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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

Before the Commission

In the Matter of)	
)	
Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

**ENTERGY'S BRIEF IN OPPOSITION TO THE
MASSACHUSETTS ATTORNEY GENERAL'S APPEAL OF LBP-06-20**

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**ENTERGY’S BRIEF IN OPPOSITION TO THE
MASSACHUSETTS ATTORNEY GENERAL’S APPEAL OF LBP-06-20**

Pursuant to 10 C.F.R. § 2.311(a), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as “Entergy”) submit this brief in opposition to the appeal filed by the Massachusetts Attorney General in the Vermont Yankee license renewal proceeding. The Massachusetts Attorney General’s Notice of Appeal¹ and Brief on Appeal² request that the Commission review and reverse that portion of the Atomic Safety and Licensing Board’s (“Licensing Board” or “Board”) Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 63 N.R.C. ___ (Sept. 22, 2006) (“LBP-06-20”) denying the Attorney General’s contention and related hearing request alleging the need for Entergy’s Environmental Report (“ER”) to address the impacts of severe spent fuel accidents. The Board, however, properly denied the contention and request for hearing based on the Commission’s decision in Turkey Point³ that on-

¹ Massachusetts Attorney General’s Notice of Appeal of LBP-6-20 (Oct. 3, 2006).

² Massachusetts Attorney General’s Brief on Appeal of LBP-6-20 (Oct. 3, 2006) (“Brief”).

³ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3 (2001) (“Turkey Point”).

site spent fuel storage is a Category 1 environmental issue for which the environmental impacts have been determined generically by regulation to be “small.” Hence, as the Commission held in Turkey Point, “all” onsite spent fuel storage environmental issues, “including accident risk,” are not subject to hearing in individual licensing renewal proceedings absent a waiver or suspension and amendment of the rules. 54 N.R.C. at 23 (emphasis added).

The Commission should affirm the Board’s decision because the decision is firmly founded on Turkey Point and is fully in accordance with NRC regulations and the National Environmental Policy Act (“NEPA”). As the Attorney General acknowledges, the Commission has discretion to address environmental issues by generic rulemaking. The Attorney General’s claim that a petitioner can challenge an ER for not addressing assertedly new and significant information runs afoul of the Commission’s determination to handle spent fuel issues in license renewal proceedings by generic rule. Because the Commission’s NEPA consideration of spent fuel impacts is embodied in regulation, the asserted new and significant information can only be handled under the Commission’s established mechanisms for waiver or suspension and amendment of the rule as described in Turkey Point. The Attorney General’s filing of a Rulemaking Petition tacitly concedes this point.

STATEMENT OF THE CASE

Entergy submitted an application, dated January 25, 2006, requesting renewal under 10 C.F.R. Part 54 of Operating License DPR-28 for the Vermont Yankee Nuclear Power Station for an additional 20-year period beyond its current license expiration date (the “Application”). On March 27, 2006, the Nuclear Regulatory Commission (“NRC” or “Commission”) published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing (“Notice”) regarding the Application. 71 Fed. Reg. 15,220 (Mar. 27, 2006)). The Notice permit-

ted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id. at 15,220-21.

On May 26, 2006, the Attorney General submitted a petition to intervene seeking admission of a single contention concerning the alleged need for the ER to address the environmental impacts of severe spent fuel pool accidents because of asserted new and significant information concerning the likelihood and severity of such accidents.⁴ The Attorney General also filed a "Petition for Backfit Order" that sought to require that the Vermont Yankee spent fuel pool be returned to its original low-density storage configuration and to use dry storage for any excess spent fuel. Id.

On June 22, 2006, Entergy and the NRC Staff filed their Answers to the Attorney General's Petition. Both Entergy and the Staff acknowledged the Attorney General's standing but determined that the Attorney General's sole contention concerning spent fuel pool fires was inadmissible because (1) the Contention was an impermissible challenge to the NRC's rules and generic determinations, and (2) the Contention did not in fact raise any new and significant information concerning spent fuel pool fires.⁵ On June 29, 2006 the Attorney General filed a Reply to the Entergy and NRC Staff Answers.⁶

⁴ Massachusetts Attorney General's Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operations, Inc.'s Application for Renewal of the Vermont Yankee Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents (May 26, 2006) ("Petition").

⁵ NRC Staff Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition for Leave to Intervene and Petition for Backfit Order (June 22, 2006) ("Staff Answer"); Entergy's Answer to the Massachusetts Attorney General's Request for a Hearing, Petition for Leave to Intervene, and Petition for Backfit Order (June 22, 2006) ("Entergy Answer").

⁶ Massachusetts Attorney General's Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene With Respect to Vermont Yankee License Renewal Proceeding (June 29, 2006) ("Reply").

A Prehearing conference was held on August 1 and 2, 2006, during which the Licensing Board heard oral argument concerning the admissibility of the petitioners' contentions, including the Attorney General's Contention.⁷ At that conference, the Attorney General advised the Board and the parties that it would be filing a Rulemaking Petition raising the same issues as those raised in his Contention. Prehearing Tr. at 79-81.

On August 25, 2006, the Attorney General submitted a Petition for Rulemaking which requested that the Commission to amend 10 C.F.R. Part 51 based on the same asserted new and significant information raised in the Attorney General's Contention⁸ and which incorporated the Contention and its supporting materials. Like the Contention, the Rulemaking Petition claims that the asserted new and significant information shows that the determination made in the license renewal GEIS⁹ that "the likelihood of a fuel-cladding fire is highly remote" is incorrect and it requests the Commission (at 3) to "withhold any decision to renew the operating licenses for the Pilgrim and Vermont Yankee nuclear power plants until the requested rulemaking has been completed and until the NRC has completed" the related NEPA process that may be required by any amended rule. On August 30, 2006, Counsel for Entergy requested the Commission to act on and resolve the Rulemaking Petition by November 2007 in order to avoid any potential for delay in the renewal of the Vermont Yankee and Pilgrim licenses.¹⁰

⁷ In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR, Oral Arguments on Contentions (Aug. 1 & 2, 2006) ("Prehearing Tr.").

⁸ Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006) ("Rulemaking Petition").

⁹ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996) ("GEIS" or "NUREG-1437").

¹⁰ Letter to Chairman Klein and Commissioners McGaffigan, Merrifield, Jaczko, and Lyons from David R Lewis, Counsel for Entergy (Aug. 30, 2006).

On September 22, 2006, the Licensing Board issued LBP-06-20. The Board ruled that “even if the AG has presented new and significant information related to the risks and environmental impacts of high density racking in spent fuel pools, as a matter of law the contention is inadmissible because the Commission has already decided, in Turkey Point, that licensing boards cannot admit an environmental contention regarding a Category 1 issue.” LBP-06-20, slip op. at 21. Accordingly, the Board found the Attorney General’s Contention to be inadmissible and denied the Attorney General’s hearing request. Id. at 29. In doing so, the Board did not reach the issue of whether the Attorney General had in fact supplied new and significant information in his Contention, but the Board did observe that the “risks and effects of high density racking of spent fuel in pools have been studied and debated since 1979 . . . and have been the subject of substantial litigation” in NRC licensing proceedings. Id. at 27 (citation omitted).

