August 2, 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 TO INTERVENORS' (1) JOINT MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE ONSITE STORAGE OF NUCLEAR WASTE AT INDIAN POINT AND (2) JOINT CONTENTION NYS-39/RK-EC-9/CW-EC-10

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the State of New York ("New York"), Riverkeeper, Inc. ("Riverkeeper") and Hudson River Sloop Clearwater, Inc. ("Clearwater) (collectively, "Intervenors") filed (1) "[Intervenors'] Joint Motion for Leave to File a New Contention Concerning On-Site Storage of Nuclear Waste at Indian Point" (July 8, 2012) ("Motion"), and (2) "[Intervenors'] Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the Onsite Storage of Nuclear Waste at Indian Point" (July 8, 2012) ("Contention NYS-39").

The Intervenors' Motion seeks leave to file a new contention based on the June 8, 2012 opinion by the U.S. Court of Appeals for the D.C. Circuit in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, a ruling on the admission of this contention turns upon when the Atomic Safety and Licensing Board ("Board") issues its decision: If the Board rules on the Motion before the court's mandate has issued, the Commission's regulations presently bar the admission of the contention and the Board should dismiss it without prejudice to its timely refiling upon issuance of the court's mandate. On the other hand, if the Board rules

on the Motion after the D.C. Circuit issues the mandate for that decision, the new contention would be admissible, except for portions of the proposed contention that exceed the scope of the court's decision, as discussed *infra* at 9-12.[1]

BACKGROUND

A. Procedural History

This proceeding concerns the license renewal application ("LRA") filed by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on April 23, 2007, in which Entergy requested that the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point" or "IP2 and IP3") be renewed for an additional period of 20 years.[2] On May 11, 2007, the Nuclear Regulatory Commission ("NRC") published a notice of receipt of the Indian Point license renewal application ("LRA"),[3] and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.[4]

On November 30, 2007, New York and Riverkeeper filed their petitions for leave to intervene in this proceeding; on December 10, 2007, Clearwater filed its petition for leave to

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[1] The Staff notes that substantially similar contentions have been filed by intervenors in more than a dozen license renewal, operating license, and combined license (COL) proceedings pending before the Commission or its licensing boards. *See generally, Union Electric Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 NRC ___, ___ (July 17, 2012), slip op. at 28 n.15 (inasmuch as petitions and contentions raising similar issues based on the Court of Appeals' decision were filed in numerous NRC proceedings, "this could be an instance in which the goal of efficient judicial administration would be well served by any guidance/ direction that the Commission might wish to provide").

[2] Letter from Fred Dacimo, Site Vice President (Entergy) to NRC Document Control Desk (April 23, 2007) (ADAMS Accession No. ML071210108), as supplemented by letters dated May 3 and June 21, 2007 (ADAMS Accession Nos. ML071280700 and ML071800318).

[3] "Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 26,850 (May 11, 2007).

[4] "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 42,134 (Aug. 1, 2007).

intervene.[5] Answers to these petitions and the Intervenors' contentions were filed by the Applicant and the Staff on January 22, 2008. On July 31, 2008, the Board issued its decision in LBP-08-13, in which it, *inter alia*, granted the Intervenors' petitions to intervene and admitted many of their contentions.[6]

On several occasions following issuance of the Board's decision in LBP-08-13, the Intervenors filed contentions challenging the Commission's proposed or final update of its waste confidence rule set forth in 10 C.F.R. § 51.23, a related temporary storage rulemaking, and various statements related thereto.[7] These contentions were rejected (or on one occasion, narrowed) by the Board on the grounds, *inter alia*, that they raised impermissible challenges to the Commission's regulations and were inadmissible under 10 C.F.R. § 2.335.[8] One of those rulings (Order of July 14, 2010), followed specific directions by the Commission to dismiss the contention, in response to a Board-certified question.[9]

On December 23, 2010, the Commission issued its final Waste Confidence Decision Update and Temporary Storage Rule. On June 8, 2012, in response to a petition for review filed

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[5] *See* (1) "New York State Notice of Intention to Participate and Petition to Intervene" (Nov. 30, 2007); (2) "Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant" (Nov. 30, 2007); and (3) "Hudson River Sloop Clearwater, Inc.'s Petition to Intervene and Request for Hearing" (Dec. 10, 2007).

