

July 6, 2011: ASLB Response to Clearwater's Amended and Expanded EC-3 Contention

Executive Summary

On July 6, 2011, the ASLB responded to Clearwater's motion of February 3, 2011 to amend and expand its EC-3 contention. The ASLB accepted the addition of disabled populations to be included in the definition of environmental justice populations. Initially the ASLB only discussed minority and low-income populations (although they actually did include the phrase "disabled populations" in accepting Clearwater's original EC-3).¹

Clearwater's filing of Feb. 3 stated that the NRC Staff's FSEIS failed to adequately address two alternatives to license renewal:

- No Action, or not granting the licensing renewal application, and
- Closed-Cycle Cooling alternative, which is being required by NY State, with regard to impacts on air quality and EJ populations

The ASLB rejected the contention that the FSEIS was factually incorrect, because Clearwater did not challenge the facts in the DSEIS and cannot now challenge the facts in the FSEIS. Further, Clearwater did not indicate what the factual deficiencies were in the NRC Staff's response to comments, but merely addressed the motives of the commenters. The ASLB also stated that Clearwater did not show a specific connection between the benefits and detriments that the relicensing of IP2 and IP3 would have on environmental justice populations. The ASLB indicates that Clearwater has not provided sufficient factual information or expert opinions to counter the information presented in the FSEIS. In regards to Clearwater's contention of the FSEIS analysis of the closed-cooling cycle alternative, Clearwater also needed to provide factual or expert opinion to challenge the FSEIS contents – that mere assertions of opinion are not sufficient.

Essentially the ASLB had little interest in the motives of what Clearwater believes to be pseudo-Environmental Justice groups and other groups that were influenced by Entergy or these groups. However, the ASLB granted Clearwater's Motion to Amend the original contention (CW-EC-3), hereinafter referred to as CW-EC-3A, as follows:

"Entergy's environmental report and the Final Supplemental Environmental Impact Statement contain seriously flawed environmental justice analyses that do not adequately assess the impacts of relicensing Indian Point on the minority, low-income and disabled populations in the area surrounding Indian Point."²

The ASLB did not dispute Clearwater's assertion that EJ populations included "not only the Sing Sing prisoners mentioned by the Board in LBP-08-13, but also other EJ populations within 50 miles of Indian Point in pre-schools, nursing homes, shelters, hospitals, and minority and low-income residents in the region who lack access to private transportation"³

¹ ASLB Memorandum and Order, July 31, 2008; p. 227.

² ASLB Memorandum and Order, July 6, 2011; p. 60.

³ *Ibid.*, p. 55-56.

**Relevant Excerpts from Atomic Safety and Licensing Board Memorandum and Order
(ruling on Pending Motions for Leave to File New and Amended Contentions Dated July 6, 2011)**

VIII. AMENDED CW-EC-3 (CW-EC-3A)

A. Procedural Background

We [ASLB] admitted Clearwater EC-3 (CW-EC-3) to the extent it claimed “that Entergy’s ER [was] deficient because it d[id] not supply sufficient information from which the Commission [could] properly consider, and publicly disclose, environmental factors that may cause harm to minority and low-income populations that would be ‘disproportionate to that suffered by the general population.’”

On February 3, 2011, Clearwater moved to amend and extend CW-EC-3.223 Clearwater’s proposed amendment, labeled herein as CW-EC-3A, first alleges that “Entergy’s Environmental Report and the Final Supplemental Environmental Impact Statement contain seriously flawed environmental justice [EJ] analyses that do not adequately assess the impacts of relicensing Indian Point on the minority, low-income and disabled populations in the area surrounding Indian Point.” Clearwater framed this claim as a “technical change” to the admitted CW-EC-3, in that it adds to the admitted contention the charge that the FSEIS’s discussion of EJ is deficient for its reliance on a generic analysis and its failure to look at the impact from emergency planning on EJ populations.

In addition, for the first time CW-EC-3A alleges that “the assessment of the impact of the no-action alternative on potentially affected environmental justice populations is inadequate,” and that “the assessment of the impact of adding closed cycle cooling on air quality and on potentially affected local environmental justice populations is inadequate.” According to Clearwater, these new claims regarding the impacts of the no-action alternative, and from adding closed-cycle cooling, arise because the NRC did not independently evaluate comments to the DSEIS made by organizations supportive of relicensing Indian Point. Clearwater claims these groups are funded by Entergy and exaggerate the negative air quality impacts from the no-action alternative.