On October 3, 2006, the Massachusetts Attorney General filed his Notice of Appeal and Brief on Appeal appealing the Licensing Board’s denial of his Request for Hearing and Petition for Leave to Intervene. On October 10, 2006, the Commission issued an Order denying the Attorney General’s “Petition for Backfit Order” which had sought to require that the Vermont Yankee spent fuel pool be returned to its original low-density storage configuration and to use dry storage for any excess spent fuel.¹¹

ARGUMENT

I. THE ATTORNEY GENERAL’S APPEAL IS UNTIMELY

The Commission’s regulation governing appeals from rulings on petitions to intervene provides that an order denying a petition to intervene “may be appealed . . . within ten (10) days

¹¹ Order, CLI-06-26, 63 N.R.C. ____, slip op. (Oct. 10, 2006).

after the service of the order.” 10 C.F.R. § 2.311(a). Here the Board’s Memorandum and Order denying the Attorney General’s request for hearing and petition to intervene was issued September 22, 2006. As reflected in the Memorandum and Order, copies were served that same day by electronic e-mail transmission to counsel for the parties. LBP-06-20, slip op. at 94 n. 85. Hence, to be timely, the Attorney General’s appeal needed to be filed by October 2, 2006.¹²

The Attorney General’s appeal was not filed until October 3, 2006. The Attorney General neither filed a request for an extension of time nor provided any reason why the appeal was not filed October 2, 2006. The failure to meet a filing deadline provides a sufficient basis to deny the requested relief and the Attorney General’s appeal should be denied on that basis. See Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-00-28, 52 N.R.C. 226, 234-239 (2000), aff’d CLI-01-1, 53 N.R.C. 1 (2001) (denying admission of late-filed contentions based on draft EIS where the contentions were filed six days after the deadline established by the licensing board for the filing of such contentions).

II. THE BOARD CORRECTLY DENIED ADMISSION OF THE ATTORNEY GENERAL’S CONTENTION BECAUSE THE CONTENTION IMPERMISSIBLY CHALLENGES COMMISSION REGULATIONS

The Attorney General argues that the Licensing Board erred in relying upon Turkey Point in ruling that his Contention was inadmissible because (1) Turkey Point is assertedly inapposite here, (2) Turkey Point as applied by the Board is inconsistent with the NRC’s regulations, and

¹² The Commission’s regulations do allow one additional business day for electronic transmissions where a document is “received by a party after 5 p.m., in the recipient’s time zone on the date of transmission.” 10 C.F.R. § 2.306. Here, the electronic transmission of the Board’s decision was sent at 2:04 p.m. on September 22, 2006. See Electronic Transmission from M. Carpentier, Law Clerk for Atomic Safety and Licensing Board Panel, to Vermont Yankee License Renewal Service List (Sept. 22, 2006). Neither the Attorney General’s Notice of Appeal nor the Brief on Appeal gives any indication that the transmission was not timely received by counsel for the Attorney General who is located in Washington D.C. Counsel for Applicant, also located in Washington D.C., had received the transmission and forwarded a brief summary of the Memorandum and Order to his client before 4:00 p.m.

(3) Turkey Point as applied by the Board is inconsistent with NEPA. None of these arguments are meritorious. The Turkey Point decision is directly on point, the Board correctly applied Turkey Point in accordance with the decision and NRC regulations, and Turkey Point is fully consistent with the NRC's regulations and NEPA. Hence, the Commission should deny the Attorney General's appeal and affirm the decision of the Licensing Board.

A. Turkey Point is Fully Applicable to This Case

The Attorney General's claim that Turkey Point is inapposite to this case (Brief at 12) is clearly without merit because Turkey Point is squarely on point and controlling here. In Turkey Point, the Commission held that a contention seeking to litigate the environmental impacts of a catastrophic accident involving the storage of spent fuel at the Turkey Point plant was inadmissible because the impacts from onsite spent fuel storage – including the risk of severe accidents – were Category 1 issues that had been resolved generically in 10 C.F.R. Part 51, Appendix B, Table B-1 of the Commission's regulations. 54 N.R.C. at 21-23. As held by the Commission:

Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically. All such issues, including accident risk, fall outside the scope of license renewal proceedings.

Id. at 23 (emphasis added; footnote omitted); see also id. at 22 ("Part 51 treats all spent fuel accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication") (emphasis added). Hence, under Turkey Point, the Attorney General's claims concerning the accident risk of spent fuel storage are not litigable in this license renewal proceeding.

Further, Turkey Point expressly addresses how a person claiming the existence of new and significant information that would impact and alter a Category 1 finding codified in 10 C.F.R. Part 51, Appendix B, Table B-1 could seek redress for his or her claim. 54 N.R.C. at 11-

13. As explained there by the Commission:

The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. See 10 C.F.R. § [2.335] . . . Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking.

54 N.R.C. at 12 (emphasis added). Thus, claims of new and significant information affecting Category 1 findings, such as those raised by the Attorney General, do not transform such findings into litigable issues within the scope of a license renewal proceeding. Rather, such claims must be pursued under the waiver or rulemaking provisions of the Commission's regulations.

In light of these broad holdings, the Attorney General's suggestion (Brief at 12) that Turkey Point is not controlling here because the "decision gives no indication that the petitioner's contention in that case had claimed a violation of 10 C.F.R. § 51.53(c)(3)(iv)" is meritless. This provision of the regulations only provides that "[t]he environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv) (emphasis added). This is a subjective standard and not an objective standard. It does not require an applicant to provide and address in the ER information that some other party might conceivably believe is new and significant, and hence does not provide a mechanism for a petitioner to introduce and litigate the alleged existence of new and significant information. As set forth in Turkey Point, the NRC has other established mechanisms (waiver and rulemaking) to serve this function. Furthermore, the Commission expressly addressed in Turkey Point an applicant's obligation under 10 C.F.R. § 51.53(c)(3)(iv) to

provide new and significant information in the ER, 54 N.R.C. at 11, but never identified potential challenges to alleged violations of 10 C.F.R. § 51.53(c)(3)(iv) as a mechanism for a petitioner to raise claims of new and significant information.

Moreover, the Attorney General's claim that a petitioner could transform Category 1 findings into litigable issues simply by alleging that an ER failed to address alleged new and significant information would open a Pandora's box that would obviate the Commission's objective of utilizing generic findings to avoid unnecessary litigation of the same issue in numerous individual licensing proceedings. As discussed further below, it would enable petitioners to directly challenge Commission regulations in individual licensing proceedings contrary to 10 C.F.R. § 2.335 and well established Commission precedent, including Turkey Point.

