THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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November 20, 2008

Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission, et al.*, Docket No. 08-5571-ag

Dear Ms. O'Hagan Wolfe:

Enclosed for filing in the above-captioned matter, please find:

1. An original and four copies of the Commonwealth of Massachusetts Motion to Transfer Venue and for Stay of Proceedings, with form T-1080;
2. Affidavit of Attorney Matthew Brock;
3. Notice of Appearance for Matthew Brock;
4. Anti-Virus Certification Form;
5. Electronic Notification Agreement forms for docket no. 08-5571-ag and related docket nos. 08-3903-ag(L); 08-4833-ag(CON); and
6. Certificate of Service.

Consistent with our discussions with your office, the Commonwealth is filing the Motion in the above docket and is serving all counsel of record in this case and in the related cases *The State of New York, Richard Blumenthal, Attorney General of Connecticut v. U.S. Nuclear Regulatory Division, et al.*, Docket Nos. 08-3903-ag(L); 08-4833-ag(CON).

Very truly yours,

Matthew Brock
Assistant Attorney General
Environmental Protection Division

Enclosures
cc: Service List

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Commonwealth of Massachusetts v.
United States Nuclear Regulatory Commission

Docket Number(s): 08-5571-ag
related cases 08-3903 -ag (L); 08-4833 -ag (CON)

Motion for: Transfer of venue to the First Circuit Court of Appeals & stay of proceedings

Set forth below precise, complete statement of relief sought:
Transfer of venue of above-related cases to the U.S. Court of Appeals for the First Circuit and stay of proceedings pending resolution of venue issue.

MOVING PARTY: Commonwealth of Massachusetts
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: US and US Nuclear Regulatory Commission

MOVING ATTORNEY: Matthew Brock
[name of attorney, with firm, address, phone number and e-mail]
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OPPOSING ATTORNEY [Name]: James Adler (see also Service list)
[name of attorney, with firm, address, phone number and e-mail]
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Court-Judge/Agency appealed from: U.S. Nuclear Regulatory Commission

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ☑ No
B. been obtained? ☐ Yes ☑ No

Is oral argument requested? ☐ Yes ☑ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Signature of Moving Attorney: _____ Date: 11/20/08

Has service been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

Form T-1080 (Revised 10/31/02).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, Petitioner,	)	
v.	)	Docket No: 08-5571-ag
UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

ATTORNEY AFFIDAVIT

1. My name is Matthew Brock, and I am an Assistant Attorney General representing the Commonwealth of Massachusetts in the above captioned *Commonwealth of Massachusetts v. United States Nuclear Regulatory Commission and United States of America*, Docket No. 08-5571-ag.

2. The Commonwealth's case is related to another case pending in this Court, *The State of New York, Richard Blumenthal, Attorney General of Connecticut v. United States Nuclear Regulatory Commission and United States of America*, Docket Nos. 08-3903-ag(L) and 08-4833(CON).

3. I submit this Affidavit in support of Commonwealth of Massachusetts Motion to Transfer Venue and for Stay of Proceedings (Commonwealth Motion), filed herewith and served on all counsel of record in both proceedings, which seeks to transfer venue of the Commonwealth's case and the related case to the United States Court of Appeals for the First Circuit.

4. The facts set forth in the Commonwealth's Motion are true and correct to the best of my knowledge, information, or belief.

Subscribed and Sworn this 20 of November, 2008.

Matthew Brock

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, Petitioner,	)	
v.	)	Docket No: 08-5571-ag
UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

COMMONWEALTH OF MASSACHUSETTS MOTION TO TRANSFER VENUE AND FOR STAY OF PROCEEDINGS

I. Introduction

The Commonwealth of Massachusetts (Commonwealth), pursuant to 28 U.S.C. § 2112 (a)(5), respectfully moves this Court to transfer the above captioned proceeding, and a related proceeding currently pending in this Court, *The State of New York, Richard Blumenthal, Attorney General of Connecticut v. United States Nuclear Regulatory Commission and United States of America,* Docket Nos. 08-3903-ag(L) and 08-4833-ag (CON), to the United States Court of Appeals for the First Circuit (First Circuit). The Commonwealth makes this request because both proceedings arise out of a Petition for Rulemaking submitted by the Commonwealth to the United States Nuclear Regulatory Commission (NRC or

Commission) more than two years ago (Rulemaking Petition), that recently was denied by the NRC. As the State-Appellant that initiated the Rulemaking Petition, the Commonwealth is most aggrieved by the NRC's denial decision, and initially appealed that denial to the First Circuit.[1]

Moreover, as discussed below, the First Circuit already is familiar with the issues raised by the present appeals, has issued a recent decision in a related proceeding involving the Commonwealth and the NRC, and likely may have further related appeals on similar nuclear licensing issues which are now pending before the agency. Finally, as construed by this Court and other Circuit Courts, the relevant factors for consideration under 28 U.S.C. § 2112(a), in the circumstances of this case, support transfer of venue of these proceedings to the First Circuit.

Therefore, the Commonwealth respectfully requests that this Court exercise its discretion to transfer these proceedings to the First Circuit Court of Appeals. The Commonwealth also requests that the Second Circuit grant a limited stay of proceedings in this Court, to promote efficient judicial administration of the present appeals, until the venue question is resolved.