Entergy does not oppose the admission of CW-EC-3A to the extent it updates claims made on Entergy’s ER to the FSEIS, but states its opposition to the admission of any claims regarding emergency planning impacts on EJ populations. Moreover, because it represents that the data or conclusions in the FSEIS do not differ significantly from those in the DSEIS, Entergy contends that Clearwater’s amendments regarding the no-action alternative and closed- cycle cooling are not timely filed.

Entergy also maintains that additional scrutiny of the no-action alternative’s impact on EJ populations is immaterial to the NRC’s licensing decision in this proceeding given that the FSEIS already concludes that those impacts would be small to moderate. Similarly, Entergy urges the Board to view CW-EC-3A as having neither the requisite support “indicating how or why [the FSEIS’s analysis of the no-action alternative] should have been conducted differently” nor showing “why the air quality impacts from closed cycle cooling would fall disproportionately on minority or low-income populations.” Lastly, Entergy maintains that the no-action and closed-cycle cooling alternatives do not raise genuine disputes with the FSEIS because the FSEIS has satisfactorily addressed the comments made on the DSEIS. Also, Entergy argues that Clearwater has not challenged the analysis and conclusions reached in the FSEIS, has not explained why minority populations would disproportionately be affected by impacts compared to the general population, and has not demonstrated that the NRC Staff has failed to reach its conclusions independently.⁴

The NRC Staff agrees with Entergy regarding CW-EC-3A inasmuch as it updates Clearwater’s challenges to the ER to the FSEIS and objects to Clearwater raising any concerns over emergency planning. However, the NRC Staff characterizes Clearwater’s challenges to the FSEIS’s no-action alternative analysis as untimely, as failing to raise a material dispute with the FSEIS, as an incorrect reading of the FSEIS, and as too vague to be admissible.

Further, the NRC Staff describes the closed-cycle cooling aspect of CW-EC-3A as unsupported, immaterial to the NRC’s licensing decision, and based on an erroneous reading of the FSEIS.

Clearwater replies that CW-EC-3A is timely filed because Section 2.309(f)(2) permits amended contentions to be filed based on the FSEIS, even if an intervenor has not challenged similar data or conclusions in the DSEIS, and that the information giving rise to the contention was presented for the first time in the FSEIS. In the alternative,

⁴ ASLB Memorandum and Order, July 6, 2011; p. 52-55.

Clearwater asserts that it has shown good cause, pursuant to Section 2.309(c)(1), to have filed this amended contention when it did, because it could not have anticipated that Entergy would encourage various organizations to submit comments on the DSEIS, and that the NRC Staff would inadequately respond to those comments.

Further, Clearwater argues that CW-EC-3A raises a material issue in this proceeding because its criticisms of the FSEIS's no-action and closed-cycle cooling alternative analyses show that the NRC Staff has failed to reach any conclusions of the impact of these alternatives on EJ populations. According to Clearwater, given that the FSEIS does not appropriately respond to those comments on this issue made in response to the DSEIS and provide the NRC Staff's own information to address them, Entergy's "manipulat[ion of] the comment process" led the NRC Staff to insufficiently analyze the adverse impacts from the no-action and closed-cycle cooling alternative to the same EJ populations alleged to be represented by these commenters.

Finally, Clearwater contends that CW-EC-3A does not challenge Entergy's emergency planning. Instead, Clearwater states that it is attacking the NRC "Staff's failure to analyze mitigation for the disparate impacts of the proposed action" on EJ populations. These populations include not only the Sing Sing prisoners mentioned by the Board in LBP-08-13, but also other EJ populations within 50 miles of Indian Point in pre-schools, nursing homes, shelters, hospitals, and minority and low-income residents in the region who lack access to private transportation.⁵

B. Board Decision

We admit those portions of CW-EC-3A that seek to update the contention as originally admitted. However, we reject the remainder of the amended contentions on timeliness and materiality grounds. NRC Staff would inadequately respond to those comments.

In order to directly challenge facts or conclusions stated in the FSEIS through timely filed new or amended contentions, Clearwater must identify significant differences between the data and conclusions in the DSEIS and the FSEIS. This policy is consistent with the Commission's longstanding and pervasive position that requires intervenors to challenge deficiencies at the earliest possible time. Having chosen not to challenge the DSEIS, Clearwater cannot now directly challenge aspects of the FSEIS that have not differed significantly from the DSEIS.