B. Turkey Point is Fully Consistent with NRC Regulations

The Attorney General's claim (Brief at 12-14) that Turkey Point as applied by the Board's contravenes NRC regulations is likewise meritless. The Board's reliance on Turkey Point in holding that "a petitioner may not challenge an ER's failure to consider new and significant information for a Category 1 environmental impact without first seeking waiver of the generic rule" (LBP-06-20, slip op. at 26) is fully consistent with and required by NRC regulations.

The Commission's regulations expressly provide that, absent waiver of a regulation, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a) (emphasis added). Numerous Commission precedents confirm and apply this fundamental tenet of NRC jurisprudence.¹³ The generic Category 1 findings from the GEIS

¹³ See, e.g., Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 N.R.C. 207, 217-18 (2003); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 N.R.C. 459, 470 (2001).

are set forth in the Commission's rules at 10 C.F.R. Part 51, Appendix B, Table B-1 and hence are not subject to attack by any means in NRC license proceedings (absent waiver or suspension of the rule). Specifically, the management of on-site spent fuel is identified in Table B-1 of Appendix B as a Category 1 issue with "SMALL" impacts based on the generic finding set forth in Table B-1 that "the expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available." 10 C.F.R. Part 51, App. B, Table B-1.

Furthermore, as held by the Commission in Turkey Point, quoted above, the generic finding of "SMALL" impacts set forth in 10 C.F.R. Part 51 encompasses "[a]ll [onsite spent fuel storage] issues, including accident risk." As elaborated on by the Commission in Turkey Point,

The GEIS's finding encompasses spent fuel accident risks and their mitigation. See GEIS at xlvi, 6-72 to 6-76, 6-86, 6-92. The NRC has spent years studying in great detail the risks and consequences of potential spent fuel pool accidents, and the GEIS analysis is rooted in these earlier studies. NRC studies and the agency's operational experience support the conclusion that onsite reactor spent fuel storage, which has continued for decades, presents no undue risk to public health and safety. Because the GEIS analysis of onsite fuel storage encompasses the risk of accidents, [a contention seeking to raise spent fuel accidents in a license renewal proceeding] falls beyond the scope of individual license renewal proceedings.

Turkey Point, CLI-01-17, 54 N.R.C. at 21.¹⁴ In this respect, the analysis in the GEIS includes a finding that "even under the worst probable cause of a loss of spent-fuel pool coolant (a severe

¹⁴ The Commission went on to emphasize that the GEIS covered mitigation of accidents as well as their environmental impacts:

[T]he GEIS deals with spent fuel storage risks (including accidents) generically, and concludes that "regulatory requirements already in place provide adequate mitigation."

Id. at 21-22 (citations omitted).

seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote.” GEIS at 6-72 – 6-75 (citation omitted).¹⁵

Consequently, the Attorney General’s assertion that the ER is inadequate because it fails to address the environmental impacts of severe spent fuel accidents (Petition at 21) is a direct challenge to the generic finding that is codified in Table B-1 of Part 51. The assertion is also a direct challenge to 10 C.F.R. §§ 51.53(c), 51.71(d) and 51.95(c), which integrate the Category 1 generic findings into the regulations for developing the ER and the Draft and Final EIS and which also do not require analysis of Category 1 issues.¹⁶

The Attorney General’s claim that Turkey Point as applied by the Board is inconsistent with NRC regulations (Brief at 12-14) totally ignores and never mentions these regulations which both codify the GEIS generic findings and obviate further analysis. By virtue of their em-

¹⁵ It is well established that under NEPA’s rule of reason, agencies are not required to probe remote or speculative consequences or discuss every conceivable alternative to a proposed action. See, e.g., NRDC v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). In particular, NEPA does not require consideration of accidents that are remote and speculative. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), aff’d on rehearing en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986); Carolina Env’t. Study Group v. U.S., 510 F.2d 796, 798-800 (D.C. Cir. 1975).

¹⁶ In this respect, 10 C.F.R. § 51.53(c)(3)(i) expressly provides that:

The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.

Similarly, 10 C.F.R. § 51.71(d) provides that:

The draft supplemental environmental impact statement for license renewal prepared pursuant to § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part.

And 10 C.F.R. § 51.95(c)(4) provides that:

In order to make its recommendation and final conclusion on the proposed [license renewal] action, the NRC staff, adjudicatory officers, and Commission shall integrate the conclusions, as amplified by the supporting information in the generic environmental impact statement for issues designated Category 1

bodiment in NRC regulations, the GEIS findings are not subject to attack in license renewal proceedings absent waiver or suspension of the rule. 10 C.F.R. § 2.335.

The provisions of the regulations relied upon by the Attorney General are not to the contrary. As discussed above, 10 C.F.R. § 51.53(c)(iv), relied upon by the Attorney General, does not require an applicant to provide and address in the ER every piece of information that some other party might conceivably believe is new and significant. Nor does this regulation require an applicant to reanalyze or revalidate Category 1 issues should there be new and significant information, as claimed by the Attorney General, because 10 C.F.R. § 51.53(c)(3)(i) (quoted in note 16 supra) expressly relieves an applicant of any such obligation.¹⁷

Furthermore, the regulatory history of the license renewal regulations set forth in the Board's decision clearly demonstrates that the Attorney General's asserted interpretation and application of 10 C.F.R. § 51.53(c)(3)(iv) is wrong. As explained by the Board, the requirement that the ER include new and significant information of which an applicant is aware was not part of the proposed rule but was added to the final rule to expand "the framework for consideration of significant new information" in response to comments received from the Council for Environmental Quality and the Environmental Protection Agency. LBP-06-20, slip op. at 24. The Statement of Considerations for the final rule refers to SECY-93-032,¹⁸ a Staff memorandum re-

¹⁷ The lack of any such obligation is confirmed by the NRC's rejection of a comment to the final rules suggesting such revalidation as follows:

Based on the NRC's confidence in the applicability of its generic review, it does not see any reason to require that an applicant perform a site-specific validation of GEIS conclusions. The NRC believes that such a requirement eliminates the efficiency and stability sought by the Part 51 rulemaking.

NUREG-1529, "Public Comments on the Proposed 10 CFR Part 51 Rule for Renewal of Nuclear Power Plant Operating Licenses and Supporting Documents: Review of Concerns and NRC Staff Response" (Feb. 1996) at C9-14.

¹⁸ SECY-93-032, Memorandum from James M. Taylor, EDO, to the Commissioners (Feb. 9, 1993).

porting to the Commission on the addition of 10 C.F.R. § 51.53(c)(3)(iv) which explained that the addition of this provision would have little impact on license renewal adjudications because:

Litigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived.

SECY-93-032 at 4.¹⁹ The Commission approved the modifications in the proposed rule and specifically endorsed SECY-93-032.²⁰ The Commission's approval of SECY-93-032 demonstrates that, when the Commission adopted the final rule, it contemplated that Category 1 issues could only be litigated after the granting of a waiver petition pursuant to 10 C.F.R. § 2.335.