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[1] Consistent with 28 U.S.C. § 2112(a), the Commonwealth's case now has been transferred to this Court, which has the discretion to decide the venue question for both proceedings. *Infra.*

II. Statement of Facts

In January 2006, Entergy Nuclear Generation Company, Entergy Nuclear Operations, Inc., and Entergy Nuclear Vermont Yankee LLC (Entergy) submitted applications to the NRC to extend the operating licenses for the Pilgrim and Vermont Yankee nuclear power plants for another twenty years. In May 2006, the Commonwealth of Massachusetts submitted challenges (hearing requests and contentions) in the separate license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants.[2,3] In each proceeding, the Commonwealth filed a virtually identical contention claiming that Entergy's relicensing applications violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f)(NEPA), and NRC implementing regulations, because Entergy did not

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[2] Documents filed with the NRC are publicly available and accessible via the public web site Electronic Reading Room in the Agency Document Access and Management System (ADAMS), http://www.nrc.gov/reading-rm/adams.html. Such documents can be found using the ADAMS number provided with the footnote-citation.

[3] *See* 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 Pilgrim Nuclear Power Plant Operating License (May 26, 2006) (No. 50-293-LR). ADAMS No. ML061630088 (Pilgrim Contention); *see also* 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 (May 26, 2006) (No. 50-271-LR). ADAMS No. ML061640065 (Vermont Yankee Contention).

address significant new information about the environmental risks of operating the Pilgrim and Vermont Yankee nuclear power plants for an additional twenty years. The Commonwealth supported its contentions by a 2001 report prepared by NRC staff, a report by the National Academy of Sciences, and a report prepared by the Commonwealth's own expert, showing that if a fuel pool were to suffer even a partial loss of cooling water, whether caused by terrorist attack, natural phenomena, equipment failure, or operator error, this could cause, over a wide range of scenarios, a catastrophic fire leading to a large atmospheric release of radioactive isotopes, extending beyond Massachusetts borders (Pilgrim) or across the border into Massachusetts communities (Vermont Yankee). In a separate expert report, the Commonwealth demonstrated that such a large atmospheric release could cause thousands of cases of cancer and billions of dollars in economic damage. *See Commonwealth v. NRC*, 522 F.3d 115, 122 – 123 (1st Cir. 2008).

The Commonwealth contended that in light of this new and significant information, the NRC must revisit the conclusion of its 1996 License Renewal Generic Environmental Impact Statement (GEIS) that spent fuel storage poses no significant environmental impacts. *Commonwealth v. NRC,* 522 F. 3d at 123-124. Consistent with the U.S. Court of Appeals for the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert.*

denied, 127 S.Ct. 1124 (2007), the Commonwealth also requested the NRC to reverse its policy of refusing to consider the environmental impacts of intentional attacks on nuclear power plants. *See* 449 F. 3d at 1035.

Subsequently, in each relicensing proceeding for Pilgrim and Vermont Yankee, a separate panel of the NRC's Atomic Safety and Licensing Board (ASLB) rejected the Commonwealth's contention on the procedural ground that the contention impermissibly challenged NRC regulations.[4] The ASLBs concluded that, in order to challenge the Pilgrim and Vermont Yankee license renewal applications' failures to address this new and significant information, the Commonwealth must first petition the NRC to change its rules or seek a waiver of the regulations prohibiting consideration of these impacts in license renewal hearings. *Id.* (LBP-06-23 at 288 and LBP-06-20 at 156).

In August 2006, the Commonwealth submitted a Rulemaking Petition to the NRC and requested the agency to amend its SFP regulations.[5] The NRC's denial

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[4] *See* Memorandum and Order (Ruling on Standing and Contentions of Petitioners Massachusetts Attorney General and Pilgrim Watch), LBP-06-23, *In the Matter of Entergy Nuclear Generation Company (Pilgrim Nuclear Power Station)*, 64 NRC 257 (2006)(No. 50-293-LR). Adams No. ML062890259; *see also* Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, *In the Matter of Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station)* 64 NRC 131 (2006)(No. 50-271-LR). Adams No. ML062650337.

[5] Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (August 25, 2006), *In the Matter of Proposed Amendment to 10 C.F.R. Part 51 (Rescinding finding that environmental impacts of pool storage of spent*

of the Commonwealth's Rulemaking Petition is now the basis for the present appeals by the State-Appellants to this Court.

However, to protect its rights to ensure that the NRC complies with NEPA for the license extensions at the specific plants of concern identified by the Commonwealth – Pilgrim and Vermont Yankee – the Commonwealth also appealed LBP-06-20 and LBP-06-23 to the NRC Commissioners claiming, *inter alia*, that if the NRC intended to use the rulemaking process to address the Commonwealth's substantive concerns regarding the environmental impacts of spent fuel storage at the Pilgrim and Vermont Yankee nuclear power plants, NEPA requires the NRC to apply or otherwise take account of the results of the rulemaking in the individual license renewal proceedings before the licenses can be extended.[6]

Subsequently, the Commission affirmed LBP-06-20 and LBP-06-23 on procedural grounds, holding that the ASLBs had correctly concluded that the Commonwealth's contentions were inadmissible because they challenged an NRC

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nuclear fuel are insignificant) (Before the NRC, Dkt. No. PRM-51-10). 71 Fed.Reg. 64, 169 (November 1, 2006). ADAMS No. ML062640409. Petition for Rulemaking (Attachment 1).

[6] Massachusetts Attorney General's Brief on Appeal of LBP-06-23 (Oct. 31, 2006), *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations Inc. (Pilgrim Nuclear Power Station)* (Before the NRC)(No. 50-293-LR). Adams No. ML063120343.

regulation.[7] The Commission also found that the Commonwealth's rulemaking petition was the "appropriate way" to address the Commonwealth's substantive concerns about the environmental risks posed by the Pilgrim and Vermont Yankee spent fuel pools, including the risks posed by terrorist attacks.[8]

However, claiming it was "premature," the Commission refused the Commonwealth's request that the NRC apply or otherwise take account of the results of the rulemaking as part of the individual licensing proceedings, so that the Commonwealth's concerns regarding severe accidents at Pilgrim and Vermont Yankee could be considered in those cases as part of the licensing process.