[6] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

[7] *See* 75 Fed. Reg. 81,037 (Dec. 23, 2010) (Waste Confidence Decision Update), and 75 Fed. Reg. 81,032 (Dec. 23, 2010) (Temporary Storage Rule). *See also*, 73 Fed. Reg. 59,551 (Oct. 9, 2008) (proposed rule); 73 Fed. Reg. 72,370 (Nov. 28, 2008) (comment period extension).

[8] *See* (1) "Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions)" (July 6, 2011), slip op. at 9-19 and 36-52 (Contentions NYS-17B, CW-EC-8/RK-EC-6, CW-SC-2/RK-TC-3, CW-EC-9/RK-EC-7, and CW-SC-3/RK-TC-4); (2) Order" (July 14, 2010) (dismissing Contentions CW-SC-1 and EC-7); (3) "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009), slip op. at 13-16 (Contention NYS-34); and (4) "Memorandum and Order (Granting Entergy's Request for Clarification) (Aug. 10, 2011), slip op. at 2-5 (Contention NYS-17B).

[9] *See* (1) *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, 72 NRC 98, 99 (2010); and (2) "Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater's Motion for Leave to Admit New Contentions)" (Feb. 10, 2010).

by New York and other Intervenors, the U.S. Court of Appeals for the D.C. Circuit vacated the Waste Confidence Decision Update and Temporary Storage Rule, and remanded the matter for further proceedings. On July 8, 2012, the Intervenors filed the instant motion for leave to file a new contention, along with Contention NYS-37.

B. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement ("EIS") to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC's regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report ("ER") as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a nuclear power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *State of Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The Commission most recently addressed issues pertaining to spent fuel storage and disposal in its "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("Waste Confidence Decision") and a temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

The Waste Confidence Decision Update and the Temporary Storage Rule support and extend generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after

the licensed period of operation. The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). In turn, 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" in any environmental impact statement, environmental assessment, or environmental report. 10 C.F.R. § 51.23(b).

DISCUSSION

A. Impact of the Court of Appeals' Decision.

The Intervenors base their proposed contention on the D.C. Circuit Court of Appeals' recent decision in *State of New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

> 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. At root, the Contention asserts that because the generic findings in the Commission's rulemaking have been vacated, "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.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, the Intervenors assert that they meet the standards of § 2.309(f)(2) for late-filed contentions. Motion at 1-7. Considering the ruling of the D.C. Circuit and the fact that the Motion was filed within 30 days of that ruling, the Staff agrees that the Intervenors have sufficiently demonstrated the timeliness of their filing under that regulation.

The Board has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations.[10] In the present circumstances, although the D.C. Circuit's decision invalidates the Waste Confidence Decision Update and Temporary Storage Rule, those regulations remain in effect until the court's mandate issues. Indeed, the Intervenors recognize this fact, stating as follows:

> Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is the order that makes the decision effective. Under the Rules, the Court's mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying the petition for rehearing is issued, whichever is later.[11]

Moreover, the Intervenors recognize – and do not directly contest – "Entergy and Staff's position that this contention is premature."[12]

In sum, because the mandate has not yet issued, the court's decision is not yet effective. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . . ." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*,

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[10] *See, e.g.,* decisions cited *supra* at 3, nn. 8 & 9.

[11] Motion at 7, n.3, *citing* Fed. R. App. P. 41(b).

[12] *Id.* at 7. In this regard, the Intervenors state only that the Applicant and Staff have previously objected to contentions as untimely, and "today's filings obviate any timeliness issues." *Id.*

309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id*. at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *See, e.g., Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[13] As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[14] *Id*. at 205.