The Commission's intent is further demonstrated by the dialogue set forth in the Board's decision between Commissioner Curtiss and the Deputy General Counsel for Licensing and Regulation upon the Commission's deliberation on the final rule and discussion of SECY-93-032. This dialogue clearly confirms that neither 10 C.F.R. § 51.53(c)(3)(iv) nor any other part of the license renewal regulations would enable a petitioner to litigate a Category 1 issue on the claim that there was new and significant information concerning the issue without first obtaining a waiver or other approval from the Commission itself. LBP-06-20, slip op. at 25 & n. 31.

The Attorney General neither disputes this regulatory history nor cites any contrary regulatory history. Rather, he argues that the Board erroneously relied on this regulatory history because such history "may be relied on only to 'resolve ambiguities' in the regulations" and here there are none according to the Attorney General. Brief at 13. However, both Commission and

¹⁹ The final rule subsequently combined Category 2 and 3 issues (61 Fed. Reg. 28,467, 28,474 (June 5, 1996)) but made no changes that would alter the treatment of Category 1 issues.

²⁰ Memorandum from Samuel J. Chilk, Secretary, to James M. Taylor, EDO (Apr. 22, 1993), ADAMS Accession No. ML003760802.

judicial precedent make clear that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examinations."²¹

Indeed, both cases cited by the Attorney General referred to and relied upon explanatory regulatory history of the regulation in question.²²

Furthermore, the Attorney General's claim that the language of the regulations is unambiguous and allows only his interpretation and application is specious. The Attorney General wholly ignores:

- (1) the plain language of 10 C.F.R. § 51.53(c)(3)(iv) that only requires an applicant to identify new and significant information "of which the applicant is aware," which as discussed above is a subjective not an objective standard that does not mandate addressing information claimed by others to be new and significant;
- (2) the conflict specifically identified by the Board in its decision (LBP-06-20, slip op. at 21) between 10 C.F.R. § 51.53(c)(3)(iv) as interpreted by the Attorney General and C.F.R. § 51.53(c)(3)(i), which expressly provides that the "environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues;" and
- (3) the fundamental conflict between the Attorney General's interpretation, which would open a Pandora's box and allow direct challenges in license renewal proceedings to the generic GEIS findings codified in the Commission's regulations, and 10 C.F.R. § 2.335 which expressly provides that absent waiver of a regulation, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."²³

Moreover, the Attorney General concedes that "an interpretation of a regulation should be consistent with the overall regulatory scheme." Brief at 14. Here, the Attorney General's "in-

²¹ Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1) ALAB-323, 3 N.R.C. 331, 336 (1976) quoting Supreme Court precedent. See also, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

²² Wrangler Laboratories ALAB-951, 33 N.R.C. 505, 515 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 N.R.C. 275, 295 (1988).

²³ The Attorney General also refers to 10 C.F.R. § 2.309(f)(2). That provision, however, only provides that petitioners are to file contentions based on the application, including the environmental report, and neither specifies the information to be included in the environmental report nor what constitutes an admissible contention.

terpretation” is inconsistent with the fundamental “overall regulatory scheme” or purpose of the license renewal rules which the Statement of Considerations repeatedly describes as follows:

The purpose of the this rulemaking is to resolve as many [NEPA] issues as possible before beginning plant-by-plant license renewal proceedings.

56 Fed. Reg. 47,016, 47,023 (Sept. 17, 1991) (emphasis added).

Those impacts that cannot be evaluated generically will have to be evaluated for each plant before its license is renewed. However, the environmental impacts that can be evaluated generically will not have to be evaluated for each plant.

Id. at 47,016 (emphasis added).

By assessing and codifying certain potential impacts on a generic basis, no need exists to address these impacts for each future license renewal.

Id. at 47,017(emphasis added). Contrary to this fundamental objective of the license renewal regulations, the Attorney General’s position would eliminate any finality on generic issues by allowing their litigation based solely on an allegation that the applicant should have recognized some asserted new and significant information. In contrast, requiring a waiver or suspension and amendment of generic rules to address new and significant information preserves the finality of the generic rules while still permitting appropriately packaged challenges to the rules where truly warranted (e.g., where a prima facie showing is made in a waiver petition).

In short, the Board properly reviewed the regulatory history and both that history and the overall regulatory scheme of the license renewal rules demonstrate that the Attorney General’s asserted interpretation of the regulations is patently wrong.

Finally, contrary to the Attorney General’s claim (Brief at 14), there is no inconsistency between the inability of petitioners to litigate new and significant information concerning Category 1 issues and the Commission’s statement that adjudicatory license renewal proceedings

share the same scope as the NRC's Staff's review.²⁴ As reflected in SECY-93-032, should the Staff determine that new and significant information exists with respect to a Category 1 issue, the Staff must also seek Commission approval to either waive or suspend and amend the rules. This process is specifically called for with respect to the Staff's review of comments provided by the public,²⁵ but the same considerations apply with respect to new and significant information provided by an applicant in the ER or identified independently by the Staff. Like licensing boards, the Staff cannot act contrary to Commission regulations and can only proceed to incorporate new and significant information that would modify the generic findings of the GEIS codified in NRC regulation by seeking Commission approval as set forth in SECY-93-032.

Thus, the regulatory history of the license renewal regulations reflects that the Staff is to review information that the applicant, the Staff itself, and members of the public believe may be new and significant, and if the Staff determines that to be the case the Staff will seek Commis-

²⁴ The Attorney General asserts that the Board "observed that *Turkey Point* is internally inconsistent" for the same reason, Brief at 10-11 (emphasis added), whereas the Board indicated only that *Turkey Point* "seems inconsistent" on this point (LBP-06-20, slip op. at 26-27 n. 32). As discussed above, however, there is no inconsistency.

²⁵ SECY-93-032 provides in this respect as follows:

a. The staff may determine that the information furnished [by a commenter] is not new and significant and therefore the analysis codified in the rule stands. A commenter dissatisfied with such a response may file a petition for rulemaking under 10 C.F.R. § 2.802 or seek a waiver under 10 C.F.R. § 2.758 [now 10 C.F.R. § 2.335] in order to pursue the matter in a hearing.

b. If the staff determines that the information furnished is new and significant, and relevant to both the plant and to other plants, the staff will seek Commission approval to either suspend the application of the rule with respect to that analysis or to delay granting the renewal application (and possibly other renewal applications) until the rule can be amended.

c. If the staff determines that the information furnished is new and significant, but relevant only to the specific plant, the staff will seek Commission approval to waive the appropriate section of the rule in that renewal proceeding.

SECY-93-032, at 3-4 (emphasis added). In contrast, SECY-93-032 provides for unbounded Category 2 and Category 3 issues (now Category 2) that the Staff can directly address new and significant information in the EIS without first seeking Commission approval. *Id.* at 3.

sion approval to waive application of the rule for the license renewal proceeding in question or to suspend and amend the rule. This process spelled out in SECY-93-032 and approved by the Commission maintains the integrity of the regulations codifying Category 1 issues while providing the Commission with the ability to update Category 1 findings for new and significant information. Thus, the scope of the Staff's review concerning Category 1 issues is the same as that for adjudicatory hearings. In neither case can new and significant information be considered and incorporated into the EIS absent prior Commission approval because in both instances the generic determination codified in the Commission's rules must first be waived or amended.

