UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	August 3, 2012

ENTERGY'S ANSWER TO HUDSON RIVER SLOOP CLEARWATER, INC.'S NEW SAFETY CONTENTION CONCERNING THE WASTE CONFIDENCE RULE

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TABLE OF CONTENTS

Page

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), and in accordance with the Atomic Safety and Licensing Board's ("Board") Scheduling Order of July 1, 2010 ("Scheduling Order"), Entergy Nuclear Operations, Inc. ("Entergy") submits this Answer opposing "Hudson River Sloop Clearwater, Inc.'s [("Clearwater")] Motion for Leave to Add A New Contention Based Upon New Information and Petition to Add New Contention" ("New Contention") filed on July 9, 2012.[1]

In the New Contention, Clearwater claims that the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *New York v. NRC*,[2] vacating and remanding the Commission's Waste Confidence Decision ("WCD") under the National Environmental Policy Act (NEPA),[3]

[1] The New Contention is supported by the two other documents that Clearwater attached to its filing. The first is the Expert Witness Declaration of Arnold Gundersen Regarding Aging Management of Nuclear Fuel Racks (Feb. 25, 2011) ("Gundersen Declaration"), originally prepared for Riverkeeper in support of Clearwater and Riverkeeper's reply in support of a prior version of the New Contention. The second is the Prefiled Direct Testimony of Arnold Gundersen Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (Dec. 21, 2011) ("Gundersen Testimony") (RIV000060), originally filed in support of the joint Clearwater/Riverkeeper environmental contention on spent fuel pool leaks. The proposed New Contention is designated CW SC-4.

[2] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[3] Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("2010 WCD").

and associated Temporary Storage Rule ("TSR") in 10 C.F.R. § 51.23(b),[4] provides new information to support the filing of a safety contention.[5] The New Contention alleges that Entergy's license renewal application ("LRA") for the Indian Point Energy Center ("IPEC") is inadequate under the Atomic Energy Act ("AEA") because there is insufficient analysis of aging management of spent fuel pools, including after the end of the period of extended operation ("PEO").[6] The New Contention essentially duplicates, with minor changes, contentions Clearwater submitted on two previous occasions.[7] The Commission rejected the first prior contention in CLI-10-19,[8] and the Board subsequently rejected two revised versions of the contention in 2011.[9]

As with its predecessors, Clearwater's New Contention also should be denied in its entirety. First, the New Contention is not based on any new and materially different information, as required by 10 C.F.R. § 2.309(f)(2), because the D.C. Circuit has not issued its mandate for the *New York* decision, and the WCD and TSR therefore remain in effect. Even assuming issuance of the mandate, the NEPA-based decision does not provide *materially* different information with respect to the AEA-based *safety* or aging management analyses in the IPEC LRA. Second, Clearwater does not satisfy the balancing test for non-timely filings under

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4 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) ("TSR")

5 *See* New Contention at 4 (*citing* 2010 WCD, 75 Fed. Reg. at 81,037; TSR, 75 Fed. Reg. at 81,032).

6 *See id*. at 8.

7 *See* Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add New Contentions Based Upon New Information (Oct. 26, 2009; corrected version, Nov. 6, 2009), *available at* ADAMS Accession Nos. ML093080129, ML093200503; Joint Motion for Leave to Add Contentions Based Upon New Information and Petition to Add New Contentions (Jan. 24, 2011), *available at* ADAMS Accession No. ML110330089 ("2011 Joint Motion").

8 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98 (2010) ("CLI-10-19").

9 *See* Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 46 (July 6, 2011) (unpublished) ("July 6, 2011 Board Order").

10 C.F.R. § 2.309(c). Third, to the extent the New Contention focuses on the aging management of spent fuel pools after the end of the PEO,[10] it raises issues that are not within the scope of license renewal and not material to the findings that the NRC must make for purposes of license renewal. Thus the contention is substantively inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) and (iv). Fourth, to the extent the New Contention focuses on Entergy's proposed aging management activities during the PEO, the contention is not adequately supported and largely ignores the portions of the LRA that address the spent fuel pool-related aging management programs ("AMPs"), thereby failing to meet the requirements for adequate support in 10 C.F.R. § 2.309(f)(1)(v) and failing to raise a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, the New Contention should be rejected in its entirety on numerous independent grounds.

II. BACKGROUND

A. Background on the Waste Confidence Decision, Temporary Storage Rule, and the Recent D.C. Circuit Decision

In response to several prior proposed contentions and related documents in this proceeding, both the Board and Commission have recited the Waste Confidence Rule's general history.[11] Most importantly, in 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[12] the Commission issued its initial WCD and TSR.[13] Since that time, the TSR has

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[10] *See*, *e.g.*, New Contention at 11 ("In general, the Entergy aging management plan is inadequate because it fails to extend beyond the period of extended operation.").

[11] *See*, *e.g.*, Licensing Board 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 Contentions at 18-22 (Feb. 12, 2010) ("Feb. 12, 2010 Order"); *see also* Applicant's Answer to Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s New Contention Concerning the Waste Confidence Rule at 3-6 (Feb. 18, 2011), *available at* ADAMS Accession No. ML110560270 ("Entergy's 2011 Answer").

