

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC)	Docket No. 50-247-LR/50-286-LR
)	
(Indian Point Nuclear Generating)	
Units 2 and 3))	
)	

NRC STAFF'S REPLY TO HUDSON RIVER SLOOP CLEARWATER INC.'S
ANSWER IN OPPOSITION TO THE NRC STAFF'S PETITION
FOR REVIEW OF LBP-13-13 (CONTENTION CW-EC-3A)

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April 9, 2014

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files its reply to Hudson River Sloop Clearwater, Inc.'s ("Clearwater") answer¹ opposing the Staff's and Entergy Nuclear Operations Inc.'s ("Entergy" or "Applicant") petitions for review² of LBP-13-13,³ resolving Contention CW-EC-3A (Environmental Justice). As discussed below, the Staff's petition for review should be granted.

DISCUSSION

I. Commission Review of the Staff's Petition is Warranted

In its answer, Clearwater asserts that it is unnecessary for the Commission to review the Atomic Safety and Licensing Board's ("Board") factual findings because the ultimate decision was in the Staff's and Applicant's favor, and a deficient EIS is "not a matter of law likely to have

¹ Hudson River Sloop Clearwater, Inc.'s Combined Answer in Opposition to the Applicant's Petition for Review and the NRC Staff's Petition for Review of Board Decision Regarding Contention CW-EC-3A (Mar. 25, 2014) ("Clearwater Answer").

² NRC Staff's Petition for Commission Review of LBP-13-13 in Part (Contentions NYS-8 and CW-EC-3A), and LBP-11-17 (Contention NYS-35/36) (Feb. 14, 2014) ("Staff Petition"); Applicant's Petition for Review of Board Decisions Regarding Contentions NYS-8 (Electrical Transformers), CW-EC-3A (Environmental Justice), and NYS-35/36 (SAMA Cost Estimates) (Feb. 14, 2014) ("Entergy Petition").

³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-13-13, 78 NRC ____ (Nov. 27, 2013) (slip op.) ("LBP-13-13").

an impact on the course of many hearings or a legal issue of recurring importance.”⁴ Clearwater is incorrect. As stated in the Staff’s petition for review, the Board established an unprecedented and erroneous requirement that the Staff’s environmental justice (“EJ”) analyses must evaluate impacts of emergency planning protective actions in the event of a severe accident – contrary to the Commission’s previous generic determination, including consideration of its emergency planning requirements, that the probability-weighted consequences of a severe accident are SMALL for all plants.⁵ Further, the Board’s decision improperly conflates the Commission’s emergency planning requirements in 10 C.F.R. Part 50 with the evaluation of environmental impacts to EJ populations under NEPA. Thus, the Board’s decision establishes an erroneous precedent that may have broad implications as to how this agency conducts its EJ analyses under NEPA and warrants Commission review as an important matter of law and policy.

Clearwater also asserts that Entergy and the Staff have failed to demonstrate any abuse of discretion or error of law by the Board in admitting Contention CW-EC-3A and that Entergy, “and by implication the NRC Staff, expands its argument that emergency planning issues are outside the scope of a relicensing proceeding.”⁶ However, both the Staff and the Applicant opposed the admission of the original Contention CW-EC-3 on the grounds, *inter alia*, that the contention raised emergency planning issues outside the scope of license renewal.⁷

Additionally, Clearwater contends that the issue in this contention, as determined by the Board, is “the insufficient NRC Staff analysis regarding disparity in environmental impacts, the risk of exposure, to low income and communities of color within the 50-mile radius in the event

⁴ Clearwater Answer at 10-11.

⁵ See *generally* Staff Petition at 24-41.

⁶ Clearwater Answer at 22-27.

⁷ See Answer of Entergy Nuclear Operations, Inc. Opposing [Clearwater’s] Petition to Intervene and Request for Hearing (Jan. 22, 2008), at 59-71; “NRC Staff’s Response to Petitions for Leave to Intervene Filed by . . . (3) Hudson River Sloop Clearwater, Inc. . . .” (Jan. 22, 2008), at 96-99.

of a severe accident at Indian Point, not the lack of an adequate emergency plan.”⁸ However, Clearwater’s assertion that disparate impacts exist in the emergency plans and should be included in the EJ analysis ignores the fact that (1) the Staff reasonably relied on the Commission’s generic determination regarding the environmental impacts of a severe accident, which explicitly included emergency planning considerations, and (2) any challenges to the adequacy of the emergency plans are outside the scope of license renewal.⁹