On March 22, 2007, the Commonwealth filed petitions for review in the United States Court of Appeals for the First Circuit seeking review of the NRC's decisions in both the Pilgrim and Vermont Yankee license renewal cases. In part, the Commonwealth appealed because the NRC refused to ensure that its generic rulemaking decision would be applied back or otherwise be taken account of in the

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[7] Memorandum and Order, CLI-07-03, *In the Matter of Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)* (Before the NRC) (Nos. 50-271-LR; 50-293-LR), 65 NRC 13 (2007) at 20. Adams No. ML070220402.

[8] *Id.* at 20-21. ("It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to spent fuel storage for all plants across the board than to litigate in particular adjudications whether generic findings in the GEIS are impeached by the Mass AG's claims of new information.")

relicensing for the individual plants where the issue arose: Pilgrim and Vermont Yankee.[9]

In reviewing the issues raised by the Commonwealth's appeal, the First Circuit summarized the Commonwealth's expert reports and other evidence on the risks of severe accidents involving SFPs. *Commonwealth v. NRC*, 522 F. 3d at 122-124. The First Circuit also discussed the relationship between the Commonwealth's contentions and the Commonwealth's Rulemaking Petition, as well as potential procedural means by which the Commonwealth could return to the Court for relief following a decision by the NRC on the Commonwealth's Rulemaking Petition. *Id.* at 127 – 130.

However, based on representations by the NRC to the Court that the Commonwealth would have the opportunity in the future to raise these issues and, as appropriate, to seek judicial review, and while binding the agency to those representations, the First Circuit ruled that the NRC's decision to dismiss the Commonwealth from the individual proceedings was not a final order with respect to the Commonwealth's NEPA and related claims involving the new and significant information on the risk of severe SFP accidents.

> The Commonwealth argues separately that the NRC violated NEPA and acted arbitrarily and capriciously when it refused to ensure that the results of the rulemaking would apply to the Pilgrim and Vermont Yankee licensing proceedings...We cannot review the NRC's treatment of that petition [for

[9] See *Commonwealth v. NRC*, 522 F.3d at 132.

rulemaking], however, because the agency has not issued a final order regarding the rulemaking petition.[10]

While the Commonwealth pursued its initial First Circuit appeal, the State-Appellants New York and Connecticut joined several other states and submitted comments on the Commonwealth's Rulemaking Petition.[11] On August 1, 2008, the NRC issued its Rulemaking Decision to deny the Commonwealth's Rulemaking Petition (PRM-51-10), as well as a parallel petition filed by the state of California (PRM-51-12).[12] On August 8, the state of New York filed in the Second Circuit a petition for review of the NRC's order. On September 29, the Commonwealth of Massachusetts filed a petition for review in the First Circuit. On September 30, the state of Connecticut filed a petition for review in the Second Circuit.[13]

On October 30, 2008, the Atomic Safety and Licensing Board for the Pilgrim plant terminated the licensing proceeding without addressing the Commonwealth's SFP concerns and without deciding whether the judicial decision on the Rulemaking Petition would be addressed as part of the Pilgrim license

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[10] *Id.*

[11] Comments submitted by Attorney Generals of Connecticut, Illinois, Kentucky, Louisiana, New Jersey, New York, and Vermont on Massachusetts Attorney General's PRM-51-10 re: Amend. of 10 C.F.R. Part 51(Document ID NRC-2006-0022-0052 March 16, 2007). Available at www.regulations.gov (As of Nov. 19 2008).

[12] Denial of Petitions for Rulemaking PRM-51-10 and PRM-51-12, 73 Fed. Reg. 46204 (2008)(Attachment 2).

[13] *See* filing history at Unopposed Respondent's [NRC] Motion for Automatic Transfer Pursuant to 28 U.S.C. § 2112(a)(5) (Attachment 3).

extension. On November 12, the Commonwealth appealed that decision to the NRC Commissioners; that appeal remains pending.[14]

While all of the state petitions for judicial review were timely filed, under the mandatory provisions of 28 U.S.C.§ 2112, the First Circuit duly transferred the Commonwealth's petition for review to the Second Circuit on November 6, 2008 because the New York petition was filed first.[15] However, for the convenience of the parties and in the interests of justice, that same statute provides this Court with the discretion to retransfer these proceedings to the First Circuit Court of Appeals, which the Commonwealth respectfully suggests should be done in these circumstances.

III. Statutory Provisions to Transfer Venue

The Hobbs Act provides that a party aggrieved by a final order issued by the NRC may file a petition for review in the court of appeals within 60 days. 28 U.S.C. §2344. Venue for the review of a final order is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court

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[14] Commonwealth of Massachusetts Petition for Review of LBP-08-22 (November 12, 2008), *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)* (Before NRC)(No. 50-293-LR). Adams No. ML083190045. (Attachment 4).

[15] First Circuit Order of Transfer (Attachment 5). The Commonwealth did not oppose the motion to transfer because initial transfer is mandatory, *infra*, and because it expressly reserved the right to seek retransfer of these proceedings back to the First Circuit consistent with § 2112(a)(5). See Attachment 3, FN 1.

of Appeals for the District of Columbia Circuit. 28 U.S.C. §2343. When multiple petitioners appeal a final order to more than one Circuit Court, 28 U.S.C. § 2112 (a) establishes the process to resolve the venue question and to determine which court will decide the merits of the appeals.

