

February 9, 2012

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 IN SUPPORT OF
ENTERGY'S MOTION IN LIMINE TO EXCLUDE
PORTIONS OF PRE-FILED TESTIMONY AND EXHIBITS FOR
CONTENTION RK-EC-3/CW-EC-1 (SPENT FUEL POOL LEAKS)

Pursuant to 10 C.F.R. § 2.323(c) and the February 1, 2012 Order of the Atomic Safety and Licensing Board ("Board") in this proceeding, the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") responds to the January 30, 2012 motion *in limine* filed by Entergy Nuclear Operations, Inc. ("Entergy"), to exclude portions of pre-filed testimony and exhibits submitted by Riverkeeper, Inc. ("Riverkeeper") and Hudson River Sloop Clearwater, Inc. ("Clearwater") (collectively, "Intervenors") in support of Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks).¹ For the reasons set forth below and in Entergy's Motion, the Staff supports Entergy's motion to exclude the specified portions of the Intervenors' testimony and exhibits.

DISCUSSION

I. Legal Standards Governing Motions in Limine.

In an evidentiary hearing, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will

¹ "Entergy's Motion In Limine To Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" (Jan. 30, 2012) ("Motion").

be segregated and excluded so far as is practicable.” 10 C.F.R. § 2.337(a). While the “strict rules of evidence do not apply to written submissions,” the Board may “on motion or on the presiding officer’s own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.”

10 C.F.R. § 2.319(d). *See also* 10 C.F.R. § 2.319(e).

NRC hearings are limited to the scope of the admitted contentions. It is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board had properly excluded the intervenors’ testimony and exhibits that were outside the scope of the admitted contention). As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

Id. at 100-01 (internal footnotes omitted). Recently, the Commission emphasized:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-01, 75 NRC ____ (Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).

Further, an expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. In addition, a party bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

II. Entergy’s Motion in Limine

Contention Riverkeeper EC-3 asserted that the Applicant’s Environmental Report failed to adequately describe the environmental impacts of spent fuel pool (“SFP”) leaks at Indian Point Units 1 and 2, as they affect groundwater and the Hudson River ecosystem; similar assertions were made in Contention Clearwater EC-1.² In admitting these contentions, the Board stated that it “admits Riverkeeper EC-3 as it relates to the environmental impacts from the spent fuel pool leaks.”³ Similarly, in admitting Contention Clearwater EC-1, the Board ruled that Clearwater had raised a genuine dispute “regarding the significance of environmental impacts from the spent fuel pool leaks.” LBP-08-13, 68 NRC at 193. The Board then

² See (1) “Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant” (“Riverkeeper Petition”) (Nov. 30, 2007), at 74-86; and (2) “Hudson River Sloop Clearwater Inc’s Petition to Intervene and Request for Hearing” (“Clearwater Petition”) (Dec. 10, 2007), at 18-23.

³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 190 (2008); see generally, *id.* at 188-191.

consolidated these two contentions. *Id.* at 219-20. Following the Staff's issuance of its Draft and Final Supplemental Environmental Impact Statements for license renewal of Indian Point Units 2 and 3,⁴ the Board granted the Intervenor's requests to apply these contentions, as admitted and consolidated, to the Draft and Final SEIS.⁵ No other changes were made to the contention. In sum, this contention, as admitted, consolidated, and twice amended, challenges the adequacy of the Applicant's and Staff's evaluations of the environmental effects of Indian Point Units 1 and 2 SFP leaks on groundwater and the Hudson River ecosystem.

On December 22, 2011, the Intervenor's filed their testimony, exhibits and statement of position on this contention. Included among the Intervenor's filings on this contention were (a) their initial statement of position (Exhibit RIV000059);⁶ (b) the "Pre-Filed Written Testimony of Arnold Gunderson on Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" ("Gunderson Testimony") (Exhibit RIV000060), (c) the "Pre-Filed Written Testimony of Gillian Stewart Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" ("Stewart Testimony") (Exhibit RIV000061), and (d) 40 other numbered exhibits (*i.e.*, Exhibits RIV000062 - RIV0000101).