Clearwater further argues that the Board correctly denied Entergy’s motions in limine.¹⁰ This assertion is without merit. In LBP-13-13, the Board concluded, based on evidence submitted by Clearwater, “that while the risk to both the EJ and non-EJ population is small, the *higher risk* to the EJ population should be discussed in an adequate EJ analysis.”¹¹ However, the Staff and Entergy submitted testimony rebutting Clearwater’s evidence by describing how the emergency plans provide for the protection of all populations, including EJ populations, in the event of a severe accident at Indian Point such that there would be no disproportionately high and adverse impacts to EJ populations.¹² To the extent the Board found that there is a “higher risk” to EJ populations, the Board, relying on Clearwater’s out-of-scope evidence, effectively found that the emergency plans are deficient. This determination was beyond the proper scope of this license renewal proceeding, and resulted from the Board’s error in denying the Staff’s and Entergy’s motions in limine.

⁸ Clearwater Answer at 23 (citing LBP-13-13, at 385).

⁹ Staff Petition at 24-41.

¹⁰ Clearwater Answer at 30-31. The Staff also filed motions in limine seeking to exclude portions of Clearwater’s pre-filed testimony, rebuttal testimony, and exhibits, because this evidence raised issues outside the scope of this proceeding and was not reliable or relevant. See Staff Petition at 39 n.150.

¹¹ LBP-13-13, slip op. at 387 (emphasis added).

¹² NRC Staff Testimony of Jeffrey J. Rikhoff and Patricia A. Milligan Regarding Contention CW-EC-3A (Environmental Justice) (“Staff Testimony on CW-EC-3A”) (Ex. NRC000063) at 23-38; Testimony of Entergy Witnesses Donald P. Cleary, Jerry L. Riggs, and Michael J. Slobodien Regarding Contention CW-EC-3A (Environmental Justice) (“Entergy Testimony on CW-EC-3A”) (Ex. ENT000258) at 47-61.

II. The Staff's Reliance on the GEIS was Reasonable Under NEPA

Clearwater asserts that the Staff's reliance on the Commission's determination in the GEIS¹³ regarding the environmental impacts of severe accidents was flawed, because a generic determination "treats 'all' people, all populations, as if they were identical" ¹⁴ However, the GEIS did not treat all populations as "identical." Rather, the GEIS considered a broad range of nuclear plants, for which the Staff had prepared site-specific EISs; the Commission observed that the Staff's evaluation of the environmental impacts of severe accidents had "consider[ed] the effects of site-specific emergency planning in calculating exposures and risks to the public," and "include[d] sites with populations that reasonably cover the range of populations at all 74 sites."¹⁵ Significantly, all of those plants were subject to the NRC's and FEMA's emergency planning requirements – including protection of institutionalized, transport-dependent, and non-English speaking populations (*i.e.*, the populations of concern to Clearwater).¹⁶

Clearwater also asserts that "the resting of an issue on the GEIS is discretionary."¹⁷ This assertion is incorrect and impermissibly challenges the Commission's regulations. As the Commission has explained, "[b]ecause the generic environmental analysis was incorporated into a regulation, the conclusions of that analysis may not be challenged in litigation unless the rule is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding."¹⁸ This approach has been found to comply with NEPA.¹⁹

¹³ NUREG-1437, Vol. 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Final Report" (May 1996) ("GEIS") (Ex. NYS000131A-I).

¹⁴ Clearwater Answer at 25-26.

¹⁵ GEIS (Ex. NYS000131A-I), § 5.3.3.2.1, at 5-26.

¹⁶ *See, e.g.*, 10 C.F.R. §§ 50.47(b)(8),(10) and (15); 10 C.F.R. Part 50, App. E, § IV; NUREG-0654, FEMA-REP-1, Rev. 1, *passim*.

¹⁷ Clearwater Answer at 25.

¹⁸ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17 (2007) (footnotes omitted), *reconsideration denied*, CLI-07-13, 65 NRC 211, 214 (2007). *See also* Clearwater Answer at 25.