C. Turkey Point is Fully Consistent with NEPA

The Attorney General's claim (Brief at 14) that Turkey Point as applied in LBP-06-20 "is inconsistent with NEPA and the NRC's regulatory scheme for implementing [NEPA]" is likewise meritless. As the Attorney General acknowledges in his Appeal (Brief at 2) and his Rule-making Petition (at 16), the Commission has ample authority to proceed generically in implementing NEPA and need not allow litigation of NEPA issues in individual licensing proceedings. The authority of the NRC to resolve environmental NEPA issues by regulation as opposed to adjudication is established by well-recognized Supreme Court precedent in Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) and Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100-01 (1983). The Attorney General does not dispute this authority and indeed cites to it. See, e.g., Brief at 2. Obviously, if the Commission may resolve issues generically by rule, it is not required to revisit such issues or allow their litigation in each individual licensing proceeding.

Nothing in Turkey Point detracts from the Commission's NEPA obligations. Indeed, as quoted above, the Commission expressly recognized in Turkey Point that "generic findings sometimes need revisiting in particular contexts" and laid out the process by which the generic conclusions in the GEIS could be revisited by the Commission to take into account new and significant information. The processes identified by the Commission in Turkey Point included the requirement for an applicant to identify in the ER new and significant information of which it is aware under 10 C.F.R. § 51.53(c)(3)(iv) and the ability of the public to bring new and significant information to the attention of the NRC. Additionally, the Staff is obligated under NRC regulation to identify new and significant information. See 10 C.F.R. §§ 51.70(b), 51.72(a)(2) and 51.92(a)(2); see also Regulatory Guide 4.1S at 4.2-S-4.²⁶ As summarized by the Staff in Reg. Guide 4.1S at 4.2-S-4:

An applicant should state in the ER whether it is or is not aware of any new and significant information and explain any actions that were taken to identify new information and evaluate its significance. This information will assist the staff in fulfilling its responsibilities under C.F.R. 51.70(b), which in part states, "The NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement." New and significant information may also be identified by other parties and the NRC in the scoping and public comment process.

Thus, nothing in Turkey Point is inconsistent with the NRC's NEPA obligations. Rather, Turkey Point merely reflects the Commission's determination made in the license renewal regulations to proceed by generic rulemaking for resolving Category 1 NEPA issues as opposed to litigating such issues in numerous individual license renewal proceedings. In accordance with this chosen approach, consideration of new and significant information that would modify the

²⁶ Supplement 1 to Regulatory Guide 4.2, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (Sept. 2000) ("Reg. Guide 4.2S1").

generic findings must proceed by waiver of the rule or by suspension and amendment of the rule. The Attorney General tacitly acknowledges this fact by having filed a Rulemaking Petition.

Finally, the Attorney General's claim (Brief at 15) that by "protecting licensees from contentions regarding their compliance with 10 C.F.R. § 51.53(c)(3)(iv), *Turkey Point* effectively shifts accountability for identifying new and significant information from the licensee to the NRC Staff and the public" is meritless.²⁷ *Turkey Point* expressly reaffirms an applicant's obligation to provide new and significant information of which the applicant is aware as part of the license renewal application, CLI-01-17, 54 N.R.C. at 11, which would be subject to extensive review and audit by the NRC Staff as part of the Staff review process. Furthermore, it is well established that "[i]nformation provided to the Commission by an applicant for a license . . . must be "complete and accurate in all material respects." 10 C.F.R. § 50.9. Failure of an applicant to do so can result in significant fines and sanctions.²⁸ Additionally, it is not to be assumed that an applicant or licensee would act contrary to NRC requirements,²⁹ as presumed by the Attorney General here.

III. THE ATTORNEY GENERAL'S CONTENTION IS ALSO INADMISSIBLE BECAUSE IT PROVIDES NO NEW AND SIGNIFICANT INFORMATION

The Attorney General's Contention is also inadmissible because it does not present any "new and significant" information that would alter the generic findings of the GEIS for on-site

²⁷ The Attorney General's suggestion as part of this argument that 10 C.F.R. § 51.53(c)(3)(iv) requires a full fledged EIS analysis of any new and significant information concerning Category 1 issues is mistaken, for as discussed above, 10 C.F.R. § 51.53(c)(3)(i) expressly provides that a license renewal ER "is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues."

²⁸ See, e.g., *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978); 52 Fed. Reg. 49,362 (Dec. 31, 1987) (Completeness and Accuracy of Information; Final Rule and Statement of Policy).

²⁹ See, e.g., *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 N.R.C. 25, 34 (1999) citing *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 N.R.C. 143, 164 (1996).

spent fuel storage codified in 10 C.F.R. Part 51, Appendix B, Table B-1. While the Board did not rule on this issue,³⁰ the Board did observe that “the risks and effects of high density racking of spent fuel in pools have been studied and debated since 1979 . . . and have been the subject of substantial litigation” before the NRC. LBP-06-20, slip op. at 27. As the Board put it, “[t]his ground is well trod.” Id.³¹

The ground is indeed well trod. The GEIS notes that the “[c]urrent and potential environmental impacts from spent fuel storage have been studied extensively and are well understood.” GEIS at 6-81. Further, the GEIS’s determination that the occurrence of a zirconium spent fuel pool fire is “highly remote” (GEIS at 6-72 – 6-75) relies on the Commission’s 1990 Review and Revision of the Waste Confidence Decision (55 Fed. Reg. 38,474 (Sept. 18, 1990)), which in turn is based on a long series of technical studies dating back to 1979 and before. As set forth in NUREG-1353,³² the major study referenced in the Waste Confidence Decision (55 Fed. Reg. at 38,481), these technical studies analyzed a wide range of potential accident initiators that could result in drain-down or boil-down of the spent fuel pool. NUREG-1353 at 4-13 – 4-36. Based on these analyses, the Commission concluded in the Waste Confidence decision that:

[E]ven if the timing of a spent fuel pool failure were conducive to fire, a fire could occur only with a relatively sudden and substantial loss of coolant – a loss great enough to uncover all or most of the fuel, damaging enough to admit enough air to keep a large fire going, and sudden enough to deny operators the time to restore the pool to a safe condition. Such a severe loss of cooling water is likely to result only from an earthquake well beyond the conservatively estimated earth-

³⁰ It is well established that “successful parties before the Licensing Board . . . may urge that its decision be sustained on any ground which finds support in the record.” Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975).

³¹ The Attorney General’s claim (Brief at 15) that “in dicta the Board suggests that the Attorney General more than met the standard for gaining admission of a contention” is thus misplaced.

