging the adequacy of the AMP for the PEO is inadmissible for being untimely, for failing to provide a concise statement of alleged facts or expert opinions to support their position, and for failing to articulate the material dispute upon which the contention is based. Finally, we conclude that the storage of spent fuel after the expiration of the period

²⁶ Supra note 25.

²⁷ CLI-14-09, 80 NRC __, __. (slip op at 2) (Oct 7, 2014).

²⁸ 10 C.F.R. § 54.21(a)(3).

of extended operation is outside the scope of license renewal and, accordingly, is not admissible in this proceeding.²⁹ Contention CW-SC-4 is therefore dismissed.³⁰

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 10, 2014

²⁹ The Board notes that the Commission finds reasonable assurance that spent fuel can be stored safely and without significant environmental impacts after license expiration and that 10 C.F.R. 50.54(bb) requires the licensee to submit to the Commission a program by which they will manage spent fuel after the PEO and prior to DOE taking possession.

³⁰ Although a safety evaluation for long-term spent-fuel storage is outside the scope of this license renewal proceeding, the Commission may wish to clarify how the safety of such storage after the proposed PEO is to be effected and licensed when it rules on the pending contentions dealing with the safety of spent-fuel disposal.

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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR
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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Dismissing Contentions NYS-39/ RK-EC-9/ CW-EC-10 and CW-SC-4)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell]
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