Additionally, in asserting that the Staff's reliance on the GEIS was flawed, Clearwater (like the Board in LBP-13-13), cites the D.C. Circuit's statement in *New York v. NRC*, that "[o]nly if the harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis."²⁰ In this regard, Clearwater cites Staff witness Jeffrey Rikhoff's testimony (in response to Board questioning), that it is theoretically possible that minority or low-income populations could be disproportionately affected in the event of a severe accident at Indian Point.²¹ However, the court in *New York* also stated that "the finding that the probability of a given harm is nonzero does not, by itself, mandate an EIS: after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI."²² Here, the Commission generically determined that the probability-weighted consequences of severe accidents are SMALL for all plants.²³ In accordance with the court's finding in *New York*, after examining the consequences of the harm in light of its likelihood, as set forth in the GEIS, the Staff reasonably concluded in the FSEIS that there would be no disproportionately high and adverse impact on EJ populations in the event of a severe accident.²⁴ Accordingly, the Staff's reliance on the GEIS was reasonable.

¹⁹ *Massachusetts v. NRC*, 708 F.3d 63, 68 (1st Cir. 2013).

²⁰ Clearwater Answer at 15-16, 26; LBP-13-13, slip op. at 385 (citing *New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012)).

²¹ Clearwater Answer at 16; LBP-13-13, slip. op at 385 (citing Transcript of Hearing ("Tr.") at 2757-58 (Oct. 23, 2012)).

²² *New York*, 681 F.3d at 482.

²³ GEIS (Ex. NYS000131A-I), § 5.3.3.2.1 at 5-26, and § 5.5.2.5 at 5-115-116. The Staff also concluded that "there are no impacts of severe accidents beyond those discussed in the GEIS." NUREG-1437, Vol. 1, Supplement 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report," (Dec. 2010) ("FSEIS") (Ex. NYS000133A-J), at 5-3, 5-4.

²⁴ FSEIS (Ex. NYS000133A-J), § 4.4.6, at 4-53; See also Staff Petition at 36-38.

III. Further Discussion of EJ Impacts and Mitigation for Emergency Planning is Unnecessary and Out of Scope

A. Further EJ Analysis of Emergency Planning is Unnecessary

In its answer, Clearwater contends that there has been no sufficient analysis of EJ populations at prisons and detention institutions within the 50-mile radius of Indian Point other than at Sing Sing prison.²⁵ Clearwater also asserts, regarding the ability of EJ populations to evacuate or shelter-in-place, that the record contains a discussion of very few minority communities other than Peekskill.²⁶ However, the Staff and Entergy's witnesses specifically addressed Clearwater's claims regarding evacuation of prisoners, transport-dependent persons, sheltering-in-place, and other emergency preparedness issues; further, they described how the NRC's regulatory framework for emergency planning, combined with New York State law, work to protect all populations, including EJ populations, in the event of a severe accident at Indian Point.²⁷ Therefore, Clearwater's assertion that there has not been sufficient development of the record concerning from evacuation and sheltering-in-place is not correct.

B. NEPA and the Environmental Justice Doctrine Do Not Require Analysis of Racial Motivation and Equity Issues

Clearwater asserts that a proper EJ analysis should address racial and economic inequality in emergency planning. Specifically, Clearwater contends that emergency plans for Indian Point are inequitable in that the "NRC Staff and Entergy employees at Indian Point would have plans in place to protect themselves from a severe nuclear accident," while "the innocent mostly minority victims of their activities who cannot evacuate or properly shelter in place due to

²⁵ Clearwater Answer at 28.

²⁶ *Id.* at 29 (citing to testimony of Dr. Edelstein and Mr. Papa, regarding evacuations and sheltering-in-place at Sing Sing prison; testimony of Dr. Larsen, Dr. Kanter, and Ms. Greene regarding evacuation and sheltering-in-place; and testimony of Mr. Mair and Ms. Guardado regarding Peekskill).

²⁷ *See generally*, Staff Testimony on CW-EC-3A (Ex. NRC000063) at 23-38; Entergy Testimony on CW-EC-3A (Ex. ENT000258) at 47-61.

their relatively impoverished conditions” would be left unprotected.²⁸ However, as described above, the Staff and Entergy provided testimony regarding the evacuation and sheltering-in-place of EJ populations and how the NRC’s regulatory framework for emergency planning and New York State law, provide for the protection of EJ populations in the event of a severe accident at Indian Point.²⁹ Moreover, because the emergency plans contain specific provisions to protect people in institutions or without transportation, Clearwater’s assertions effectively challenge the adequacy of those plans³⁰ and are outside the scope of license renewal.