Under the Federal Rules of Appellate Procedure, a "court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later." Fed. R. App. P. 41(b). With regard to the D.C. Circuit's decision in *New York v. NRC* – upon which the instant contention relies – on July 6, 2012, at the Commission's request, the D.C. Circuit extended the period of time to file a petition for rehearing until August 22, 2012.[15] As a result, under Rule 41(b), the mandate will not issue until at least

[13] *But see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued . . . we have deferred our rulings on these requests").

[14] The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.' " *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit this contention challenging an NRC regulation, until the Court of Appeals issues its mandate striking down that regulation.

[15] *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing).

August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the Board to exclude the Intervenors' contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when this Board rules on the Motion.[16]

If the D.C. Circuit's mandate has not issued by the time the Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from the NRC's NEPA documents any consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because Contention NYS-39 demands such a consideration, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If the Intervenors refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be admissible provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345.

On the other hand, if the D.C. Circuit's mandate has issued before the Board rules on the contention's admissibility, upon the mandate's issuance, the contention as pled appears to satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. *See* Motion at 7-15. This determination, however, would remain 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

[16] *See* 10 C.F.R. § 2.335(a) (unless a party seeks a waiver of Commission regulations, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding").

contentions based on the court's ruling are to be addressed in individual NRC proceedings.[17] For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 345 ("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.' ").

B. The Intervenors' Claims that Go Beyond the Holding in *New York v. NRC* Are Outside the Scope of this Proceeding, Lack Adequate Basis and/or Are Immaterial.

While the Staff recognizes that a portion of Intervenors' new contention would be admissible upon issuance of the court's mandate, several aspects of the contention are inadmissible. Specifically, Intervenors provide a litany of additional issues that, in light of the remand, they believe that the "NRC must now evaluate, before a decision on Indian Point's operating licenses can be made." Contention at 13-14, ¶ 33. However, as discussed below, many of these claims are inadmissible as they (1) are outside the scope of this proceeding, (2) lack an adequate basis, and/or (3) are immaterial.

First, the Intervenors allege that the NRC must consider "offsite land use impacts of continued operations and the [impacts of] additional storage of spent fuel on real estate values in the surrounding areas"[18] Contention, at 14, ¶33; *cf.* Motion at 9, 10. But, the NRC has already explicitly determined, based on a study of several facilities (including Indian Point), that the overall impacts of license renewal on nearby land values will be small. *See* NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report,

[17] *See* n. 1, *supra*.

[18] 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.

at 4-103 (May 1996) (ADAMS Accession No. ML040690705) ("GEIS") (considering the impacts of license renewal on land value in the housing impacts section); Table B-1 in Appendix B to 10 C.F.R. Part 51 ("Table B-1"), Housing Impacts ("Housing Impacts are expected to be of small significance at plants located in a medium or high population area . . .").

Further, while the Board in this proceeding admitted a contention that challenged the impacts of license renewal on adjoining land values, that contention was supported by an expert affidavit. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 115-16 (2008). In contrast, here, the Intervenors have not provided any expert opinion or other support for their assertion that the agency must consider the impacts of spent fuel storage on nearby property values;[19] accordingly, this claim lacks an adequate factual basis and is inadmissible. *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007). Further, the Intervenors ignore the fact that the Court of Appeals rejected their offsite land use claims as grounds for overturning the Waste Confidence Decision rule. *See New York v. NRC*, 681 F.3d at 482.[20] In sum, the Intervenors' reliance on the decision in *New York v. NRC,* to support their attempt to bring the issue of offsite land values into this contention, must be rejected.

Second, although Contention NYS-39 is limited, by its own terms, to environmental issues, in their basis statements the Intervenors assert that the NRC must consider the "safety of the generation and long-term storage of radioactive waste." Contention at 14, ¶ 33; emphasis added. This assertion is without merit. The D.C. Circuit's ruling was limited to NEPA issues;

[19] Indeed, the Intervenors assert that "no expert opinion is necessary to support this contention, which is a contention of omission and asserts that the review of the license applications does not comply with [NEPA]." Motion at 12.