[12] *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

[13] *See Rulemaking on the Storage and Disposal of Nuclear Waste* (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984);

made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in reactor licensing proceeding environmental reports or impact statements.[14] The Commission has thus clearly and consistently chosen to generically address waste storage environmental impacts through the TSR, rather than repeatedly litigating identical or near-identical issues in individual licensing proceedings.[15]

After considering public comments, the Commission issued revisions to the WCD and TSR in December 2010.[16] Four states, an Indian community, and several environmental groups (but not Clearwater) challenged that rulemaking in the D.C. Circuit. On June 8, 2012, the D.C. Circuit issued a decision in *New York v. NRC*, vacating and remanding the WCD and TSR update.[17] Importantly, the D.C. Circuit's decision in *New York* vacating and remanding the WCD and TSR is based solely on the requirements of the National Environmental Policy Act ("NEPA"). The decision does not mention the AEA or its associated safety requirements.[18]

No mandate has issued, however, and parties are still evaluating their options, including potentially seeking rehearing or rehearing en banc.[19] Thus, the WCD and TSR remain in effect at the present time. Notwithstanding the still-evolving developments in *New York*, on July 8, 2012, Clearwater, along with New York State and Riverkeeper Inc., filed a new joint

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Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984) ("Spent Fuel Disposition Requirements").

14 *Compare* Spent Fuel Disposition Requirements, 49 Fed. Reg. at 34,694, *with* 10 C.F.R. § 51.23(b).

15 CLI-10-19, 72 NRC at 99 (*quoting Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

16 2010 WCD, 75 Fed. Reg. at 81,037; TSR, 75 Fed. Reg. at 81,032.

17 *See New York*, 681 F.3d at 483.

18 *See generally New York*, 861 F.3d 471.

19 *See New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc).

environmental contention based on the *New York* decision.[20] The next day, Clearwater filed the New (safety) Contention, which New York State and Riverkeeper did not join.

B. The Post-Operational Safety of Spent Fuel Storage Is Regulated Under 10 C.F.R. Part 50, Not the License Renewal Process in 10 C.F.R. Part 54

From a safety perspective, the Commission addresses the post-operational management of spent fuel storage in spent fuel pools through the regulatory requirements set forth in 10 C.F.R. § 50.54(bb).[21] Under this regulation, within 2 years following permanent cessation of operations or 5 years before expiration of a reactor operating license, licensees must submit for preliminary Commission approval "the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy."[22] Final Commission review of the program "will be undertaken as part of any proceeding for continued licensing under part 50 or part 72 of this chapter,"[23] *i.e.*, a proceeding for an amended Part 50 license for a shut down reactor or a Part 72 license for storage of spent fuel following operating license termination.[24]

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[20] *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), *available at* ADAMS Accession No. ML12190A003.

[21] The long term management of dry spent fuel storage at an Independent Spent Fuel Storage Installation ("ISFSI") is regulated under 10 C.F.R. Part 72. *See* Final Rule, Notification of Spent Fuel Management and Funding Plans by Licensees of Prematurely Shut Down Power Reactors, 59 Fed. Reg. 10,267, 10,268 (Mar. 4, 1994) ("Spent fuel management and funding plans submitted in compliance with the amended § 50.54(bb) need not cover spent fuel while it is being stored in an ISFSI in compliance with part 72."). Clearwater does not challenge the long-term safety of spent fuel storage at an ISFSI in this contention.

[22] 10 C.F.R. § 50.54(bb).

[23] *Id*.

[24] *See* Final Rule, Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,692 (Aug. 31, 1984) ("1984 Spent Fuel Rulemaking"). The reference to "continued licensing under part 50 or part 72" in 10 C.F.R. § 50.54(bb) is therefore clearly ***not*** a reference to license renewal under Part 54.

Section 50.54(bb)'s requirements are separate from the license renewal process under 10 C.F.R. Part 54.[25] License renewal regulations require applicants to demonstrate that aging effects will be adequately managed "*for* the period of extended operation," *not after the PEO ends*.[26] Likewise, the Commission must find, prior to issuance of a renewed license, that there is reasonable assurance with respect to "managing the effects of aging *during* the period of extended operation."[27] In other words, the scope of the NRC's safety review of a license renewal application under Part 54 includes the aging management of in-scope structures, systems, and components ("SSCs") during the PEO, but does not include the time period after the end of the PEO. This distinction is logical because the post-operational safety of spent fuel is an issue that licensees and the NRC must address regardless of whether a plant's operating license is renewed, and the Commission's adoption of this distinction is codified in 10 C.F.R. § 50.54(bb). Thus, any questions regarding the adequacy of Entergy's submittals under 10 C.F.R. § 50.54(bb)[28] are not subject to litigation in this license renewal proceeding.[29]

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[25] *See* 10 C.F.R. § 50.54(bb) ("For nuclear power reactors licensed by the NRC . . ."); *see also* Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,968 (Dec. 13, 1991) (determining that the post-operation spent fuel management requirements in 10 C.F.R. § 50.54(bb) should not be waived for license renewal applicants).

[26] 10 C.F.R. §§ 54.21(a)(3), 54.21(c)(1(iii) (emphasis added).

[27] *Id*. § 54.29(a)(1) (emphasis added).

[28] *See* NL-08-144, Letter from J. E. Pollock, Entergy, to NRC, "Unit No. 1 and 2 Program for Maintenance of Irradiated Fuel and Preliminary Decommissioning Cost Analysis in Accordance with 10 CFR 50.54 (bb) and 10 CFR 50.75(f)(3)" (Oct. 23, 2008) (ENT000141); NL-10-123, Letter from J.E. Pollock, Entergy, to NRC, "Unit 3 Program for Maintenance of Irradiated Fuel and Preliminary Decommissioning Cost Analysis in Accordance with 10 CFR 50.54 (bb) and 10 CFR 50.75(f)(3)" (Dec. 10, 2010) (ENT000142). The NRC reviewed and approved the Section 50.54(bb) submittals for IP2 and IP3 in March 2010 and June 2011, respectively. *See* Letter from J. P. Boska, NRC, to Entergy, "Indian Point Nuclear Generating Unit Nos. 1 and 2 – Safety Evaluation Re: Spent Fuel Management Program and Preliminary Decommissioning Cost Estimate" (Mar. 17, 2010) (ENT000159); Letter from J.P. Boska, NRC, to Entergy, "Indian Point Nuclear Generating Unit No. 3 – Safety Evaluation Re: Spent Fuel Management Program and Preliminary Decommissioning Cost Estimate" (June 22, 2011) (ENT000160).

