

March 8, 2016

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
(Indian Point Nuclear Generating Units 2 and 3) and 50-286-LR
)

**RIVERKEEPER’S REQUEST FOR ADMISSION OF
NEW ENVIRONMENTAL CONTENTION**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2), Riverkeeper, Inc., seeks admission of a single “place-holder” contention challenging the Nuclear Regulatory Commission’s (“NRC’s”) reliance, in proposing to re-license Indian Point Units 2 and 3, on the Continued Storage of Spent Nuclear Fuel Rule (79 Fed. Reg. 56,238, Sept. 19, 2014) (“Continued Spent Fuel Storage Rule”) and the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157, September 2014) (“Continued Spent Fuel Storage GEIS”). The NRC issued the Continued Spent Fuel Storage Rule and GEIS on remand from *State of New York v. NRC*, 681 F.3d 471 (D. C. Cir. 2012) (“*New York I*”).

While Riverkeeper seeks admission of its contention, it does not seek to litigate the substantive content of the contention in an adjudicatory hearing. Riverkeeper has already raised its concerns about the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS in comments on draft versions of those documents, and the NRC has already either rejected or disregarded Riverkeeper’s comments in the final versions of the Rule and GEIS.

Riverkeeper also has appealed the final versions to the U.S. Court of Appeals for the District of Columbia Circuit. *See Beyond Nuclear et al. v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).¹

The sole purpose of this contention is to lodge a formal challenge to the NRC's complete and unqualified reliance, in the individual licensing proceeding for Indian Point Units 2 and 3, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS. Riverkeeper submits its contention with the reasonable expectation that it will be denied, pursuant to the Commission's decision on virtually identical motions in other cases. *See e.g., Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), *et al.*, CLI-15-15, 81 NRC 803 (2015); *Union Electric Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC 546 (Apr. 23, 2015); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC 551 (2015). Riverkeeper respectfully contends that nevertheless, the filing of this contention is the only procedural means offered by NRC regulations for ensuring that any court decision resulting from Riverkeeper's appeal of the generic Continued Spent Fuel Storage Rule and GEIS will also be applied to the individual Indian Point license renewal proceeding, in the event that the NRC approves license renewal for Indian Point before the Court issues a decision in *New York I.*² Riverkeeper intends to appeal the denial of its contention to the U.S. Court of

¹ *Beyond Nuclear v. NRC* was consolidated with four other cases and is now captioned *New York et al. v. NRC*, Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (filed October 31, 2014) ("*New York II*").

² In this context, Riverkeeper notes that its contention is not accompanied by a petition for a waiver of 10 C.F.R. §§ 51.71(d), 51.95(c)(2), or any of the other regulations on which the Commission relies to bar members of the public from litigating generic NEPA issues in individual licensing proceedings. No purpose would be served by such a waiver, because Riverkeeper does not seek an adjudicatory hearing on the NRC's generic environmental findings. Instead, Riverkeeper's only purpose in raising its contention is to ensure that any decision by the U.S. Court of Appeals regarding the validity of the Continued Spent Fuel Storage Rule and GEIS

Appeals for the D.C. Circuit and request the Court to hold the appeal in abeyance pending the court's decision in *New York II*.³

II. FACTUAL AND PROCEDURAL BACKGROUND

For several decades, the NRC relied on its “Waste Confidence” decision and Temporary Storage Rule to address, in reactor licensing and re-licensing proceedings, safety and environmental issues associated with spent fuel storage and disposal. In 2010, the NRC published updates to the Waste Confidence decision (the “Waste Confidence Update”) and Temporary Storage Rule, which were challenged by several state governments, an Indian tribe, and environmental organizations. Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) and Temporary Storage Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010). In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (“*New York I*”), the U.S. Court of Appeals vacated the Waste Confidence Update and Temporary Storage Rule, and remanded them to the NRC for

will also be applied to this proceeding, in which the NRC relies on them.

³ Intervenors in other NRC licensing cases have taken similar actions in *Missouri Coalition for the Environment v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1114 (filed Apr. 23, 2015); *Beyond Nuclear vs. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1173 (filed June 19, 2015); *Southern Alliance for Clean Energy v. NRC*, D.C. Cir. No. 15-1427 (filed Nov. 20, 2015); and *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1258 (filed Aug. 6, 2015) (consolidated by Order dated August 7, 2015 with *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1259 (filed Aug. 6, 2015); *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1260 (filed Aug. 6, 2015); *Nuclear Information and Resource Service v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1261 (filed Aug. 6, 2015); *Sustainable Energy and Economic Development Coalition v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1262 (filed Aug. 6, 2015); and *Beyond Nuclear v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1263 (filed Aug. 6, 2015)). These cases have been held in abeyance pending the Court's decision in *New York II*.

further proceedings.