Although Clearwater acknowledges that NEPA is not a tool for investigating racial discrimination, Clearwater nevertheless asserts that an EJ analysis performs “the collateral function of exposing and alleviating racial and economic inequity.”³¹ However, as explained in the Commission’s EJ Policy Statement, “[r]acial motivation and fairness or equity issues are not cognizable under NEPA, and . . . their consideration would be contrary to NEPA and [Executive Order 12898’s] limiting language emphasizing that it creates no new rights.”³² Moreover, “were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, ‘available resources may be spread so thin that agencies are unable adequately to pursue protection of physical environmental and natural resources.’”³³

²⁸ Clearwater Answer at 16-18.

²⁹ See generally, Staff Testimony on CW-EC-3A (Ex. NRC000063) at 23-38; Entergy Testimony on CW-EC-3A (Ex. ENT000258) at 47-61; Tr. at 2913-17.

³⁰ The Commission has concluded that “the adequacy of existing emergency preparedness plans need not be considered anew as part of issuing a renewed operating license.” Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991) (Final Rule) (Ex. ENT000270).

³¹ Clearwater Answer at 17-18 (citing *Louisiana Energy Servs.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-04 (1998) (“LES”)).

³² Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52040, 52,047 (Aug. 24, 2004) (“EJ Policy Statement”) The Commission also noted that “[s]uch issues are more appropriately considered under Title VI of the Civil Rights Act [of 1964].” *Id.* at 52,047 n.3 (citing *LES*, CLI-98-3, 47 NRC at 101-06). The NRC does not have the authority to enforce Title VI in the NRC licensing process. *Id.*

³³ EJ Policy Statement at 52,045 (citing *LES*, CLI-98-3, 47 NRC 77, 102-03).

C. Mitigation of the Emergency Plans is Outside the Scope of License Renewal

Clearwater also contends that with regard to mitigating EJ issues, a full examination of all the impacted EJ communities and institutions within the 50-mile radius of Indian Point, not just a few communities or institutions, is required.³⁴ As discussed in the Staff's answer to Clearwater's Petition, however, to the extent that Clearwater seeks changes to the onsite and/or offsite emergency plans for Indian Point, it impermissibly raises an out-of-scope issue.³⁵

Clearwater further asserts that "[r]evising the emergency plan to address and ameliorate [inequity] is one of many possible mitigation measures" and that possible mitigation measures "could be *outside and independent of or within the emergency plan itself*" such as training of public bus drivers, training of prison guards and law enforcement personnel and the addition of buses for transportation of inmates, creation of adequate facilities to shelter in place with supplies of potassium iodide pills, and the improvement of medical services.³⁶ All such measures, however, are typically embraced by offsite emergency plans, in accordance with 10 C.F.R. § 50.47 and Part 50 Appendix E. Indeed, Clearwater appears to be seeking mitigation of allegedly inadequate measures in the offsite plans at Indian Point,³⁷ Clearwater's claims, however, directly challenge the adequacy of emergency planning and, accordingly, are outside the scope of this proceeding.³⁸

³⁴ Clearwater Answer at 19.

³⁵ NRC Staff's Answer in Opposition to Hudson River Sloop Clearwater, Inc.'s Petition for Review of LBP-13-13 Regarding Contention CW-EC-3A (Environmental Justice) (Mar. 25, 2014), at 11-14.

³⁶ *Id.* at 23-24 (emphasis in original).

³⁷ Inasmuch as the Board admitted Clearwater's evidence and denied the motions in limine, the Staff and Entergy submitted testimony explaining how the emergency plans specifically address the mitigation measures of concern to Clearwater, including emergency response training, the evacuation of prisoners, the availability of potassium iodide pills at facilities, and medical services. See Staff Testimony on CW-EC-3A (Ex. NRC000063) at 29-30, 36-37; Entergy Testimony on CW-EC-3A (Ex. ENT000258) at 54-55; Tr. at 2768-69, 2771, 2916-17. See *also* 10 C.F.R. § 50.47(b)(15); 10 NYCRR § 405.24 (g) (Ex. ENT000292) (outlining the requirements for hospital emergency preparedness plans); 10 NYCRR § 702.7 (Ex. ENT000293) (applying the same requirements to other medical facilities).