[29] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC __, slip op. at 10 (Oct. 12, 2011) ("license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity.") (*quoting N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 484 (2010)); Final Rule,

C. Clearwater's New Safety Contention

On July 9, 2012, Clearwater filed its New Contention ("CW SC-4"). The contention alleges that:

> The license renewal application requesting the relicensing of Indian Point Units 2 and 3 is inadequate because it provides insufficient analysis of the aging management of the spent fuel pools that could be used to store waste on the site in the long term. In addition, both the applicant and the NRC Staff have failed to establish that any combination of such storage will provide adequate protection of safety over the long term.[30]

CW SC-4 essentially duplicates, with minor changes, proposed contention CW SC-1 that Clearwater submitted in October 2009, and that the Commission rejected in CLI-10-19.[31] It also mirrors proposed contention CW SC-2/RK TC-3 that Clearwater and Riverkeeper jointly submitted in January 2011, and that the Board rejected in the July 6, 2011 Board Order. One difference between CW SC-4 and its previously-rejected iterations is that the CW SC-4 omits allegations related to the storage of spent fuel in "dry casks," *i.e.*, the dry storage of fuel at the IPEC ISFSI.[32] Thus, CW SC-4 is limited to alleged deficiencies in the aging management of spent fuel storage in the IP2 and IP3 spent fuel pools.[33]

Nuclear Power Plant License Renewal; Revisions, 56 Fed. Reg. at 64,952; *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 116-20 (2008) (rejecting NYS' assertion that it can challenge, in this proceeding, whether the applicant follows conditions laid out in 10 C.F.R. § 50.54).

30 New Contention at 8.

31 *See* CLI-10-19, 72 NRC at 100.

32 *Compare* 2011 Joint Motion at 18 (alleging that the LRA is "inadequate because it provides insufficient analysis of the aging management of the *dry casks and* spent fuel pools") (emphasis added), *with* New Contention at 8 (alleging that the LRA is "inadequate because it provides insufficient analysis of the aging management of the spent fuel pools").

33 As Entergy explained in response to CW SC-2/RK TC-3 and its companion proposed contention, CW SC-3/RK TC-4, issues related to the IPEC ISFSI, which is licensed and regulated under 10 C.F.R. Part 72, are not within the scope of this 10 C.F.R. Part 54 license renewal proceeding. *See* Entergy's 2011 Answer at 20-21; *see also Nuclear Mgmt. Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733 (2006) ("The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72."); *Oconee*, CLI-99-11, 49 NRC at 344 n.4 ("the Commission handles as a separate licensing matter [from license renewal] any applications for an onsite ISFSI.

In support of this New Contention, Clearwater identifies five "[e]xamples of specific issues," *i.e.*, bases, that allegedly support the contention.[34] They are as follows:

1. *Inspection Scope for the IP2 Spent Fuel Pool Liner*: Entergy allegedly "relies upon a one-time inspection of only 40% of the liner of the spent fuel pool because the fuel density is too great to allow a more thorough inspection."[35]

2. *Long-Term Degradation of the Spent Fuel Pool Liner and Concrete*: "The long-term degradation of the liner and the concrete for the spent-fuel pool must be monitored and action taken when these components no longer fulfill their safety function."[36]

3. *Boraflex Degradation*: "The long-term degradation of the Boraflex or other wrapping around the fuel assemblies in the spent fuel pool."[37]

4. *Leaks of Radioactive Fluid*: "The potential for ongoing leaks of radioactivity from existing spent-fuel pools is going to get worse over the long term."[38]

5. *Terrorism*: "[The] long-term wet storage of spent-fuel in high-density racks does not meet NRC requirements for adequate protection and renders the plant excessively vulnerable to terrorism."[39]

As explained in Section IV.A.2 below, none of these five bases provide new and materially different information that would support a timely challenge to Entergy's aging

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ISFSI licenses are granted under 10 C.F.R. Part 72"). Thus, to the extent there are any claims related to the IPEC ISFSI, they are inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

[34] Clearwater characterizes these bases as describing the issues it seeks to raise, "without limitation." New Contention at 12. While it is not clear what Clearwater means by "without limitation," absent an amendment to the contention, the Commission does not permit the expansion of a contention beyond the bases specifically pled by the petitioner and admitted by the Board. *See*, *e.g.*, *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-01 (2010); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309; *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, slip op. at 11 n.50 (Mar. 8, 2012).

[35] New Contention at 12. This basis for the contention refers to page 7 of the Gundersen Testimony, filed more than six months before the New Contention.

[36] *Id*. at 12-13. In support, Clearwater refers to a number of documents, rather than any expert declaration or report. None of these documents are newer than June 2011, and none of these documents were actually attached to or filed with the New Contention. *See* Scheduling Order at 18 (requiring pleadings to attach documents, "or they will not be considered by the Board").

[37] New Contention at 13.

[38] *Id*. at 14.