On September 13, 2013, in response to the Court's remand in *New York I*, the NRC published a proposed rule entitled Waste Confidence – Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013) (“Proposed Waste Confidence Rule”). The NRC also published a Draft Waste Confidence GEIS (NUREG-2157, noticed at 78 Fed. Reg. 56,621 (Sept. 13, 2013)). Riverkeeper joined thirty-two other environmental organizations in submitting Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal (Dec. 20, 2013, corrected Jan. 7, 2014) (Corrected comments posted on ADAMS at ML14024A297) (“Riverkeeper et al. Comments”). The Riverkeeper et al. Comments were supported by expert declarations by Dr. Arjun Makhijani, David Lochbaum, Dr. Gordon Thompson, and Mark Cooper (ADAMS Accession No. ML14030A152). The comments and supporting declarations made detailed and comprehensive criticisms of the Proposed Waste Confidence Rule and Draft Waste Confidence GEIS, charging that they were inadequate to satisfy the National Environmental Policy Act (“NEPA”) or the Atomic Energy Act on both legal and technical grounds. Other organizations, as well as state and local governments, also filed comments critical of the Proposed Rule and Draft GEIS.

Despite receiving significant criticisms of the Proposed Waste Confidence Rule and Draft Waste Confidence GEIS, in September 2014, the NRC published the Final Continued Spent Fuel Storage Rule and Final Continued Spent Fuel Storage GEIS, without changing its environmental analysis in any significant respect. Upon issuance of the Rule and GEIS, the Commission lifted

the suspension of licensing and re-licensing for Indian Point Units 2 and 3 and other reactors.

Calvert Cliffs 3 Nuclear Power Project, LLC et al., CLI-12-08, 80 NRC 71 (2014).

In October 2014, Riverkeeper joined seven other environmental organizations in seeking judicial review of the Rule and GEIS by the U.S. Court of Appeals for the District of Columbia Circuit under NEPA, the Atomic Energy Act, and the Administrative Procedure Act, *inter alia*. *Beyond Nuclear et al. v. NRC*, No. 14-1216. The case was consolidated with similar appeals by the States of New York, Connecticut, Massachusetts, and Vermont; the Prairie Island Indian Community; and Natural Resources Defense Council in *New York II*. See note 1 above. The case has been briefed and argued, and the parties are now awaiting a decision.

In December 2015, the NRC issued a draft second supplement to the final supplemental environmental impact statement for the proposed renewal of the operating licenses for Indian Point Nuclear Generating Unit Nos. 2 and 3. Draft Supplement 38 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 (NUREG-1437) (“Draft SEIS”). Notice of the issuance of the Draft SEIS was published at 80 Fed. Reg. 81,377 (Dec. 29, 2015). The Draft SEIS cross-references the Continued Spent Fuel Storage GEIS findings regarding the safety and environmental impacts of storing and disposing of spent fuel after license termination. *Id.* at iii, 115-123.

III. CONTENTION

A. Statement of Contention

For all of the reasons stated in Riverkeeper et al.’s Comments on the Proposed Rule and Draft GEIS, the NRC lacks a lawful basis under NEPA for re-licensing Indian Point Units 2 and 3 because it relies on the Continued Spent Fuel Storage GEIS. To summarize, the Draft SEIS for

Indian Point Units 2 and 3 incorporates the Continued Spent Fuel Storage Rule, which in turn incorporates the GEIS, into the Draft SEIS.⁴ Draft SEIS at iii, 115-123. The Continued Spent Fuel Storage GEIS is inadequate to support the re-licensing of Indian Point Units 2 and 3 because it suffers from the following failures:

- In blatant violation of NEPA and the Court’s decision in *New York I*, the Continued Spent Fuel Storage GEIS fails to examine the probability and consequences of failure to site a repository. Instead of examining the risk of failing to site a repository, the GEIS rationalizes the risk away, by arbitrarily assuming that spent fuel will be protected by “institutional controls” for an infinite period of time at reactor sites. This assumption is not only absurd and inconsistent with the Nuclear Waste Policy Act (“NWPA”), but it also defeats the Court’s purpose of forcing NRC to reckon with the environmental consequences of its failure to site a repository.
- The GEIS fails to acknowledge that the Continued Spent Fuel Storage Rule enables licensing and relicensing, and therefore it distorts the statement of purpose and need for the rule as relating solely to administrative rather than environmental concerns. As a result, the GEIS also mischaracterizes the alternatives that must be considered. Instead of evaluating alternatives related to storage and disposal of spent fuel, the GEIS examines alternatives related to the administrative question of how to prepare an EIS. The result is a farcical cost-benefit analysis that utterly fails to address alternatives for avoiding or mitigating the environmental impacts of storing spent fuel or siting a repository.
- The GEIS’ analysis of the environmental impacts of extended spent fuel storage ignores the fact that NRC knows very little about the behavior of spent fuel in long-term or indefinite storage conditions, especially the potentially significant effects of long-term dry cask storage on high burnup fuel integrity. In violation of NEPA, the NRC makes no attempt to quantify these uncertainties.
- The GEIS fails to fully consider the environmental impacts of spent fuel pool leaks and fires. In violation of NEPA, the GEIS relies upon incomplete data, adopts a flawed concept of risk, and ignores a range of causes for accidents.
- In violation of NEPA, the GEIS makes no attempt to show how the environmental impacts associated with the Continued Spent Fuel Storage Rule will be quantified and