If, however, a party made comments to the DSEIS that are not adequately addressed in the FSEIS, then the triggering event for a timely challenge would be the publication of the FSEIS. Nevertheless, in this Motion Clearwater did not identify actual deficiencies in the NRC's response to comments. Rather, it challenged the motives of commenters, an issue that is irrelevant. Regardless of the commenters' motives, comments must be addressed by the NRC Staff and any challenge to the NRC Staff's response to a comment must point to errors in how the comment was resolved in the FSEIS. Clearwater, however, did not catalogue the DSEIS comments nor explain why the NRC Staff's responses to them were inadequate.

Part of the NRC Staff's responsibility in preparing its FSEIS is responding to comments made on the DSEIS. Contentions alleging that the NRC Staff has not fulfilled its obligation to take a hard look in its FSEIS at comments filed on the DSEIS can be within the scope of this proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iii). However, as we stated before, such a contention must also show "why the alleged error or omission is of possible significance to the result of the proceeding," namely, "some significant link between the claimed deficiency and either the health and safety of the public, or the environment."

Clearwater asserts that the NRC Staff did not look hard enough at the potential health impacts of the no-action alternative as stated in comments on the DSEIS from groups purportedly affiliated with Entergy. However, the identity of those groups is irrelevant to whether the NRC Staff has given a hard look at their comments. We are not told why the comments were misleading or how the NRC Staff's analysis of them was deficient, beyond a challenge to the motives of the commenters and unsupported conclusions regarding the accuracy of the comments and the NRC Staff's assessment thereof.

The purpose of the no-action alternative is for the agency to review and allow the public to understand its review of both the positive and negative impacts that would result from remaining with the status quo rather than proceeding with the proposed action. If Clearwater's position in CW-EC-3A was that the actual no-action alternative is more preferable than the NRC Staff's description of the no-action alternative, such a position might

⁵ *Ibid.*, p. 55-56.

lead to a dispute over whether the NRC Staff has incorrectly minimized the benefits or maximized the adverse impacts of the no-action alternative. Instead, Clearwater only asserted that the untrustworthiness of the commenters claiming to represent EJ populations could potentially impact the relicensing decision for IP2 and IP3. Moreover, Clearwater has not pointed to specific impacts potentially flowing to EJ populations in the no-action alternative that have not been addressed by the NRC Staff. Clearwater offers no critique of the NRC's analysis other than to note that it "mirrors Entergy's public relations slogan" and suggests that "the FSEIS should have treated them with great care." Accordingly, Clearwater has neither raised an issue that is material to the NRC's licensing decision in this proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iv) nor alleged any facts or provided expert opinions to controvert the analysis in the FSEIS. Therefore, this aspect of CW-EC-3A is inadmissible.

In addition, Clearwater's expressed concern over the closed-cycle cooling alternative is that the FSEIS's analysis "is both too indeterminate to be useful and entirely dependent on the assertions of Entergy." However, Clearwater has not provided any alleged facts or expert opinion challenging the FSEIS's analysis of the closed-cycle cooling alternative. In its Motion, Clearwater states that it and others commented on the DSEIS, pointing out that the relicensing of IP2 and IP3 would have the potential for disparate impacts on potentially affected EJ populations. But Clearwater merely reproduces concerns raised by an engineer, Bill Powers, regarding the Staff's review in the Oyster Creek license renewal proceeding, says that the NRC lacks independent judgment, and asserts (without support) that the NRC Staff did not look hard enough at the air quality impacts from pursuing replacement power costs and their possible effect on EJ populations. These vague allegations do not meet the minimal pleading requirements for an admissible contention.

In preparing its FSEIS, the NRC Staff may rely on information submitted by an applicant such as Entergy, as long as that information is independently verified by the NRC Staff. Beyond its bare assertions, Clearwater has not explained why it believes the NRC Staff has failed to conduct such an independent verification in its FSEIS. Therefore, the closed-cycle cooling aspect of CW-EC-3A is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

In summary, Clearwater's Motion to Amend and Extend CW-EC-3 is granted in part and denied in part. CW-EC-3A is consolidated with CW-EC-3 as CW-EC-3A and is amended to read as follows:

Entergy's environmental report and the Final Supplemental Environmental Impact Statement contain seriously flawed environmental justice analyses that do not adequately assess the impacts of relicensing Indian Point on the minority, low-income and disabled populations in the area surrounding Indian Point.

X. CONCLUSION For the foregoing reasons, we:

G. Grant Clearwater's Motion to Amend CW-EC-3 as limited to those proposed amendments that update the contention as originally admitted hereinafter as CW-EC-3A