[39] *Id*. In support, Clearwater vaguely refers to "the Thompson Report cited above (Environmental Impacts)." This appears to be a reference, however, to Gordon R. Thompson, Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC's Waste Confidence Decision and Environmental Impact Determination (Feb. 6, 2009) ("Thompson/TSEP Report")), which appears to be available in ADAMS at Accession No. ML090700781.

management activities for the spent fuel pool. None of the information that is even arguably relevant to aging management of the spent fuel pools is new. Indeed, the only information referenced in the New Contention that is less than six months old is the *New York* decision. That decision does not provide materially different information with respect to the safety or aging management analyses in the IPEC LRA. Furthermore, to the extent that the contention focuses on the time period after the end of the PEO,[40] it raises issues that are outside the scope of this proceeding. Finally, to the extent it alleges inadequacies in Entergy's proposed aging management activities during the PEO,[41] the five bases Clearwater identifies fail to raise a genuine dispute with the LRA.

III. LEGAL STANDARDS GOVERNING ADMISSION OF NEW AND AMENDED CONTENTIONS

A. Timeliness Requirements

After the expiration of the deadline in 10 C.F.R. § 2.309(b) for filing a timely petition to intervene, an intervenor may file new contentions only with leave of the presiding officer upon 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.[42]

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[40] *See* New Contention at 11; *see also id*. at 10 (alleging the failure, in the LRA, to analyze the "safety of storing waste on-site indefinitely *after the license has expired*.") (emphasis added)).

[41] *See id*. at 11 ("It is also inadequate in specific areas even during the period of extended operation . . . .").

[42] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

The Commission recently reiterated that the publication of a new document, standing alone, does not meet this standard unless the information in that document is new and *materially different* from what was previously available.[43] Furthermore, the Petitioner must act promptly to bring the new or amended contention.[44] A new contention is not an occasion to raise additional arguments that could have been raised previously.[45]

If an intervenor cannot satisfy the criteria of 10 C.F.R. § 2.309(f)(2), then a contention is considered nontimely, and the intervenor must successfully address the eight-factor balancing test for non-timely filings in Section 2.309(c)(1)(i)-(viii).[46] The burden is on Intervenors to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[47] The eight factors in Section 2.309(c)(1) are not of equal importance. The first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[48]

B. <u>Contention Admissibility Standards</u>

Any new contention also must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[49] These requirements are discussed in detail in Entergy's Answer to

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43 *See*, *e.g.*, *Prairie Island*, CLI-10-27, 72 NRC at 493-96.

44 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573 & 579-80 (2006) (rejecting petitioner's attempt to "stretch the timeliness clock" because its new contentions were based on information that was previously available and petitioners failed to identify precisely what information was "new" and "different").

45 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385-86 (2002).

46 *See* Scheduling Order at 5-6; 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.").

47 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

48 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, slip op. at 25 n.96 (June 7, 2012) ("The standard for new or amended contentions involves a balancing of eight factors set forth in 10 C.F.R. § 2.309. The factor given the most weight is whether there is 'good cause' for the failure to file on time."); *see also Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009).

49 That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the

Clearwater's original proposed contentions[50] and a brief discussion of the key contention admissibility requirements is set forth below.

The Commission's rules on contention admissibility are "strict."[51] "[T]he NRC in 1989 revised its rules to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.' The agency deliberately raised the contention-admissibility standards to relieve the hearing delays that such contentions had caused in the past."[52] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from another proceeding involving another reactor,' even though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[53]

The purpose of the six 10 C.F.R. § 2.309(f)(1) admissibility criteria is to focus litigation on concrete issues and thereby ensure a clear and focused record for decision.[54] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[55] Thus, a licensing

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findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

50 *See* Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater, Inc.'s Petition to Intervene and Request for Hearing at 11-18, 24-30 (Jan. 22, 2008), *available at* ADAMS Accession No. ML080300149.

51 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC __,, slip op. at 31 (Mar. 27, 2012); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (characterizing the contention admissibility rules as "strict by design").

52 *Davis-Besse*, CLI-12-08, slip op. at 3-4 (*quoting Oconee*, CLI-99-11, 49 NRC at 334).

53 *Id*. at 4 (*quoting Oconee*, CLI-99-11, 49 NRC at 334).

54 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

55 *Id.*

proceeding is not the proper forum to attack an NRC rule or regulation.[56] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[57] In evaluating the admissibility of a contention, the Board must specify each basis relied upon for admitting the contention.[58]

IV. THE NEW CONTENTION SHOULD BE REJECTED

A. Clearwater SC-4 Is Untimely

1. Clearwater SC-4 Fails to Satisfy 10 C.F.R. § 2.309(f)(2) Because the D.C. Circuit's Mandate Has Not Issued

Clearwater has not shown that the information upon which the Proposed Contention is based is materially different than information previously available and thus fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii). The D.C. Circuit has not yet issued its mandate returning the WCD proceeding to the Commission. In fact, the earliest the mandate will issue, if ever, is late August 2012.[59] Because it is the mandate that makes the decision effective, the *New York* decision has no legal effect on the WCD. In turn, it cannot have an effect on this proceeding. As the Commission has previously held, it is premature for a party to request relief based upon a court

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[56] *See, e.g.*, *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

[57] *Oconee*, CLI-99-11, 49 NRC at 345 (*quoting Douglas Point*, ALAB-218, 8 AEC at 85).

[58] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC __, slip op. at 11 n.50 (Mar. 8, 2012).

[59] *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); Clerk's Order, *New York*, 681 F.3d 471 (No. 11-1045) (July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

decision before the mandate issues.[60] Accordingly, *New York* does not provide any new and materially different information and CW SC-4 fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii).

Similarly, the Scheduling Order specifies that a new contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if filed within 30 days of "when the new and material information on which it is based first becomes available."[61] Because no new material information has become available, CW SC-4 fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii) as well. For these reasons, CW SC-4 is does not satisfy the Section 2.309(f)(2) requirements that new and materially different information form the basis for a contention.