⁴ 10 C.F.R. § 51.23(b) states that the Continued Spent Fuel Storage GEIS is deemed incorporated into EISs prepared under 10 C.F.R. § 51.95 (which governs preparation of draft and final supplemental EISs for reactor licensing and license renewal).

incorporated into cost-benefit analyses for nuclear reactors. Although spent fuel disposal and long-term storage costs are high enough to tip the balance of a cost-benefit analysis for reactor licensing away from licensing, nowhere does the NRC explain how it will take these costs into account in reactor licensing decisions.

- In violation of NEPA, the GEIS fails to support the limited conclusions in the Continued Spent Fuel Storage Rule and GEIS regarding the technical feasibility of spent fuel disposal.
- The NRC has splintered the analysis of environmental impacts associated with storage and disposal of spent fuel into an array of safety findings and environmental analyses. While the issues covered by these separate findings and analyses overlap and involve cumulative impacts, the NRC refuses to integrate them. The NRC also refuses to correct inconsistencies between them.

B. Statement of Basis for the Contention

The basis for Riverkeeper's contention is provided in the Riverkeeper et al. Comments and attachments (including the declarations of Dr. Arjun Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

C. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it challenges the adequacy of the NRC's NEPA review for the relicensing of Indian Point Units 2 and 3.

D. Demonstration that the Contention is Material to the Findings the NRC Must Make to Relicense This Reactor

The contention is material to the findings that the NRC must make in order to relicense this reactor because it asserts that the environmental findings in the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS are not supported and are legally deficient.

E. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along with Appropriate Citations to Supporting Scientific or Factual Materials

The statements of fact or expert opinion supporting the contention are set forth in the Riverkeeper et al. Comments and attachments (including the declarations of Dr. Arjun Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

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

This contention raises a genuine dispute with both the applicant and the NRC regarding whether the NRC has satisfied NEPA for the purpose of renewing the operating license for Indian Point Units 2 and 3.

IV. THE CONTENTION IS TIMELY AND RIVERKEEPER HAS GOOD CAUSE FOR THE TIMING OF THE CONTENTION PURSUANT TO 10 C.F.R. §§ 2.309(c) and 2.309(f)(2).

NRC regulations 10 C.F.R. § 2.309(c) and § 2.309(f)(2) call for a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

This motion to file a new contention satisfies the NRC's standards for timeliness and good cause because it does not depend at all on past information. Instead, it is a "place-holder" whose admissibility depends entirely on an event that will occur in the future: the U.S. Court of Appeals' decision in *New York II*. Riverkeeper's contention seeks the denial (or revocation) of a renewed license for Indian Point Units 2 and 3 in the event that the Court of Appeals reverses the

Continued Spent Fuel Storage Rule and/or GEIS. As discussed above in Section I, Riverkeeper must file a contention before the NRC makes a license renewal decision for Indian Point Units 2 and 3, in order to ensure that the Court's decision in *New York II* will be applied to Indian Point if an NRC license renewal decision precedes the Court's decision in *New York II*. While Riverkeeper could wait longer to submit the contention, *i.e.*, until the eve of a license renewal decision, Riverkeeper believes it is most efficient for the Atomic Safety and Licensing Board ("ASLB") and parties to submit it now, while the ASLB is considering contentions regarding the Draft SEIS.

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

In accordance with the ASLB's Scheduling Order of July 1, 2010 and 10 C.F.R. § 2.323(b), undersigned attorney for Riverkeeper certifies that he has made a sincere effort to contact the other parties in the proceeding and resolve the issues raised in the motion. The State of New York and Hudson River Sloop Clearwater do not oppose Riverkeeper's motion. Counsel for Entergy and the NRC Staff stated that they will oppose the motion.

VI. CONCLUSION

For the reasons stated, Riverkeeper respectfully requests that its contention be admitted.

Respectfully submitted,

Signed (electronically) by:

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2), I certify that on March 8, 2016, copies of Riverkeeper's Request for Admission of New Environmental Contention were served in the above-captioned proceeding electronically via the NRC's Electronic Information Exchange.

Signed (electronically) by Paul Gallay

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