⁴ See (1) "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment," NUREG-1437, Supp. 38 (Dec. 2008) ("Draft SEIS"); and (2) "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report, Main Report and Comment Responses," NUREG-1437, Supp. 38 (Dec. 2010) ("Final SEIS").

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Applying Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 to the NRC Staff's Supplemental Environmental Impact Statement" (May 28, 2009) (unpublished); *Id.*, "Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011) (unpublished), slip op. at 35-36.

⁶ "Riverkeeper and Hudson River Sloop Clearwater Initial Statement of Position Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" (Dec. 22, 2011).

In its Motion, Entergy seeks, pursuant to 10 C.F.R. § 2.337, to exclude certain specified portions of the Intervenor's pre-filed written testimony and exhibits, on the grounds that:

(1) Mr. Gundersen and Dr. Stewart each lacks expertise in certain areas covered by their testimony; (2) releases from non-spent fuel pool ("SFP") systems, structures, and components ("SSCs") are outside the scope of RK-EC-3/CW-EC-1; (3) aging management programs ("AMPs") are outside the scope of RK-EC-3/CW-EC-1; (4) site remediation decisions for existing contamination are outside the scope of RK-EC-3/CW-EC-1; (5) challenges to dose and reporting regulations are prohibited; (6) the Draft Generic Environmental Impact Statement ("GEIS") for License Renewal is the subject of rulemaking and thus beyond the scope of this proceeding; (7) Mr. Gundersen's statements concerning Indian Point Unit 1 ("IP1") are beyond the scope of this proceeding; and (8) Mr. Gundersen's statements concerning Vermont Yankee, Entergy's purported motives for conducting groundwater investigations, and maintenance funding are irrelevant.

Motion at 1-2. In "Attachment 1" to its Motion, Entergy identified the specific portions of the Intervenor's filing that it seeks to exclude, along with a statement of the reason(s) supporting its view that those matters should be excluded.

The Staff has reviewed Entergy's Motion and Attachment 1 thereto, and agrees with Entergy's view that the matters identified therein should be excluded from evidence on this contention. First, the Staff agrees with Entergy's view that certain matters are beyond the scope of this contention and/or are inappropriate for consideration in a license renewal proceeding. Thus, nowhere does the contention address releases from systems, structures, and components ("SSCs") other than the Unit 1 and 2 spent fuel pools; the Intervenor's introduction of such matters in their evidentiary filings is beyond the scope of the contention, and those portions of their filings should be excluded. *Vogtle*, CLI-10-5, 71 NRC at 101. Similarly, this contention raises environmental issues only, and nowhere addresses the adequacy of Entergy's aging management programs ("AMPs") for the SFPs or any other SSC at the site; such matters

raise safety issues and are beyond the scope of this contention;⁷ accordingly, those matters should be excluded from the Intervenor's evidentiary filings.

Second, the Intervenor's introduction of challenges to Entergy's or the Staff's approved site remediation measures fails to raise an issue that is appropriate for litigation in a license renewal proceeding, in that those decisions pertain to existing contamination at the site and plant operations under the facility's current licenses; those decisions are not subject to reexamination in a license renewal proceeding. Similarly, complaints that the NRC's dose standards and/or reporting requirements are inadequate constitute challenges to the Commission's regulations⁸ -- which the Board previously recognized would be impermissible.⁹ In addition, the Intervenor's challenges based upon a *proposed* rulemaking that has not been adopted as yet (*i.e.*, the draft proposed revision to the "Generic Environmental Impact Statement for License Renewal" ("GEIS")),¹⁰ fails to raise a cognizable issue for litigation.