2. Even If the Mandate Issues, Clearwater SC-4 Would Still Fail to Satisfy the 10 C.F.R. § 2.309(f)(2) Requirements

Even if the D.C. Circuit issues its mandate, CW SC-4 would still fail to meet the requirements in 10 C.F.R. § 2.309(f)(2) because the court's decision to vacate and remand the WCD and TSR in *New York* provides no materially different information with respect to the safety analysis of Entergy's LRA. Specifically, there is no regulation in 10 C.F.R. Part 54 that is materially impacted by the *New York* decision. Accordingly, there is nothing in the *New York* decision—which is solely based on the requirements of NEPA—that can provide the basis for this new safety contention. As such, CW SC-4 is untimely.

Clearwater generally cites the Atomic Energy Act[62] and three regulations in 10 C.F.R. Part 50: Sections 50.35(c) (issuance of construction permits ("CPs")), 50.40(a) (common standards for issuance of CPs, operating licenses ("OLs"), early site permits, combined licenses,

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60 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006) (denying premature motion seeking procedural relief in advance of an appellate court's mandate).

61 *See* Scheduling Order at 6.

62 *See* New Contention at 3, 10, 11, 15, 16.

and manufacturing licenses), and 50.57(a)(3) (issuance of OLs),[63] and to various judicial and NRC administrative decisions, none of which establish the materiality of the issues raised in CW SC-4. Clearwater appears to recognize its failure to establish the materiality of the issues it seeks to raise—with respect to license renewal—when it states that: "[t]o the extent that the contention goes beyond the normal scope of AEA contentions on relicensing, the legal basis for the contentions [sic] is that the NRC is required to comply with the AEA when issuing a license."[64]

These citations do not establish that the issues raised in CW SC-4, including the vacation and remand of the WCD in *New York*, are based on new and materially different information with respect to this Part 54 license renewal proceeding.[65] As explained in Section II.B, above, the post-operational safety of spent fuel stored on-site after the cessation of operation is assured through the regulatory requirements of 10 C.F.R. § 50.54(bb)—requirements which are separate from and not subject to litigation in this license renewal proceeding.[66]

Further, the decision in *New York* provides no new information with respect to the aging management of spent fuel pool SSCs *during the PEO*, which, as previously noted, is one of the issues Clearwater seeks to litigate in CW SC-4.[67] The D.C. Circuit's decision simply does not address such issues.

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63 *See id*. at 10.

64 *Id*.

65 The Court's vacation and remand of the Commission's *environmental* regulations in the TSR (10 C.F.R. § 51.23) also does not provide any new information that might support the admission of this proposed *safety* contention.

66 *See*, *e.g.*, *N.J. Env't'l Fed'n v. NRC*, 645 F.3d 220, 224 (3d Cir. 2011) ("The scope of the NRC license renewal process is limited. While the ongoing regulatory process ensures that the current licensing basis ('CLB') maintains an acceptable level of safety . . . ."); *Fla. Power & Light Co.* (Turkey Point Nuclear Plan, Units 3 & 4), CLI-01-17, 54 NRC 3, 9 (2001) ("In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."); *Diablo Canyon*, CLI-11-11, slip op. at 10 ("license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity.").

67 *See* New Contention at 11.

Finally, Clearwater does not—and cannot—claim that anything in the Gundersen Declaration, Gundersen Testimony, or any other document referenced in the New Contention qualifies as new information or information that was previously unavailable. Further, Clearwater points to no amendment to the LRA that might have changed Entergy's relevant AMPs and no other new safety analysis that might serve as the trigger for a timely safety contention. Tellingly, none of the five bases listed in Section II.C, above, is supported by any document that is less than six months old.

Thus, even if the D.C. Circuit issues the mandate for *New York*, CW SC-4 would remain untimely under 10 C.F.R. § 2.309(f)(2), because the contention is not based on information that is *materially* different than information previously available, contrary to Section 2.309(f)(2)(ii).

3. Clearwater SC-4 Fails to Satisfy the 10 C.F.R. § 2.309(c)(1) Timeliness Requirements

Because the New Contention does not identify new and materially different information, it must satisfy the criteria for non-timely submissions in 10 C.F.R. § 2.309(c)(1)(i) to (viii).[68] Clearwater asserts that the most important factor of "good cause" weighs in its favor because its contentions were previously barred by the Commission due to the WCD being in place, an impediment that has only recently been removed.[69] As explained above, however, the WCD and associated D.C. Circuit decision are NEPA-based. The *New York* decision, therefore, is not relevant to Clearwater's proposed safety and aging management contention, so there is no plausible "good cause" for the belated filing of this contention.

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[68] *See id.* at 12; 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.").

[69] *See* New Contention at 20.

Nor has Clearwater made a "compelling showing" as to any of the remaining factors under Section 2.309(c)(1) to outweigh the lack of good cause.[70] Clearwater asserts that denial of its contention "could lead to more delay if a Circuit Court were to find on appeal that analysis of spent fuel issues is essential to comply with [the] AEA."[71] But that argument proves far too much. Every late-filed contention could be justified on the basis that, if the proponent of the contention eventually succeeds on a later appeal, it would have been "more efficient" to address the issue initially. On the contrary, the belated admission of a contention that challenges issues that the Commission has excluded from this proceeding will undoubtedly broaden the issues and delay the proceeding. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor seven), weighs heavily against Clearwater.[72]

Furthermore, Clearwater provides no indication that its participation in the litigation of CW SC-4 would contribute to the development of a sound record (factor eight). The proposed new safety contention is fundamentally unsupported and the allegations in them are outside the scope of this proceeding and immaterial,[73] so litigation of them would not assist in developing a sound record, contrary to Section 2.309(c)(1)(viii).[74]

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70 *See Commonwealth Edison Co.* (Braidwood Nuclear Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

71 New Contention at 21.

72 *See Tex. Utils. Elec. Co.*, (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993) (holding that "the potential for delay if the petition is granted, weighs heavily against" petitioners because "[g]ranting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule").