³² NUREG-1353, Regulatory Analysis for the Resolution of Generic Issue 82, “Beyond Design Basis Accidents in Spent Fuel Pools” (April 1989) (“NUREG-1353”).

quake for which reactors are designed. Earthquakes of that magnitude are extremely rare.

The plant specific studies . . . found that, because of the large safety margins inherent in the design and construction of their spent fuel pools, even the more vulnerable older reactors could safely withstand earthquakes several times more severe than their design basis earthquake. Factoring in the annual probability of such beyond-design-basis earthquakes, . . . the average annual probability of a major spent fuel pool fuel pool failure at an operating reactor . . . was calculated at two chances in a million per year of reactor operation.

Id. (emphasis added) (citations omitted).

Thus, the probability of the dominant accident sequence contributing to the risk of a spent fuel pool fire – seismically induced major spent fuel pool failure – was calculated at two chances per million per reactor year of operation,³³ which the Commission considered “extremely rare.” 55 Fed. Reg. at 38,481. The Commission went on to note that the risks due to other accident scenarios – such as structural failure of the pool due to high energy tornado or other missiles, aircraft crashes, and heavy load drops, inadvertent drainage of the pool, and boil-down of the pool due to loss of spent fuel cooling or make-up water – “are at least an order of magnitude smaller.”

Id. These other probabilities are summarized in Table 1 below.

TABLE 1 NUREG-1353 Accident Initiators and Associated Probabilities		
Accident Initiator	Probability of Spent Fuel Pool Drain-down or Boil-down	NUREG-1353 Page References
Tornado and Other High Energy Missiles	1×10^{-8}	4-13 – 4-18, 4-36
Aircraft Crash	6×10^{-9}	4-14, 4-36
Heavy Load Drop	3.1×10^{-8}	4-14 – 4-15, 4-36

³³ 55 Fed. Reg. at 38,481, citing NUREG-1353 at ES-3-4. In a subsequent study, the NRC concluded that the risk of a seismically induced structural failure of the spent fuel pool was in the range of 2×10^{-6} to 2×10^{-7} . NUREG-1738 at 3-36 to 3-38. See note 34 *infra*.

Inadvertent Drainage, (including Pneumatic Seal Failure)	4.2×10^{-8}	4-15 – 4-22, 4-36
Boil-down due to Loss of Cooling or Makeup	6.0×10^{-8}	4-22 – 4-28, 4-36

The Attorney General's Contention provides no new and significant that would alter the determination reached by the Commission in its Waste Confidence decision and relied upon in the GEIS that "even if the timing of a spent fuel pool failure were conducive to fire," the likelihood of such a fire would be "extremely rare." 55 Fed. Reg. at 38,481 (emphasis added). The Contention refers to NUREG-1738,³⁴ a report by the National Academy of Sciences concerning spent nuclear fuel storage,³⁵ and the reports of Drs. Gordon Thompson³⁶ and Jan Beyea³⁷ supporting the Contention. Petition at 22, 24, 30. None of these sources contains new and significant information that would "lead[] to an impact finding different from that codified in 10 C.F.R. Part 51," requiring amendment of the rules,³⁸ nor provides the basis for an admissible contention.

³⁴ NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk and Decommissioning Nuclear Power Plants" (Jan. 2001) ("NUREG-1738").

³⁵ National Academy of Sciences Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, "Safety and Security of Commercial Spent Nuclear Fuel Storage" (The National Academies Press: 2006) ("NAS Rept.")

³⁶ Gordon R. Thompson, "Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants" (May 25, 2006) ("Thompson Rept.")

³⁷ Jan Beyea, "Report to the Massachusetts Attorney General on the Potential Consequences of a Spent-Fuel-Pool Fire at the Pilgrim or Vermont Yankee Nuclear Power Plant" (May 25, 2006) ("Beyea Rept.")

³⁸ Reg. Guide 4.2S1 at 4.2-S-4 (emphasis added). The Staff has provided a definition in Reg. Guide 4.2S1 of the meaning of "new and significant information" as that term is used in 10 C.F.R. § 51.53(c)(3)(iv), which has two prongs and provides as follows:

- (1) information that identifies a significant environmental issue that was not considered in NUREG-1437 and, consequently, not codified in Appendix B to Subpart A of 10 C.F.R. Part 51, or
- (2) information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 C.F.R. Part 51.

This definition accords with NRC precedent which holds that "[n]ot every change requires a supplemental EIS; only those changes that cause effects which are significantly different from those already studied. The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project." Hy-

Footnote continued on next page

NUREG-1738 considered the potential of spent fuel pool fires in the context of plants undergoing decommissioning (which lack many of the functioning safety systems of an operating nuclear power plant). While NUREG-1738 does provide some additional information on the potential for spent fuel pool fires, the repeated claims made by the Attorney General that NUREG-1738 undercuts the rationale of the license renewal GEIS (e.g., Brief at 4; Petition. at 30-31) is simply not supported by that document. None of the information presented in NUREG-1738 controverts the conclusion in the GEIS that the occurrence of a zirconium spent fuel pool fire is “highly remote.” See GEIS at 6-72 – 6-75. Indeed, NUREG-1738 ultimately concludes that there is a “very low likelihood” of a zirconium pool fire (NUREG-1738 at ix, xi, 5-1 and 5-3; emphasis added) – a conclusion that parallels and reconfirms the conclusion of the GEIS that the likelihood of a fuel cladding fire is “highly remote” (GEIS at 6-72 – 6-75).

The lack of any new and significant information in NUREG-1738 that undermines the conclusions of the GEIS is reinforced by the probabilities that NUREG-1738 determined for various accident initiators. NUREG-1738 considered accident initiating events similar to those considered in NUREG-1353 and reached similar conclusions regarding the improbability of those events causing pool drain-down or boil-down. The probability of occurrence (per year) of pool drain-down or boil-down resulting from the various accident scenarios evaluated in NUREG-1738 are set forth in Table 2 below.

dro Resources, Inc., CLI-01-4, 53 N.R.C. 31, 52 (2001) (internal quotes and citations omitted). Clearly the first prong of the above definition of new and significant information does not apply here for the GEIS expressly considered severe spent fuel pool accidents and concluded that “even under the worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote.” GEIS at 6-72 – 6-75 (citation omitted).