The first part of the statutory process is mandatory. Notwithstanding the 60 day appeal period provided under the Hobbs Act, if only one petitioner duly files a petition for review in the court within the first ten days after issuance of the order, then pursuant to § 2112 (a)(1) and (5), the record and all other subsequently filed petitions in other Circuit Courts must initially be transferred to Circuit Court in which the first petition was filed:

> If within ten days after the issuance of the order the agency...concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency... shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. 28 USC § 2112 (a)(1).
>
> . . .
>
> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed.[16]

However, under the "two-tiered procedure in 28 U.S.C. § 2112(a), [this Court] will have an opportunity to exercise [its] discretion to retransfer the petition for review." *BASF Wyandotte Corporation, et al. v. Costle*, 582 F. 2d 108, 109 (1st Cir. 1978). For notwithstanding the statutory mandate that these petitions for

[16] 28 USC § 2112 (Attachment 6).

review must first be transferred to this Court, Section 2112(a)(5) also provides this Court with the discretion to retransfer proceedings to another Circuit Court:

> [f]or the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

As construed by this Court and other Circuit Courts, and based on the facts in this case, the weight of the relevant factors under § 2112(a)(5) clearly favors retransfer of these proceedings, involving the NRC's order denying the Commonwealth's Rulemaking Petition, back to the First Circuit for decision.

IV. Section 2112(a) Factors Favor Transfer of Proceedings to the First Circuit Court of Appeals.

A. Public policy supports transfer to a single court to resolve related proceedings.

In interpreting Section 2112(a)(5), courts have consistently emphasized the importance of supporting review by a single court to decide related court proceedings, in order to ensure judicial efficiency and uniformity in decision making. *ITT World Communications, Inc. v. FCC*, 621 F. 2d 1201, 1208 (2nd Cir. 1980)("[T]here is a policy of unifying related proceedings in a single court, and obtaining consistent results."); *see also ACLU v. FCC*, 486 F. 2d 411, 414 (D.C. Cir. 1973)("The public policy underlying section 2112(a) requires that it be liberally applied to permit review by a single court of closely related matters where appropriate for sound judicial administration." *internal quotes omitted*).

Moreover, the reasons supporting this public policy for transfer of related cases to a single court are readily apparent: a single court handling multiple related and complex matters "is intimately familiar with the background of the controversy through review of the [earlier] decision." *AT&T v. FCC*, 519 F. 2d 322, 327 (2nd Cir. 1975)(transfer ordered in the interest of justice and sound judicial administration). A Circuit Court's familiarity with the background of the case also avoids confusion and duplication of effort by multiple Circuits. *Nat'l Labor Relations Board v. Bayside Enter., Inc.*, 514 F. 2d 475, 476 (1st Cir. 1975).

In this case, the First Circuit already has decided a recent, related matter regarding the Commonwealth's Rulemaking Petition and SFP issues, and – while the First Circuit did not yet decide the merits of the Commonwealth's Rulemaking Petition – it is clearly familiar with the background and context of the controversy. *See Commonwealth v. NRC*, 522 F. 3d at 122 – 126. In addition, there is a reasonable likelihood that further appeals, arising out of the Pilgrim and Vermont Yankee licensing cases, also will soon be appealed to the First Circuit regarding application of the same SFP issues.[17] [18] Therefore, transfer is appropriate.

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[17] See FN 14.

[18] The NRC's decision on the Vermont Yankee license extension is expected out this month. See Vermont Yankee License Renewal Review Schedule, available at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/vermont-yankee.html#schedule (As of Nov. 18, 2008).

> The first in time concept [to determine venue] was the starting point used by Congress; but further transfers are permitted for reasons of judicial administration.
>
> In short, the statute should be liberally applied to permit review by a single court of closely related matters where appropriate for sound judicial administration.

Eastern Airlines, Inc. v. CAB, 354 F. 2d 507, 511 (D.C. Cir. 1965) (granting motion to transfer); *see also Farah Manufacturing Company, Inc., v. NLRB,* 481 F. 2d 1143 (8th Cir. 1973)(granting order of transfer).

B. Transfer is appropriate where the Commonwealth's own petition was denied and therefore it is most aggrieved by the agency decision.

Without question, all of the State-Appellants – and other states that commented on the Commonwealth's Rulemaking Petition -- have a substantial interest in ensuring the safe operation of nuclear plants within their respective jurisdictions. However, in this case, the Commonwealth has taken the lead among the State-Appellants before the NRC on SFP issues for several years, has been involved in active litigation with the NRC in three proceedings on this issue (Rulemaking, Pilgrim, and Vermont Yankee), and is the party which had its own Petition denied by the NRC and which is now on review before this Court. Therefore, the Commonwealth is the party "most clearly aggrieved" by the NRC's denial of the Commonwealth's Rulemaking Petition. As recognized by this Court, this factor also should weigh in favor of deciding the appropriate venue under Section 2112 and supporting transfer to the First Circuit. See *ITT World*

Communications v. FCC, 621 F. 2d at 1208(Second Circuit retained jurisdiction in part because "[i]t is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision.").[19]

V. Conclusion

Consistent with 28 U.S.C. § 2112(a), and given the First Circuit's prior knowledge of the Commonwealth's Rulemaking Petition and the SFP issues, its recent decision in a related proceeding, the potential for further appeals to the First Circuit in the near term on additional SFP-related matters including application of the Rulemaking Petition to individual licenses, the Commonwealth's lead role on these matters before the agency, and, finally, to promote efficiency and to avoid the potential for inconsistent decision making, the Commonwealth respectfully requests the United States Court of Appeals for the Second Circuit to transfer these related proceedings for disposition to the First Circuit Court of Appeals.

[19] In deciding a prior venue question, this Court also considered the convenience of the parties, which "center[s] around the physical location of the parties." *ITT World Communications v. FCC*, 621 F. 2d at 1208. Given the relative proximity of all parties to both the First and Second Circuits, the Commonwealth submits that this factor is not a significant issue in this case.