73 *See* Section IV.B.1, below.

74 *See Pilgrim*, CLI-12-15, slip op. at 26 n.96. In addition, Clearwater has previously acknowledged a general lack of expertise and knowledge with respect to technical safety issues. *See* Hudson River Sloop Clearwater, Inc.'s Reply to Entergy and the Nuclear Regulatory Commission (NRC) Responses to Clearwater Petition to Intervene and Request for Hearing at 3 (Feb. 8, 2008) (ADAMS Accession No. unavailable) ("Clearwater has, and will, provide input in areas where it has expertise and experience. Clearwater's contentions involved

As to factors 2 through 4 (nature and extent of petitioners' right to be made a party, their property or financial interests in the proceeding, the possible effect of any order on petitioners' interests), they do not provide any unique justification related to the pending New Contention, because Clearwater is already a party to this proceeding.[75] Factors 5 and 6 (availability of other means to protect petitioners' interest and the extent to which petitioners' interests will be represented by existing parties)[76] also weigh against admission of the New Contention. Contrary to Clearwater's assertions that the allegedly "required analyses would not be performed,"[77] many of the concerns raised in the CW SC-4 are either addressed in Clearwater's admitted contention on the alleged impacts of spent fuel pool leakage, or relate to the IPEC post-operational spent fuel management program, which, as explained in Section II.B, above, is subject to separate regulatory processes under 10 C.F.R. Part 50.

In summary, having failed to establish good cause or to make a compelling showing on the remaining factors, the balance of factors relevant under 10 C.F.R. § 2.309(c)(1)(i) to (viii) weighs against Clearwater. Therefore, CW SC-4 should be denied.

B. Clearwater SC-4 Is Substantively Inadmissible

1. Clearwater SC-4 Raises Safety Issues that Are Outside Scope and Immaterial to the License Renewal Proceeding, Contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv)

As previously noted, Clearwater claims that the LRA is inadequate because aging management activities are limited to the PEO.[78] Contentions, however, may not raise issues that

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environmental impacts and did not relate to technical aspects beyond its knowledge. . . . We will participate where our expertise and experience is helpful.").

75 *See* 10 C.F.R. § 2.309(c)(1)(ii)-(iv) (addressing the nature of petitioners' right to be made a party, nature and extent of petitioners' property, financial, or other interests, and the effect of any order on such interests).

76 10 C.F.R. § 2.309(c)(1)(v)-(vi)

77 *See* New Contention at 20-21.

78 *See id*. at 10-11.

are outside the specified scope of the proceeding.[79] As specified in 10 C.F.R. § 54.30(b), "The licensee's compliance with the obligation . . . to take measures under its current license is not within the scope of the license renewal review." As a result, the safety issues within the scope of this license renewal proceeding do not include any question of the adequacy of Entergy's program to manage the storage of spent fuel after the cessation of operations, an issue that is addressed under 10 C.F.R. § 50.54(bb), not Part 54. Thus, Clearwater's contention, to the extent it alleges a deficiency in or the absence of such a program, is outside the scope of this Part 54 proceeding and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

Similarly, as explained in Sections II.B and IV.A.2, above, to the extent CW SC-4 focuses on the aging management of spent fuel pools after the end of the PEO, it is not material to the findings that the NRC must make to issue a renewed license.[80] Thus, CW SC-4, to the extent it raises such issues, is immaterial and inadmissible under 10 C.F.R. § 2.309(f)(1)(iv).

2. Clearwater SC-4 Is Insufficiently Supported and Raises No Genuine Dispute Regarding Entergy's LRA, As Required By 10 C.F.R. § 2.309(f)(1)(v) and (vi)

CW SC-4 also alleges inadequacies in Entergy's proposed aging management activities during the PEO.[81] In support, Clearwater presents the five bases listed in Section II.C, above: (1) the alleged insufficient inspection scope for the IP2 spent fuel pool liner; (2) the potential for long-term degradation of the spent fuel pool liner and concrete; (3) the potential for Boraflex degradation; (4) the potential for leaks of radioactive fluid; and (5) the claim that high-density

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79 10 C.F.R. § 2.309(f)(1)(iii); *Diablo Canyon*, CLI-11-11, slip op. at 11.

80 To raise an issue of law or fact that is material to the outcome of a proceeding, the subject matter of the contention must impact the grant or denial of the pending license application—in this case, the renewed licenses for IP2 and IP3. 10 C.F.R. § 2.309(f)(1)(iii); *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-07, 75 NRC __, slip op. at 10-11) (Mar. 16, 2012).

81 *See* New Contention at 8, 11.

spent fuel pool racks are vulnerable to terrorism.[82] Whether considered individually or collectively, however, none of these five bases is sufficiently supported through alleged facts or expert opinion such that the contention raises a genuine dispute with the LRA, as is required under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Section 2.309(f)(1)(v) requires a petitioner "to provide the analyses and expert opinion showing why its bases support its contention,"[83] and to "provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention."[84] Under this standard, the Board is expected to examine documents to confirm that they support a proposed contention.[85] In this proceeding, the Board's Scheduling Order requires documents supporting a proposed contention to be attached to the pleading, or they will not be considered by the Board.[86]

In order to raise a genuine dispute, the Commission has stated that a petitioner must ''read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view,'' and explain why it disagrees with the applicant.[87] Thus, a

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82 *See id*. at 12-14.