TABLE 2 NUREG-1738 Accident Initiators and Associated Probabilities		
Accident Initiator	Probability of Spent Fuel Pool Drain-down or Boil-down	NUREG-1738 Page References
Tornado Missile	$<1.0 \times 10^{-9}$	3-38
Aircraft Crash	2.9×10^{-9}	3-38
Cask Drop	2×10^{-7}	3-38
Boil-down (Loss of Cooling, Makeup, etc.)	1.8×10^{-7}	3-35
Drain-down Due to Seismic Events ³⁹	2×10^{-6} (LLNL) 2×10^{-7} (EPRI)	3-36 – 3-38

Important to note in relation to the repeated claims made by the Attorney General is that the probabilities in the Table are the probability of drain-down or boil-down and therefore these probabilities assume that the fuel will burn if drain-down or boil-down does occur due to any of these initiating events (though as the fuel ages it may well not burn).⁴⁰ Furthermore, NUREG-1738 expressly considered partial drainage and obstructed air flow scenarios (e.g., NUREG-1738 at A1A-4) which the Attorney General repeatedly claims had not been taken into account in previous Commission studies.⁴¹ Even accepting that this information is new to NUREG-1738,

³⁹ NUREG-1738 utilized the separate seismic hazard estimates that had been developed independently by Lawrence Livermore National Laboratory (“LLNL”) and the Electric Power Research Institute (“EPRI”) for U.S. nuclear power plants and developed separate spent fuel pool fire estimates based on each. See NUREG-1738 at ix, 3-7 – 3-9, 3-36 – 3-38.

⁴⁰ The Attorney General repeatedly claims based on NUREG 1738 that “regardless of the age of the fuel in a pool, the fuel will burn shortly after the tops of the fuel assemblies are uncovered.” E.g., Petition at 31 (emphasis added); see also Brief at 4. This claim, however, misstates the NUREG’s conclusion. Rather, the NUREG’s conclusion was that, because of the different variables involved, the possibility of “a zirconium fire cannot be precluded” based solely on the decay time of the fuel. NUREG 1738 at 2-1 – 2-2 (emphasis added).

⁴¹ This claim (e.g., Petition at 30; Reply at 14) is refuted by NUREG/CR-0649, “Spent Fuel Heatup Following Loss of Water During Storage” (Mar. 1979) prepared by Sandia National Laboratories which expressly considered the “Effect of Incomplete Drainage” of the spent fuel pool and concluded that “[i]t is clear” . . . that an incomplete drainage [of the pool] can potentially cause a more severe heatup problem than a complete drainage” of the pool. NUREG/CR-0649, § 5.1 (“Effect of Incomplete Drainage”) at 73-78 (emphasis added). NUREG/CR-0649 was one of the authoritative sources extensively relied upon and subsumed within the technical analyses underlying the Commission’s Waste Confidence Decision and the GEIS. See, e.g., NUREG-1353 at 4-7 – 4-11, 8-1. Thus, this information was considered in the analyses summarized within NUREG-1437 and does not constitute new information.

based on the probabilities in Table 1 and Table 2, the information is clearly not significant. It is self evident from these two Tables that the probability of accident initiators in NUREG-1738 – which expressly account for partially obstructed pool fires – is virtually identical to those in NUREG-1353, as is NUREG-1738's conclusion, discussed above, that there is a “very low likelihood” of a spent fuel pool fire, which is identical to that in both the GEIS and the Waste Confidence Decision. Hence, the information in NUREG-1738 that partial drainage of a pool is a more severe condition than total, instantaneous drainage would not “lead[] to an impact finding different from that codified in 10 C.F.R. Part 51,” and thus is not significant even if new.

In short, the conclusion of NUREG-1738 that there is a “very low likelihood” of a zirconium pool fire (NUREG-1738 at ix, xi, 5-1 and 5-3; emphasis added), which parallels and reconfirms the conclusion of the GEIS that the likelihood of a fuel cladding fire is “highly remote” (GEIS at 6-72 – 6-75), demonstrates that the information in NUREG-1738, even if considered new, is not significant.⁴² Indeed, the Commission in Turkey Point referred to NUREG-1738 noting that NUREG-1738 found the “the risk of accident somewhat greater than originally believed but still very low.” CLI-01-17, 54 N.R.C. at 22 n. 11. Referring to Waste Confidence studies and NUREG-1738, the Commission noted that these studies “concluded that the risk of accidents is acceptably small.” 54 N.R.C. at 22.

⁴² In his Reply (at 13-14), the Attorney General incorrectly seeks to dismiss this conclusion of NUREG-1738 because the study concerned decommissioned plants. The reference to NUREG-1738 at 5-2, relied upon by the Attorney General, of a large number of different accident sequences at operating plants concerns severe reactor accidents and not spent fuel pool accidents which would be subject to the same types of accident sequences (e.g., loss of spent fuel cooling and makeup) at both operating and shutdown plants. Furthermore, NUREG-1738 conducted analyses for plants that had only recently been shut down (starting at 30 or 60 days after final shutdown depending on the analyses) and moreover assumed that, because the plant was permanently shutting down, the full core would be unloaded into the spent fuel pool. NUREG-1738 at 2-1, 3-28, A1A-3 – A1A-4, A4-2; see also NAS Rept. at 45. Because of its assumption that the full core had just recently been off-loaded to the spent fuel pool, the analysis in NUREG-1738 is in fact highly conservative compared to an operating plant where typically only one-third of the core is off-loaded to the spent fuel pool at each refueling outage.

It is well established that, in determining the admissibility of a contention, licensing boards are to “carefully examine[]” documents provided in support of a contention to determine whether they “supply an adequate basis for the contention.” See, e.g., Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004). Where the board’s independent examination of a document shows no basis for the contention, the contention must be dismissed. See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 88-90 (1996).⁴³ In Yankee Atomic, the petitioner had claimed that the applicable NEPA analysis for decommissioning the Yankee Rowe plant had failed to consider a transportation accident scenario evaluated by a Sandia National Laboratory technical report. Id. at 89. However, upon its independent examination, the licensing board found that the report had concluded that such an accident event had “a very low probability” of occurring, and, on that basis, dismissed the contention since NEPA does not require evaluation of “remote and speculative” events. Id. at 89-90.⁴⁴

Similarly here, assuming that the Commission does not affirm the Board’s decision dismissing the Contention for the reasons discussed in Section II supra, it should nevertheless dismiss the Attorney General’s Contention based on its review of NUREG-1738 – touted by the Attorney General as a major source of new information for the asserted certainty of spent fuel pool fires following drain-down or boil-down – because actual review of NUREG-1738 shows a “very low likelihood” for a spent fuel pool fire even assuming that pool drain-down or boil-down

⁴³ Reversed in part on other grounds, Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235 (1996).

⁴⁴ The Licensing Board in its decision suggests that a licensing board should eschew such an independent examination. LBP-06-20, slip op. at 27. Such a course of action is, however, contrary to the precedent discussed above.

invariably results in a spent fuel pool fire. Hence, NUREG-1738 extensively relied upon by the Attorney General shows such an event to be remote and speculative and not requiring an evaluation under NEPA, and provides absolutely no basis for his Contention.

