

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

Before Administrative Judges:

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

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

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

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

April 1, 2014

ORDER

(Denying Riverkeeper's Motion and Granting Entergy's Motion Addressing RK-EC-8A)

On August 20, 2013, Riverkeeper, Inc. (Riverkeeper) filed a Consolidated Motion for Leave to File an Amended Contention, and Amended Contention RK-EC-8A.¹ Subsequently, Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff filed motions opposing Riverkeeper's proposed amendment.² In its motion, Riverkeeper argued that it was necessary to amend RK-EC-8 due to the new information presented in the Staff's Final Supplemental Environmental Impact Statement (FSEIS), which was issued on July 1, 2013.³

¹ See Riverkeeper Consolidated Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A (Aug. 20, 2013) [hereinafter Riverkeeper Motion].

² See Entergy's Answer to Riverkeeper, Inc.'s Consolidated Motion for Leave to File Amended contention RK-EC-8A and Amended Contention RK-EC-8A (Endangered Aquatic Species) (Oct. 1, 2013); NRC Staff's Answer to Riverkeeper, Inc.'s Consolidated Motion for Leave to File Amended Contention RK-EC-8A and Amended Contention RK-EC-8A (Oct. 1, 2013) [hereinafter NRC Staff Answer].

³ See Letter from S. Turk (Counsel for NRC Staff) to ASLB (June 21, 2013); Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 - Final Report Supplemental Report and Comment Responses (NUREG-1437, Supplement 38, Volume 4), *available at*, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/v4/>.

Entergy, likewise sought to use the new information presented in the FSEIS. According to the applicant, the FSEIS provided a basis to dismiss RK-EC-8 as moot.⁴

I. Ruling on Entergy's Motion

On July 17, 2013, Entergy filed a Motion to Dismiss Riverkeeper Contention RK-EC-8 (Endangered and Threatened Aquatic Species) as moot.⁵ Thereafter, the NRC Staff filed an answer, agreeing with Entergy that all issues raised by RK-EC-8 had been resolved and recommending that Riverkeeper's contention be dismissed.⁶

As filed, Riverkeeper Contention RK-EC-8 asserted:

NRC Staff's FSEIS is deficient for failure to include or consider the assessment of the National Marine Fisheries Service ("NMFS") regarding impacts to endangered species due to incomplete ESA § 7 consultation procedures. A supplemental EIS must be prepared by NRC Staff that fully considers the outcome of the consultation process, including NMFS' forthcoming biological opinion, prior to any decision by the NRC regarding whether to relicense Indian Point.⁷

As presented by the NRC Staff and Entergy, following the Board's admission of RK-EC-8, extensive consultations took place between the NRC Staff and NMFS. These consultations led to the issuance of a Biological Opinion (BiOp) by NMFS, which addressed the environmental impacts of Indian Point license renewal on both shortnose sturgeon and Atlantic sturgeon, and

⁴ See Entergy Motion to Dismiss Riverkeeper Contention RK-EC-8 (Endangered and Threatened Aquatic Species) As Moot (Jul. 17, 2013).

⁵ See id.

⁶ NRC Staff's Answer to Entergy's Motion to Dismiss Contention RK-EC-8 (Endangered and Threatened Aquatic Species) As Moot (Aug. 6, 2013) [hereinafter NRC Answer to Entergy Motion].

⁷ Riverkeeper, Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement at 1 (Feb. 3, 2011) [hereinafter Contention RK-EC-8].

provided an Incidental Take Statement (ITS) and reasonable and prudent measures with which Entergy and the NRC must comply.⁸

The NRC Staff and Entergy asserted that completion of the ESA § 7 consultation process, followed by the NRC Staff's consideration and incorporation of NMFS's views in the FSEIS Supplement, cures the deficiencies alleged in Contention RK-EC-8, and thus renders the contention moot.⁹ The FSEIS Supplement gave consideration to NMFS's BiOp and ITS in reaching its conclusions under NEPA regarding the impacts of IPEC license renewal on endangered and threatened species.¹⁰ The completion of the ESA § 7 consultation process, followed by the NRC Staff's consideration and incorporation of NMFS's views in the FSEIS Supplement, cures the deficiencies alleged in RK-EC-8. Thus, the Board finds that RK-EC-8 is moot.