RESPECTFULLY SUBMITTED,

MARTHA COAKLEY
ATTORNEY GENERAL

Matthew Brock

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Environmental Protection Division
One Ashburton Place
Boston, MA 02108
(617) 727-2200 x2425

November 20, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERTIFICATE OF SERVICE

I, Matthew Brock, hereby certify that on November 20, 2008, copies of the foregoing Notice of Appearance and Motion for Transfer of Venue were served, by electronic mail and first-class mail, on the following, except as noted:

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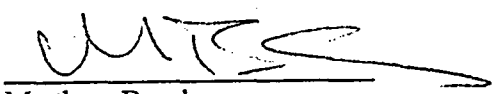

Matthew Brock
Assistant Attorney General
Commonwealth of Massachusetts

ATTACHMENT 1

August 25, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	
Proposed Amendment to 10 C.F.R. Part 51 (Rescinding finding that environmental impacts of pool storage of spent reactor fuel are insignificant)	)	Docket No. PRM-___

MASSACHUSETTS ATTORNEY GENERAL'S PETITION FOR RULEMAKING TO AMEND 10 C.F.R. PART 51

I. INTRODUCTION

Pursuant to the Administrative Procedure Act ("APA") [5 U.S.C. § 553(e)], the National Environmental Policy Act ("NEPA") [42 U.S.C. § 4332], and the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") regulations for implementation of the APA and NEPA, the Attorney General of Massachusetts petitions the NRC to: (a) consider new and significant information showing that the NRC's characterization of the environmental impacts of spent fuel storage as insignificant in the 1996 Generic Environmental Impact Statement for Renewal of Nuclear Power Plant Licenses ("License Renewal GEIS") is incorrect, (b) revoke the regulations which codify that incorrect conclusion and excuse consideration of spent fuel storage impacts in NEPA decision-making documents, (c) issue a generic determination that the environmental impacts of high-density pool storage of spent fuel are significant, and (d) order that any NRC licensing decision that approves high-density pool storage of spent fuel at a nuclear power plant or any other facility must be accompanied by an environmental impact statement ("EIS") that addresses (i) the environmental impacts of high-

density pool storage of spent fuel at that nuclear plant and (ii) a reasonable array of alternatives for avoiding or mitigating those impacts.

This petition for rulemaking is a companion to the contentions filed by the Attorney General in the license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants and raises the same substantive concern as those contentions: that spent fuel stored in high-density fuel storage pools is much more vulnerable to fire than the License Renewal GEIS concludes.[1] Thus the petition relies on and incorporates by reference the legal and technical assertions made in the Attorney General's contentions.[2] It also supplements the contentions with information about the extent to which the environmental impacts of spent fuel pool storage can be addressed generically and the extent to which they should be considered on a case-by-case basis.[3]

As the Attorney General has demonstrated, the contentions he submitted in the Pilgrim and Vermont Yankee license renewal proceedings are admissible.[4] Entergy

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1 Massachusetts Attorney General's Request for a Hearing and Petition to Intervene With Respect to Entergy Nuclear Operations Inc.'s Application for Renewal of the Pilgrim Nuclear Plant Operating License, etc. (May 26, 2006) ("Pilgrim Hearing Request"); Massachusetts Attorney General's Request for a Hearing and Petition to Intervene With Respect to Entergy Nuclear Operations Inc.'s Application for Renewal of the Vermont Yankee Nuclear Plant Operating License, etc. (May 26, 2006) ("Vermont Yankee Hearing Request").

2 A copy of the Pilgrim Hearing Request is appended to the petition as Attachment 1. The Vermont Yankee Hearing Request is not attached to this petition because the content is virtually identical to the Pilgrim Hearing request and therefore its inclusion would be duplicative. The Vermont Yankee Hearing Request can be found in the NRC's ADAMS system at accession number ML 061640032.

3 *See* Declaration of Dr. Gordon Thompson in Support of Rulemaking Petition (August 23, 2006) ("Thompson Declaration") (Attachment 2).

4 *See* Massachusetts Attorney General's Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene With Respect to Pilgrim License Renewal Proceeding (June 30, 2006); 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 30, 2006), Transcript of

Nuclear Operations, Inc. ("Entergy") and the NRC Staff have argued, however, that admission of the contentions is precluded by NRC regulations which excuse license renewal applicants from addressing the environmental impacts of spent fuel storage in their environmental reports ("ERs").[5] While the Attorney General disagrees with their argument, he presents this rulemaking petition in the alternative, in order to ensure that before renewing the operating licenses for the Pilgrim and Vermont Yankee plants, the NRC will address the environmental issues the Attorney General has raised.

If the Commission accepts this petition for rulemaking, it should 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 NEPA process for consideration of environmental impacts of high-density pool storage of spent fuel at the Pilgrim and Vermont Yankee nuclear plants. The Commission should also suspend the consideration of the Attorney General's contentions in the individual license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants.

Pilgrim oral argument (July 6, 2006), transcript of Vermont Yankee oral argument (August 1, 2006).