Similarly, the NAS Report does not provide significant new information mandating the Commission to reconsider its license renewal GEIS. The NAS Report focused on terrorist attacks potentially causing a severe spent fuel accident. However, as discussed below, the Commission has ruled that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, and thus the subject of the NAS Report is beyond the scope of this license renewal proceeding. Moreover, the NRC has carefully evaluated the NAS Report, and has acted on the Report's Findings and Recommendations as it deemed appropriate. Most relevant to the issue here, the NRC has concluded, after reviewing the information in the NAS Report, that it continues to generally consider "the likelihood of a zirconium fire capable of causing large releases of radiation into the environment to be extremely low."⁴⁵ Thus, the NRC has fully considered the NAS Report and found no basis, even in the context of a terrorist attack, to change its conclusion regarding the risks of spent fuel pool fires stated in the GEIS.

The Thompson and Beyea reports repeat many arguments that were made in a 2003 paper by Alvarez, et al. (referenced in Thompson Report at 12 and Beyea Report at 3). This article has, however, already been reviewed by the NRC and found to suffer from excessive conservatisms, so that its recommendations do not have a sound technical basis.⁴⁶ No new substantive informa-

⁴⁵ "U.S. Nuclear Regulatory Commission Report to Congress on the National Academy of Sciences Study on the Safety and Security of Commercial Spent Nuclear Fuel Storage" (Mar. 2005), at 21. ("NRC Rept. on NAS Study").

⁴⁶ COMSECY-03-0019, Review of the Paper "Reducing the Hazards from Stored Spent Power-Reactor Fuel in the United States," Robert Alvarez et al., January 31, 2003, Adams Accession No. ML052340740.

tion responding to the deficiencies identified by the NRC in the Alvarez paper is provided in the Contention or its supporting papers. For example, the report supplied by Dr. Beyea on radiological consequences continues to use unrealistic and excessive conservatisms regarding the overestimation of radiation release and overestimation of societal costs associated with a severe spent fuel accident. See Entergy Answer at 24-25. Similarly, Dr. Thompson's Report provides no new substantive information regarding the probability of a worst case spent fuel damage scenario involving a terrorist attack. Rather, it claims, without any factual support or explication, that "prudent judgment indicates that a probability of at least one per century is a reasonable assumption for policy purposes." Thompson Rept. at 26. This is the same sophistry that NRC rejected as meaningless in COMSECY-03-0019. See COMSECY-03-0019, Attachment at 2-4.

While Dr. Thompson alleged in his Report (at 18) that certain accident events could lead to spent fuel pool fire at Vermont Yankee, he provided no information to demonstrate that the accident induced probabilities of pool drain-down or boil-down underlying the GEIS set forth in NUREG-1353 are incorrect. See Entergy Answer at 18-20. Dr. Thompson did postulate that a severe reactor accident would trigger a spent fuel pool accident, but he completely ignored the fact that, even in such an event, pool drain-down due to structural failure of the pool or pool boil-down due to loss of cooling or make-up water capability must still occur before a spent fuel pool fire could be triggered. See Entergy Answer at 20-24. For example, he used an entirely unsupported assumption of a 50% conditional probability of a spent fuel pool fire given a severe reactor accident wholly devoid of any factual basis.⁴⁷

⁴⁷ Id. See also Entergy's Brief on New and Significant Information in Response to Licensing Board Order of July 14, 2006 (July 21, 2006) at 15 n. 24 filed in the Pilgrim license renewal case.

In short, the Attorney General has provided no information that is either new or significant falling within the definition of new and significant information provided in Regulatory Guide 4.2S1 which undercuts the analyses and conclusion of the GEIS that the likelihood of spent fuel pool fires is “highly remote.” GEIS at 6-72 – 6-75.

IV. THE MOTHER’S FOR PEACE DECISION IS NOT CONTROLLING HERE

Finally, the Attorney General argues (Brief at 16-17) that the Commission should overturn its existing precedent precluding consideration of terrorism in NRC licensing proceedings (e.g., McGuire, CLI-02-26, 56 N.R.C. at 365) and apply the Ninth Circuit’s decision in San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006). However, this decision does not affect license renewal proceedings, because the Commission has held:

Even if we were required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement (“GEIS”) that considers sabotage in connection with license renewal. . . . The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological release would be no worse than those expected from internally initiated events.

Duke Energy Corp. (McGuire Nuclear Station Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 365 n.24 (2002) (citations omitted). As such, the GEIS expressly concludes that “the risk from sabotage . . . at existing nuclear power plants is small.” NUREG-1437, at 5-18 (emphasis added).⁴⁸

Moreover, the Ninth Circuit’s decision is inconsistent with Limerick Ecology Action v. NRC, 869 F.2d 719, 741-44 (3d Cir. 1989), which upheld the NRC’s determination that the risk

⁴⁸ The Attorney General claims, however, that the resultant consequences of a spent fuel pool fire could be “more severe” than the consequences of a severe reactor accident. See, e.g., Petition at 19, 47. However, these claims of far reaching consequences of a spent fuel pool fire are, as set forth in Entergy’s Answer (at 24-25), based on excessive conservatism as well as technical assumptions (e.g., use of a supra-linear dose-response curve) unsupported by any recognized authoritative body. In contrast, the technical studies underlying the GEIS evaluated the consequences of a spent fuel pool fire (e.g., NUREG-1353 at 3-36 – 3-42) and, while noting differences between severe reactor accidents and spent fuel fires (e.g., id. at 3-41), the results showed that consequences from a spent fuel pool fire “could be comparable to those for a severe reactor accident.” NUREG-1738 at 3-28 (emphasis added). This conclusion is confirmed by the recent analysis in NUREG-1738. Id. at 3-28 – 3-34.

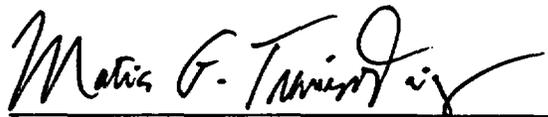
of sabotage could not be assessed meaningfully and therefore was unlitigable. Therefore, even though the Ninth Circuit's decision has now become effective, there is a split in the circuits, and Vermont Yankee is not located in the Ninth Circuit. Furthermore, the Pacific Gas & Electric Company has filed a petition for certiorari requesting Supreme Court review of the Ninth Circuit decision. Therefore, although the decision is now effective, it is still under review.

Because the Ninth Circuit decision is not controlling, and because the Commission held in McGuire that sabotage is already addressed in the GEIS, Entergy respectfully submits that the Commission should continue to follow its established precedent precluding consideration of terrorism in license renewal proceedings. In any event, because spent fuel storage is governed by the Waste Confidence Rule and is a Category 1 issue, the issue can be admitted as a contention only if the Commission waives these rules.

CONCLUSION

For the reasons stated above, the Commission should affirm the Licensing Board's decision dismissing the Massachusetts Attorney General's Petition to Intervene and Contention.

Respectfully Submitted,



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Dated: October 13, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission

In the Matter of)	
)	
Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Brief in Opposition to the Massachusetts Attorney General's Appeal of LBP-06-20" dated October 13, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 13th day of October, 2006.

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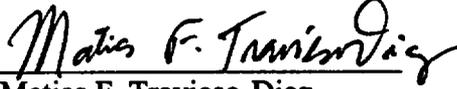
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