83 *Ga. Inst. of Tech*. (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95- 6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995).

84 *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180, *aff'd*, CLI-98-13, 48 NRC 26 (1998) (emphasis added).

85 *See Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

86 *See* Scheduling Order at 18. Clearwater has previously taken the position that the enforcement of this provision of the Scheduling Order would "elevate form over substance." Combined Reply to NRC Staff and Entergy's Answers in Opposition to Clearwater and Riverkeeper's Joint Motion for Leave and Petition to Add New Contentions at 13 (Feb. 25, 2011), *available at* ADAMS Accession No. ML110670381. Entergy respectfully submits that Clearwater's routine disregard of Board-imposed requirements, if permitted to continue, unnecessarily complicates the efficient completion of this already-extended adjudicatory proceeding.

87 Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Millstone,* CLI-01-24, 54 NRC at 358.

contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[88]

Contrary to these requirements, Clearwater effectively admits that CW SC-4 was filed in the hope that Entergy and the NRC Staff, in responding to the contention, will develop a genuine dispute for litigation. As Clearwater states, "Petitioner expects that the answers to this Petition will demonstrate further sharp factual and legal disputes between the parties that will need to be resolved through a hearing."[89] This is precisely the type of "notice pleading" contention that the Commission sought to exclude when it toughened the contention pleading standards twenty years ago.[90]

With respect to the proffered bases for CW SC-4, the contention fails to raise a genuine dispute because the LRA *contains* AMPs related to the spent fuel pools. Entergy's LRA includes AMPs for spent fuel pool structural components, including liner plates and gates;[91] concrete structures, including floor slabs, interior walls, and ceilings;[92] spent fuel storage racks;[93] and neutron absorbers.[94] None of the five bases for the contention identify any genuine dispute with these programs. In particular:

1. *Inspection Scope for the IP2 Spent Fuel Pool Liner*: Clearwater alleges that the inspection scope for the IP2 spent fuel pool liner is inadequate, because it only covers

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88 *See Oconee*, CLI-99-11, 49 NRC at 342.

89 New Contention at 17.

90 *See*, *e.g.*, Proposed Rule, Rules of Practice for Domestic Licensing Proceedings–Procedural Changes in the Hearing Process, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986) (proposing the introduction of the support and genuine dispute standards to avoid the admission of "frivolous contentions" where the petitioner "may not fully understand a contention" or does not "adequately identify the issues that [it] seeks to litigate.").

91 License Renewal Application [("LRA")] Tbl. 3.5.2-3 (ENT00015B).

92 *Id*.

93 *Id*.

94 *Id.* Tbls. 3.3.2-1-IP2, 3.3.2-1-IP3 (ENT00015A).

40% of the spent fuel pool liner.[95] Clearwater relies on the Gundersen Testimony, which alleges that Entergy has not demonstrated that the IP2 spent fuel pool is "now leak proof."[96] The Gundersen Testimony, however, merely provides one isolated and selective quote from the NRC's Safety Evaluation Report,[97] and omits the subsequent five-page discussion of the NRC Staff's requests for additional information ("RAIs") regarding Entergy's Structures Monitoring Program, and Entergy's responses to those RAIs, wherein Entergy explained the basis for the inspection scope and the subsequent analyses that it undertook.[98] Further, the issues in this basis are already being litigated in RK EC-3/CW EC-1, and, as explained above, there is no new information on this issue in CW SC-4.

2. *Long-Term Degradation of the Spent Fuel Pool Liner and Concrete*: Clearwater cites to various documents allegedly showing the potential for long-term degradation of the spent fuel pool liner and concrete.[99] None of these documents were actually attached to or filed with the New Contention. Thus, this basis is entirely unsupported, contrary to 10 C.F.R. § 2.309(f)(1)(v).[100] Moreover, this basis does not allege any specific deficiency in the relevant AMPs in Entergy's LRA, but merely observes that there is a need for the monitoring of aging effects.

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95 *See* New Contention at 12 (*citing* Gundersen Testimony at 7).

96 Gundersen Testimony at 7.

97 *See id*. (*citing* NUREG-1930, Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3 (Nov. 2009) at 3-134 [sic-131]) ("SER") (NYS000326)).

98 *See* SER at 3-130 to -136.

99 *See* New Contention at 12-13.

100 *See* Scheduling Order at 18.

3. *Boraflex Degradation*: Clearwater alleges that Entergy's "proposals" to address potential Boraflex degradation are inadequate.[101] The supporting 2011 Gundersen Declaration, however, fails to provide sufficient support to raise a genuine dispute.[102] Specifically:

    a. Mr. Gundersen asserts that a 2001 license transfer application for IP2 contains "several inaccuracies,"[103] but his challenges to this prior application do not raise a genuine dispute with the LRA.

    b. Mr. Gundersen asserts that Entergy does not manage "boroflex" degradation, it merely "watches as the boron degrades."[104] Mr. Gundersen also asserts that no AMP can possibly address the "industry-wide issue of boroflex degradation."[105] The Commission has held, however, that the license renewal regulations do not require the applicant to demonstrate that aging effects be *precluded*, but that they be adequately managed,[106] which is what Entergy's Boraflex Monitoring Program does.[107] Mr. Gundersen provides no support for his speculation that no Boraflex degradation whatsoever can be tolerated, or for his crucial unexplained assumption that Entergy's spent fuel pool criticality analysis must assume "fire or inadequate cooling."[108]

    c. Mr. Gundersen asserts that LRA Table 3.5.2-3 does not address the management of aging effects on Boraflex.[109] He is correct, but to no avail. As noted above, different tables in the LRA—which Mr. Gundersen ignores—provide information on AMPs that manage the effects of aging on neutron absorbers such as Boraflex.[110]

    d. Mr. Gundersen discusses two NRC information notices, one from 2009 and one from 2011, which allegedly illustrate the industry-wide problem of "boroflex" degradation.[111] Mr. Gundersen does not specifically explain, however, how these information notices, both issued by the NRC Staff as part of its ongoing

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101 New Contention at 13.