II. Ruling on Riverkeeper's Motion

Riverkeeper's proposed amended contention fails to "[p]rovide a specific statement of the issue of law or fact to be raised or controverted;" "provide a concise statement of the alleged facts or expert opinions which support the requestor's . . . position on the issue;" or "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact" as required by 10 C.F.R. § 2.309(f)(1)(i), (v), and (vi).¹¹ Accordingly, it is inadmissible.

⁸ NRC Answer to Entergy Motion at 4–5 (Aug. 6, 2013) (citing Letter from John K. Bullard, Regional Administrator, Northeast Region, National Oceanic and Atmospheric Administration, to Dr. Amy Hull (NRC) (Jan. 30, 2013)).

⁹ Id. at 7.

¹⁰ NUREG-1437, Supplement 38, Vol. 4 "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Units Nos. 2 and 3 (June 2013).

¹¹ 10 C.F.R. § 2.309(f)(1) (2013).

In its Motion to Amend, Riverkeeper asserted that the FSEIS Supplement did not resolve the FSEIS prior deficiencies:

because it (1) fails to properly consider or address Riverkeeper's comments regarding various deficiencies with NMFS' analyses and conclusions resulting from the ESA § 7 consultation process, and, in turn, fails to adequately assess impacts to endangered species posed by the potential relicensing of Indian Point, and (2) fails to explain how the new and significant information assessed by NRC Staff in the FSEIS Supplement affect NRC Staff's recommendation to the Commission regarding the appropriateness of the proposed license renewal of Indian Point.¹²

Yet, Riverkeeper failed to set forth specific facts, references, or expert opinions indicating how NMFS could have conducted its evaluation differently. Nor did Riverkeeper present technical analysis negating the rationale provided in the 2013 BiOp and the FSEIS when they concluded that continued operation of IP2 and IP3 would not likely jeopardize the continued existence of shortnose or Atlantic sturgeon. Likewise, although Riverkeeper asserts that the NRC Staff's response to its comments was not "meaningful," Riverkeeper did not point to or demonstrate specific deficiencies in the NRC Staff's substantive response to its comments.

While Riverkeeper may disagree with the NRC Staff's assessment of its comments, the Motion fails to identify specific errors in the NRC Staff's analysis that would render the final FSEIS Supplement inadequate. Absent such showing, Riverkeeper's assertions concerning the "meaningfulness" of the NRC Staff's analysis of its comments fail to establish a genuine dispute of material fact or law.

The instances where Riverkeeper cited specific comments that the FSEIS Supplement failed to consider were either not timely or did not address a material issue. For instance, New York State Department of Environmental Conservation's comments of March 25, 2013, were submitted seven months after the *Federal Register* deadline for comments on the draft FSEIS Supplement had passed, far too late to be considered as a "practical" matter in the final FSEIS Supplement. In another instance, although the NRC Staff's Supplement did not reproduce the

¹² Riverkeeper Motion at 6–7.

August 2012 Pisces Conservation, Ltd. Report, Riverkeeper does not assert that the NRC Staff failed to address any of its comments that were based on the Pisces report. Accordingly, these two specific instances where the FSEIS Supplement allegedly ignored comments are not sufficient to raise a genuine issue of material fact or law.¹³ Thus, Riverkeeper's Consolidated Motion to File Amended Contention RK-EC-8A is denied.

Riverkeeper has 14 days to appeal this order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 1, 2014

¹³ NRC Staff Answer at 20 .

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Units 2 and 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Riverkeeper's Motion and Granting Enenergy's Motion Addressing RK-EC-8A)** have been served upon the following persons by Electronic Information Exchange.

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ORDER (Denying Riverkeeper's Motion and Granting Enenergy's Motion Addressing RK-EC-8A)

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Office of the Secretary of the Commission

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