[5] Entergy's Answer to Massachusetts Attorney General's Request for a Hearing, Petition to Intervene, and Petition for Backfit Order at 13-14 (June 22, 2006) ("Entergy Pilgrim Answer"); NRC Staff's Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition to Intervene and Petition for Backfit at 8-9 (June 22, 2006) ("NRC Staff Pilgrim Answer"). Entergy's Answer to Massachusetts Attorney General's Request for a Hearing, Petition to Intervene, and Petition for Backfit Order at 13 (June 22, 2006) ("Entergy Vermont Yankee Answer"); NRC Staff's Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition to Intervene and Petition for Backfit at 11-13 (June 22, 2006) ("NRC Staff Vermont Yankee Answer").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Attorney General's Contentions

On May 26, 2006, the Attorney General submitted hearing requests and contentions in the license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants. *See* note 1, *supra.* In each proceeding, the Attorney General submitted a virtually identical contention challenging the adequacy of Entergy's ER to comply with NEPA's requirement that it address significant new information bearing on the environmental impacts of operating the nuclear power plant during a license renewal term. The Pilgrim Contention reads as follows:

> The Pilgrim ER does not satisfy the requirements of 10 C.F.R. § 51.53(c)(3)(iv) and NEPA, 42 U.S.C. § 4332 *et seq.,* because it fails to address new and significant information regarding the reasonably foreseeable potential for a severe accident involving nuclear fuel stored in high-density storage racks in the Pilgrim fuel pool. Although an NRC-sponsored study conducted as early as 1979 raised the potential for a severe accident in a high-density fuel storage pool if water is partially lost from the pool (NUREG/CR-0649, *Spent Fuel Heatup Following Loss of Water During Storage* (March 1979) ("1979 Sandia Report")), the NRC has failed to take that risk into account in every EIS it has prepared, including the 1979 GEIS on the environmental impacts of fuel storage; the 1990 Waste Confidence rulemaking (Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,481 (September 18, 1990) ("1990 Waste Confidence Rulemaking"); and the 1996 License Renewal GEIS on which the Pilgrim license renewal application relies. Moreover, the environmental impacts of a pool accident were not considered in the 1972 EIS issued in support of the original operating license for the Pilgrim nuclear power plant (Final Environmental Statement Related to Operation of Pilgrim Nuclear Power Station, Boston Edison Company, Docket No. 50-293 (May 1972) ("1972 Pilgrim EIS")).
>
> Significant new information now firmly establishes that (a) if the water level in a fuel storage pool drops to the point where the tops of the fuel assemblies are uncovered, the fuel will burn, (b) the fuel will burn regardless of its age, (c) the fire will propagate to other assemblies in the pool, and (c) the fire may be catastrophic. *See* Thompson Report and Beyea Report. This new information has also been confirmed by the NRC Staff in NUREG-1738, *Final Technical Study of Spent Fuel Pool Accident Risk and Decommissioning Nuclear Power Plants* (January 2001) ("NUREG-1738"), and by the National Academies of Sciences. *See* NAS Committee on the Safety and Security of Commercial Spent

> Nuclear Fuel Storage, *Safety and Security of Commercial Spent Nuclear Fuel Storage* at 53-54 (The National Academies Press: 2006) ("NAS Report").
>
> Moreover, significant new information, including the attacks of September 11, 2001 and the NRC's response to those attacks, shows that the environmental impacts of intentional destructive acts against the Pilgrim fuel pool are reasonably foreseeable. Taken together, the potential for severe pool accidents caused by intentional malicious acts and by equipment failures and natural disasters such as earthquakes is not only reasonably foreseeable, but is likely enough to qualify as a "design-basis accident," *i.e.*, an accident that must be designed against under NRC safety regulations. Thompson Report, §§ 6,7,9.
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> The ER also fails to satisfy 10 C.F.R. § 51.53(c)(3)(iii) because it does not consider reasonable alternatives for avoiding or reducing the environmental impacts of a severe spent fuel accident, *i.e.*, SAMAs. Alternatives that should be considered include re-racking the fuel pool with low-density fuel storage racks and transferring a portion of the fuel to dry storage.[6]

Each of the contentions was supported by the expert declarations and reports of Drs. Gordon Thompson and Jan Beyea regarding the likelihood and consequences of spent fuel pool accidents at the Pilgrim and Vermont Yankee nuclear power plants.[7]

The basis for each contention also provided a detailed discussion of the history of NRC's NEPA consideration of environmental impacts of spent fuel storage, and the nature and the significance of the new information the Attorney General presented in support of his contention.[8] In addition, a discussion of the statutory and regulatory requirements of NEPA and NRC regulations for consideration of new and significant information in the NEPA decision-making process prefaced each contention.[9]

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[6] Pilgrim Contention at 21-23 (footnote omitted).

[7] 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 Report"); 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 Plant (May 25, 2006) ("Beyea Report").

[8] Pilgrim Contention at 21-47, Vermont Yankee Contention at 23-47.

[9] Pilgrim Contention at 5-16, Vermont Yankee Contention at 5-16.

B. Procedural Arguments in Opposition to Contentions

In each case, both Entergy and the NRC Staff opposed the admission of the Attorney General's contention. In addition to claiming that the information presented by the Attorney General is not new or significant, they argued that the Commission has designated the environmental impacts of spent fuel storage as a generic "Category 1" issue that is exempted from consideration in any individual license renewal proceeding.[10] Citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12-16, 21-23 (2001) ("*Turkey Point*"), they argued that the only means by which the Attorney General could obtain a hearing on the environmental impacts of spent fuel storage would be a petition for rulemaking or a waiver petition. *Id.*

In his reply briefs and in oral arguments regarding the admissibility of the contentions, counsel for the Attorney General defended the admissibility of the contentions.[11] He also stated that, in the alternative, he planned to submit a rulemaking petition to the Commission.[12] The Attorney General did not, however, request either of

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10 Entergy's Pilgrim Answer at 11-14, Entergy's Vermont Yankee Answer at 10-12, NRC Staff's Pilgrim Answer at 11-13, NRC Staff's Vermont Yankee Answer at 11-13, citing 10 C.F.R. §§ 51.53(c)(2), 51.95(c), Table B-1 of Appendix A to 10 C.F.R. Part 51, *Turkey Point.*