102 Further, as discussed in Section IV.A.2, above, the information in the Gundersen Declaration is not new.

103 Gundersen Declaration ¶ 16.

104 *Id*. ¶ 25; *see also id*. ¶¶ 16-24.

105 *Id*. ¶ 27.

106 *See Seabrook*, CLI-12-05, slip op. at 3, 18.

107 *See* Gundersen Declaration ¶ 25 (*citing* SER § 3.0.3.2.3).

108 *Id*. ¶ 21.

109 *Id*. ¶ 26.

110 *See supra* note 94.

111 *See* Gundersen Declaration ¶¶ 28-31.

regulatory oversight under 10 C.F.R. Part 50, show any deficiency in Entergy's LRA.

e. Mr. Gundersen raises the issue of safety after the conclusion of the PEO,[112] but as discussed in Section IV.B.1, above, such issues are outside the scope of this proceeding and immaterial, and therefore cannot raise a genuine dispute on a material issue of law or fact.

4. *Leaks of Radioactive Fluid*: Clearwater relies upon maps that the State of New York submitted to the NRC over four years ago to support a new Clearwater assertion that the potential for leaks of radioactive fluid is going to get worse over time.[113] Again, these maps were not actually attached to or filed with the New Contention, so they cannot provide support for it. In any event, Clearwater does not explain why these maps show that Entergy's spent fuel pool-related AMPs are deficient under the safety standards in 10 C.F.R. Part 54. Similarly, with respect to the environmental impacts of potential spent fuel pool leaks, the FSEIS includes a substantial discussion of the status of spent fuel pool leakage, including potential environmental impacts, but Petitioners do not cite or challenge any of the information in the FSEIS.[114]

5. *Terrorism*: Finally, Clearwater alleges that high-density spent fuel pool racks are vulnerable to terrorism.[115] Once again, Clearwater fails to attach the documents it relies upon in support of this basis, specifically, the Thompson/TSEP Report, so this basis is

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112 *See id*. ¶ 32.

113 *See* New Contention at 14 (*citing* Exhibit A from "ML081340325"). This appears to be a reference to the comments submitted to the NRC in May 2008, by the Office of the Attorney General of the State of New York on a decommissioning planning rulemaking. *See* Letter from J. Dean, NYS, to NRC Sec'y, "NRC Docket No. RIN 3150-AH45: Comments Submitted by the State of New York Concerning the NRC's Proposed Rulemaking to Amend 10 C.F.R. Parts 20, 30, 40, 50, 70 and 72 to Require Certain Changes in Decommissioning Planning (May 8, 2008), *available at* ADAMS Accession No. ML081340325; *id.* Ex. A.

114 *See* NUREG-1437, Supp. 38, Final Supplemental Environmental Impact Statement at 2-110 to -114, 4-56 (Dec. 2010) ("FSEIS"). Moreover, Clearwater already has an admitted environmental contention regarding spent fuel pool leaks—a contention that relies on the same Gundersen Testimony filed in support of CW SC-4. *See Indian Point*, LBP-08-13, 68 NRC at 191-94 (admitting Clearwater EC-1).

115 New Contention at 14.

unsupported.[116] Moreover, terrorism is not an aging effect, so the alleged vulnerability of plant SSCs to terrorism due to the *design* of those SSCs is not a safety issue within the scope of a license renewal proceeding under 10 C.F.R. Part 54.[117]

In sum, as in the prior Clearwater safety contentions on this issue, Clearwater again fails to provide the requisite support for its claims and fails to identify any specific deficiencies in Entergy's AMPs, as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi).

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116 *See* Scheduling Order at 18.

117 *See Seabrook*, CLI-12-05, slip op. at 2 ("The license renewal safety review—and any associated license renewal adjudicatory proceeding—focuses on the detrimental effects of aging posed by long-term reactor operation.") (*citing N.J. Envtl. Fed'n*, 645 F.3d at 224). Further, to the extent this basis can be understood to refer to terrorism-related environmental issues, the Commission—and this Board—have consistently held that the NRC does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants. *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007) (holding that impacts associated with terrorist attacks are "simply too far removed from the natural or expected consequences of agency action to require a study under NEPA."); *Indian Point*, LBP-08-13, 68 NRC at 143 ("[W]e are nonetheless bound by the Commission's ruling in *Oyster Creek* 'that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.'").

V. CONCLUSION

As discussed above, Clearwater fails to show that the New Contention relies on the requisite new and materially different information, nor does it establish that the balance of factors for non-timely filings works in its favor. Even if it can surmount these procedural requirements, the contention fails to meet the Commission's substantive contention admissibility requirements. For all of these reasons, the New Contention should be denied in its entirety.

Respectfully submitted,

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Dated in Washington, D.C.
this 3rd day of August 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 6, 2012

MOTION CERTIFICATION

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

Executed in Accord with 10 C.F.R. § 2.304(d) by Paul M. Bessette

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UNITED STATES OF AMERICA
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In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of "Entergy's Answer to Hudson River Sloop Clearwater, Inc.'s New Safety Contention Concerning the Waste Confidence Rule" was served electronically via the Electronic Information Exchange on the following recipients.

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