[20] Moreover, despite the Intervenors' suggestion to the contrary (*see* Motion at 9 and Contention at 12-13 ¶ 29, *citing* "FSEIS, Appendix A, at A-22 [sic]"), the Staff's consideration of offsite land value impacts at Indian Point rested on a number of different considerations. *See* NUREG-1437, Supp. 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Dec. 2010) ("FSEIS"), at 4-45 – 4-47, A-105, A-122, and A-157 – A-158.

the court did not suggest that the NRC must reevaluate safety issues. *See New York v. NRC*, 681 F.3d at 483. Moreover, the Commission has repeatedly emphasized that NRC regulations limit the scope of safety issues in license renewal proceedings to questions of aging management. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 490-93 (2010). Consequently, the Intervenors' suggestion that the NRC must consider the safety of on-site spent fuel storage facilities is outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).[21]

Likewise, the Intervenors' claims that the NRC must evaluate and analyze (1) "the comparative impacts of spent fuel storage in [spent fuel] pools versus in dry casks" and (2) "alternatives to mitigate these impacts, among others" are also inadmissible. Contention at 14, ¶ 33. First, these claims lack an adequate basis, as Intervenors do not point to any statement in *New York v. NRC* that would indicate that such analyses are required on remand; further, they do not provide any facts or expert opinion in support of these claims. Bare assertions are insufficient to support an admissible contention. *Palisades*, CLI-07-18, 65 NRC at 414. Second, Intervenors do not demonstrate that such analyses would impact the grant or denial of a renewed license. Therefore, these claims should be rejected as are immaterial. *See* 10 C.F.R. § 2.309(f)(1)(i), (iv), and (vi).

Finally, the Intervenors assert that the NRC must evaluate "the implications of on-site storage of waste for decommissioning." Contention at 14, ¶ 33. But the D.C. Circuit's opinion does not discuss decommissioning in any way, much less require the NRC to evaluate this issue on remand. *See New York v. NRC*, 681 F.3d 471. Moreover, for purposes of license renewal, other Commission rules, not at issue in *New York v. NRC,* establish that

[21] In addition, these basis statements should be rejected as impermissibly vague, in that the Intervenors fail to explain what they mean in asserting that the safety of "generation . . . of radioactive waste" must be evaluated. *See* Contention at 14 ¶ 33. Nor have the intervenors provided facts or expert opinion in support of their assertions, or shown the existence of a genuine dispute of material fact, as required by 10 C.F.R. §§ 2.309(f)(1)(i) (ii), (iv), (v), and (vi).

decommissioning is a Category 1 issue and therefore does not constitute a litigable issue in this proceeding. 10 C.F.P. Part 51, Appendix B, Table B-1, "Decommissioning" (finding that the impacts of license renewal on radiation doses, waste management, air quality, water quality, ecological resources, and socioeconomic impacts from decommissioning will be small). In any event, the NRC's thorough consideration of the impacts of license renewal on decommissioning assumed that spent fuel would remain on site during, and potentially after, the decommissioning process. GEIS at 7-5 to 7-7. The Intervenors have not suggested, let alone provided, any basis to support a claim that this analysis is inadequate. Consequently, this portion of the contention is also inadmissible. See 10 C.F.R. § 2.309(f)(1)(iii), (v).

In sum, the 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.

CONCLUSION

For the foregoing reasons, the Staff submits that if the Board rules before the mandate has issued, the contention must be rejected as an impermissible challenge to NRC regulations. On the other hand, Contention NYS-37 would be admissible upon issuance of the D.C. Circuit's mandate in *New York v. NRC,* except with respect to certain claims as set forth herein. Further, the Staff notes that the admission of this contention would be subject to any further action by the Commission, including the possible commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 2nd day of August, 2012

CERTIFICATION OF COUNSEL

Counsel for the Staff certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

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this 2nd day of August 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Indian Point Nuclear Generating Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO INTERVENORS' (1) JOINT MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE ONSITE STORAGE OF NUCLEAR WASTE AT INDIAN POINT AND (2) JOINT CONTENTION NYS-39/RK-EC-9/CW-EC-10," dated August 2, 2012, in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 2nd day of August, 2012.

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