11 *See* note 4, *supra.* In the Pilgrim proceeding, the ASLB also conducted an additional briefing in which the parties addressed the question of whether the Attorney General had brought his concern regarding the environmental impacts of fuel pool accidents to the correct forum. *See* Order (Regarding Need for Further Briefing on Definition of "New and Significant Information," etc.) (July 14, 2006); Massachusetts Attorney General's Brief Regarding Relevance to This Proceeding of Regulatory Guide's Definition of "New and Significant Information" at 7 (July 21, 2006); Entergy's Brief on New and Significant Information in Response to Licensing Board Order of July 14, 2006 at 4-6 (July 21, 2006); NRC Staff's Response to July 14, 2006 Licensing Board Order at 2 (July 21, 2006); Massachusetts Attorney General's Reply Brief Regarding Relevance to This Proceeding of Regulatory Guide's Definition of "New and Significant Information" at 6-7 (July 21, 2006).

12 Transcript of Pilgrim oral argument at 89, transcript of Vermont Yankee oral argument at 79-81.

the ASLB panels to suspend or otherwise delay a ruling on the admissibility of his contention pending submission of a rulemaking petition. The Attorney General now awaits the issuance of decisions by the Pilgrim and Vermont Yankee ASLB panels regarding the admissibility of his contentions.[13]

III. STANDARD FOR RULEMAKING PETITIONS

NRC regulation 10 C.F.R. § 2.802(a) provides that "[a]ny interested person may petition the Commission to issue, amend or rescind any regulation." The petitioner must describe:

> The specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought.

10 C.F.R. § 2.802(c)(3). The rule also requires that the petitioner "should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened." *Id.* Revocation of 10 C.F.R. §§ 51.53(c)(2) and 51.95(c) and Table B-1 of Appendix A to 10 C.F.R. Part 51 will be necessary to ensure NEPA compliance in the Pilgrim and Vermont Yankee license renewal cases if the ASLB or the Commission interprets those regulations to bar the consideration of significant new information presented by the Attorney General's contentions regarding the environmental impacts of high-density pool storage of spent fuel.

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13 Given the close similarity of the issues raised by the contentions, the Attorney General anticipates that he will seek a consolidated hearing if the contentions are admitted in both proceedings.

IV. THE COMMISSION MUST CONSIDER NEW AND SIGNIFICANT INFORMATION BEARING ON THE ENVIRONMENTAL IMPACTS OF HIGH-DENSITY POOL STORAGE OF SPENT FUEL.

A. NEPA Requires the NRC to Take a Hard Look at New and Significant Information Regarding Environmental Impacts of Spent Fuel Storage.

NEPA requires that before taking major federal action, an agency must take a "hard look" at new and significant information bearing on the environmental impacts of the action. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989) ("*Marsh*"). As required by 10 C.F.R. § 51.92(a), if an EIS has been prepared but the proposed action has not been taken, the NRC Staff must supplement the EIS if, *inter alia,* "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." In addition, 10 C.F.R. §§ 51.59(c)(3) and (c)(4) require the supplemental EIS prepared at the license renewal stage to address "significant new information." NRC regulations for the preparation of ERs by license renewal applicants also require that an ER must address "new and significant information regarding the environmental impacts of license renewal of which the licensee is aware." 10 C.F.R. § 52.53(c)(3)(iv). *See also* Pilgrim Hearing Request at 10, 15.

B. New and Significant Information Shows That Fuel Stored in High-Density Fuel Storage Pools Is More Vulnerable to Fire Than NRC Concludes in its NEPA Analyses.

As discussed in the Attorney General's contentions, new and significant information regarding the behavior of spent fuel in high-density storage pools under accident conditions shows that the fuel is much more vulnerable to fire than stated in the License Renewal GEIS or other NEPA decision documents such NUREG-0757, the GEIS for Handling and Storage of Spent Light Water Reactor Fuel (1979) ("1979 Spent

Fuel Storage GEIS"), or the Waste Confidence Rule.[14] This significant new information, not considered in any previous EIS, now firmly establishes that, across a broad range of scenarios, (a) if the water level in a fuel storage pool drops to the point where the tops of the fuel assemblies are uncovered, the fuel will burn, (b) the fuel will burn regardless of its age, (c) and the fire will propagate to other assemblies in the pool. This new information has been confirmed by Dr. Thompson in his report, by the NRC Staff in NUREG-1738, and by the National Academy of Sciences in the NAS Report. Pilgrim Hearing Request at 21-32, Vermont Yankee Hearing Request at 21-32. In contrast, all of the NRC's previous NEPA analyses were based on the faulty assumptions that (a) total instantaneous drainage is a more severe case than partial drainage and (b) aged fuel will not burn. *Id.*

A severe pool accident could be caused by a range of events normally addressed by the NRC in its EISs for the licensing of nuclear power plants. Pilgrim Hearing Request at 32-33, Vermont Yankee Hearing Request at 32-33. A severe accident caused by an intentional attack on a nuclear power plant fuel pool is also reasonably foreseeable and therefore should be considered. Pilgrim Hearing Request at 33-47, Vermont Yankee Hearing Request at 33-47. Recently, the Ninth Circuit of the U.S. Court of Appeals overturned the Commission's rationale for categorically refusing to consider the impacts of intentional attacks in any EIS. *San Luis Obispo Mothers for Peace v. NRC*, No. 93-74628 (June 2, 2006).[15]

New and significant information also shows that the consequences of a severe pool accident could be grave, and that the consequences of pool accidents differ in

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[14] Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474 (September 18, 1990).

significant respects from the consequences of reactor accidents. Pilgrim Hearing Request at 40-41, 47; Vermont Yankee Hearing Request at 40-41, 47, citing Beyea Report.