³⁸ In fact Clearwater itself acknowledges that these "mitigation measures" relate to emergency planning, stating that "the EJ analysis and the Board's EJ deficiency findings and EJ violation ruling were

Clearwater mistakenly relies on the Third Circuit's decision in *Limerick*,³⁹ to argue that the Commission violated NEPA "in failing to consider the training of civilian drivers who would be employed in the evacuation of inmates from a Pennsylvania prison near a nuclear facility in the event of a severe accident."⁴⁰ Clearwater is incorrect. The contention in *Limerick* that related to emergency response training was a safety contention under the Commission's emergency planning regulations in 10 C.F.R. § 50.47(b)(15);⁴¹ it was not an environmental contention under NEPA and did not raise any environmental justice claims.⁴² Moreover, *Limerick* was an operating license proceeding,⁴³ not a license renewal proceeding; thus, the adequacy of emergency planning was not an out-of-scope issue in that proceeding.

Finally, in arguing for an evaluation of mitigation measures, Clearwater relies on 10 C.F.R. § 51.103(a)(4), which requires the Commission to state in the record of decision whether it "has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted."⁴⁴ The Staff's FSEIS, however, satisfies this regulation.⁴⁵ In contrast, Clearwater's suggested mitigation measures, relate to emergency planning, which the Commission addressed in the GEIS and which is beyond the scope of license renewal.

separate and independent of the required discussion of mitigation measures under NEPA, including the mitigation alternative of revisions to the emergency plan." Clearwater Answer at 24.

³⁹ *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989).

⁴⁰ Clearwater Answer at 19, 23 (citing *Limerick*, 869 F.2d at 754).

⁴¹ 10 C.F.R. § 50.47(b)(15) requires that "[r]adiological emergency response training is provided to those who may be called on to assist in an emergency."

⁴² In *Limerick*, one intervenor, (Limerick Ecology Action, Inc. ("LEA")) raised contentions asserting that the NRC violated NEPA. 869 F.2d at 722-45. A separate intervenor, (Thomas Martin, a prison inmate), raised safety contentions challenging the adequacy of Pennsylvania's emergency plans. *Id.* at 747-54. LEA's NEPA contentions are unrelated to Mr. Martin's safety contentions.

⁴³ *Limerick*, 869 F.2d at 722.

⁴⁴ Clearwater Answer at 19.

⁴⁵ See FSEIS (Ex. NYS000133A-J), § 5.2 (discussing SAMAs); § 8 (discussing environmental impacts of alternatives to license renewal). See *also id.* § 1.2, at 1-6; § 9.1, at 9-5.

D. SAMAs Are Outside the Scope of Contention CW-EC-3A

Clearwater also asserts, improperly for the first time on appeal,⁴⁶ that the analysis of site-specific severe accident mitigation alternatives (“SAMAs”) must include measures to alleviate economic and racial disparity in the environmental impacts to EJ communities during a severe nuclear accident.⁴⁷ This assertion should be rejected. In accordance with 10 C.F.R. § 51.53(c)(3)(ii)(L), the Staff reviewed potentially cost-beneficial SAMAs in the FSEIS.⁴⁸ Clearwater did not challenge the Staff’s SAMA evaluation in Contention CW-EC-3A.⁴⁹ Thus, Clearwater’s assertions regarding SAMAs must be rejected.

CONCLUSION

For the reasons set forth above, the NRC Staff’s petition for review of the Board’s resolution of Contention CW-EC-3A should be granted.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
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⁴⁶ *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 10 NRC 1 (2010) (noting that the Commission “will not consider information that is introduced for the first time on appeal in an attempt to cure deficient contentions”) (internal citations and quotations omitted).

⁴⁷ Clearwater Answer at 24-26, 31.

⁴⁸ FSEIS (Ex. NYS000133A-J), § 5.2, at 5-4 to 5-12.

⁴⁹ Moreover, the Board specifically denied admission of Clearwater’s Contention EC-4 which had asserted that Entergy’s SAMA analysis does not adequately consider the impacts of a possible terrorist attack, a radiological event, or an evacuation at Indian Point, particularly the impact on the EJ communities discussed in Clearwater EC-3. *Indian Point*, LBP-08-13, 68 NRC 43, 201-03 (2008).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S REPLY TO HUDSON RIVER SLOOP CLEARWATER INC.'S ANSWER IN OPPOSITION TO THE NRC STAFF'S PETITION FOR REVIEW OF LBP-13-13 (CONTENTION CW-EC-3A)," dated April 9, 2014, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 9th day of April, 2014.

/Signed (electronically) by/

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