Third, the Staff shares Entergy's view that certain matters in Mr. Gundersen's proffered testimony, concerning Vermont Yankee, Entergy's motives for conducting groundwater investigations, and its maintenance funding are irrelevant to the issue raised in this contention -- *i.e.*, the environmental impacts of the SFP leaks on groundwater and the Hudson River ecosystem. The inclusion of such matters in Mr. Gundersen's pre-filed testimony should be precluded, in that those matters plainly exceed the scope of the contention. Similarly, while the contention, as admitted, includes concerns regarding contamination originating from the Indian

⁷ In contrast, various other contentions challenge the adequacy of Entergy's AMPs for license renewal, including Contention NYS-5 (AMP for buried piping and tanks).

⁸ See 10 C.F.R. § 2.335(a).

⁹ LBP-08-13, 68 NRC at 193-94.

¹⁰ Proposed Rule, "Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 74 Fed. Reg. 38,117 (July 31, 2009).

Point Unit 1 (“IP1”) SFP, the Staff shares Entergy’s view that Mr. Gundersen’s testimony regarding the potential that other SSCs at IP1 may continue to contaminate the site until IP1 is decommissioned (Gundersen Testimony at 12) is beyond the scope of this contention and is irrelevant in this license renewal proceeding for IP2 and IP3. See Motion at 17.

Finally, the Staff shares Entergy’s view that Mr. Gundersen and Dr. Stewart lack the requisite expertise to testify as experts on certain matters presented in their written testimony, in that their *curriculum vitae*¹¹ demonstrate that they lack the “knowledge, skill, experience, training, or education” that is required for their opinion testimony on such matters to be admitted. *Catawba*, CLI-04-21, 60 NRC at 27-28. In this regard, the Staff shares Entergy’s view that Mr. Gundersen (a nuclear engineer) lacks expertise in “hydrogeology, ecological impact assessment, or human health impacts.” Entergy Motion at 8; *cf. id.* at 9-10. Similarly, the *curriculum vitae* for Dr. Stewart (a professor of Environmental Science, with degrees in Biology, Coastal Oceanography and Marine and Atmospheric Science), shows that she has expertise in the use of radiochemical tracers in aquatic environments, but has no demonstrated “knowledge, skill, experience, training, or education” to qualify her as an expert with respect to the environmental impacts or human health effects of radiation. Dr. Stewart’s opinion testimony on such matters should therefore be excluded as lacking in expertise.¹²

In sum, based on the Staff’s review of the Intervenor’s prefiled written testimony and exhibits and its review of Entergy’s Motion, the Staff believes that portions of the Intervenor’s filings on this contention, as specified in Entergy’s Motion, should be excluded from evidence on

¹¹ See (a) Exhibit RIV000062 (“Curriculum Vitae of Arnold Gundersen (“Gundersen CV”); and (b) Exhibit RIV000063 (“Curriculum Vitae of Gillian Stewart (“Stewart CV”).

¹² Likewise, Dr. Stewart’s stated opinion that the “high ranges of radioactivity” detected at another site are “likely due to leaks or flows via groundwater effluent into the Hudson River” (Stewart Testimony, at 4) should be excluded or given little weight, as lacking in scientific basis and reliability. See Motion at 8-19.

the grounds that the materials lack relevance, are beyond the scope of Contention RK-EC-3/CW-EC-1, constitute impermissible challenges to NRC regulations, and/or lack a proper sponsoring expert witness with the requisite expertise to present testimony on those matters.

CONCLUSION

For the foregoing reasons, the Staff supports Entergy's Motion in Limine to exclude portions of Riverkeeper and Clearwater's pre-filed testimony and exhibits for Contention RK-EC-3/CW-EC-1, to the extent set forth in that Motion.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
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CERTIFICATION OF COUNSEL

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9), and 10 C.F.R. § 2.323(b), the undersigned Counsel hereby certifies that he has participated in discussions between the movant and the Intervenor concerning this matter, and has made a sincere effort to make himself available to listen and respond to the moving party and the Intervenor, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

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Dated at Rockville, Maryland
this 9th day of February 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC Staff's Response In Support Of Entergy's Motion In Limine To Exclude Portions Of Pre-Filed Testimony And Exhibits For Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), have been served upon the following persons by Electronic Information Exchange this 9th day of February, 2012:

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