Because this new and significant information was not previously considered in the License Renewal GEIS or any other EIS for a nuclear power plant license or spent fuel storage, and because it would significantly affect the NRC's conclusions regarding the likelihood of severe spent fuel accidents, it must be considered in an EIS or supplemental EIS for any NRC licensing decision that involves high-density pool storage of spent fuel. *Marsh,* 490 U.S. at 374. The Commission also should apply the Ninth Circuit's decision by considering the environmental impacts of intentional attacks on nuclear power plant fuel storage pools in all prospective licensing decisions. Moreover, the EIS must be prepared *prior* to the licensing decisions. *Robertson v. Methow Valley Citizens Council* (*Robertson*), 490 U.S. 332, 349 (1989).

C. NRC Regulations Precluding Consideration of Spent Fuel Storage Impacts Do Not Bar Consideration of New and Significant Information Regarding Spent Fuel Storage Impacts in Individual License Renewal Cases.

In the Pilgrim and Vermont Yankee license renewal cases, Entergy and the NRC Staff have opposed the admission of the Attorney General's contentions on the ground that environmental impacts of spent fuel storage constitute "Category 1" impacts that are beyond the scope of individual license renewal proceedings by virtue of Table B-1 of Part 51 and 10 C.F.R. §§ 51.53(c)(2) and 51.95(c). *See* note 5, *supra.* But their argument is not consistent with the NRC's procedural regulations governing the admissibility of contentions to a proceeding, NRC regulations for implementation of NEPA, or Supreme Court precedent with respect to the consideration of new information

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15 The mandate in that case is due to issue August 31, 2006.

in NEPA reviews. The NRC's regulatory and statutory scheme requires Entergy to identify any new and significant information of which it is aware regarding the environmental impacts of renewing the Pilgrim and Vermont Yankee operating licenses, including Category 1 issues; it also allows the Attorney General to challenge Entergy's failure to do so.

1. NRC regulations require the Attorney General to submit a contention challenging Entergy's environmental report.

In order to raise NEPA environmental issues in this license renewal adjudication, NRC regulations require a petitioner to submit contentions establishing "genuine" and "material" disputes with the applicants regarding the adequacy of its ER. 10 C.F.R. § 2.309(f)(2)(vi). *See also* Final Rule, Rules of Practice for Domestic Licensing Proceeding – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (August 11, 1989) ("1989 Final Procedural Rule") ("The rule makes clear that to the extent an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document.")[16] An intervenor may not skip this threshold pleading requirement and wait for an EIS to be issued by the NRC Staff. *Id.* Here, the Attorney General properly raised the "environmental issue" of whether Entergy's ERs for Pilgrim and Vermont Yankee comply with 10 C.F.R. § 51.53(c)(3)(iv) by taking into account "new and significant information" regarding the environmental impacts of pool fires.

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[16] When it was originally promulgated in 1989, the regulation governing admission of NEPA contentions was codified as 10 C.F.R. § 2.714(b)(2)(iii). In 2004,

2. 10 C.F.R. § 51.53(c)(3)(iv) requires Entergy to discuss significant new information regarding severe pool accidents in its ER for Pilgrim and Vermont Yankee license renewal.

Both a plain reading and the regulatory and statutory context of 10 C.F.R. § 51.53(c)(3)(iv) show that § 51.53(c)(3)(iv) requires Entergy to discuss new and significant information relating to Category 1 impacts in its ERs for renewal of the Pilgrim and Vermont Yankee operating licenses. First, the plain language of 10 C.F.R. § 51.53(c)(3)(iv) requires a license renewal applicant to address "any" new information of which it is aware.[17] The NRC's use of the word "any" plainly shows that it did not intend to limit the scope of the required discussion of significant new information to information that relates only to Category 2 and 3 impacts. *Wrangler Laboratories, et al.*, ALAB-951, 33 NRC 505, 513-14 (1991) ("*Wrangler*"), quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) ("*Long Island Lighting*") ("As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself.")

Second, the regulatory history of § 51.53(c)(3)(iv) confirms that the Commission intended the scope of the regulation to include Category 1 impacts. *Wrangler*, 33 NRC at 513-14 ("[A]dministrative history and other available guidance may be consulted for background information and the resolution of ambiguities"). In the proposed rule, the NRC had required applicants to address new information only with respect to Category 2 and 3 issues. Proposed 10 C.F.R. § 51.35(c)(4) would have provided that:

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the same regulation was re-codified as 10 C.F.R. § 2.309(f)(2). Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,218, 2,240 (January 14, 2004).

[17] Entergy has not asserted that it is unaware of the information presented in the Attorney General's contention.

> The supplemental [environmental] report must contain an analysis of whether the assessment required by paragraphs (c)(3)(ii)-(iii) of this section changes the findings documented in Table B-1 of appendix B of subpart A of this part that the renewal of any operating license for up to 20 years will have accrued benefits that outweigh the economic, environmental, and social costs of license renewal.

Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,028 (September 17, 1991). The assessment required by proposed paragraph (c)(3)(ii) related to Category 2 impacts, and the assessment required by proposed paragraph (c)(3)(iii) related to Category 3 impacts. *Id.*

In the Final Rule, the Commission changed the numbering of the provision to 10 C.F.R. § 51.53(c)(3)(iv) and broadened its language to require consideration of "any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 61 Fed. Reg. 28,467, 28,488 (June 5, 1996) ("Final Rule for Environmental Review"). The changed provision also eliminated the previous cross-reference to Category 2 and 3 impacts. *Id.*

The intent of this change is discussed in the preamble to the Final Rule. One of the comments on the proposed rule had included the criticism that: "the rigidity of the proposed rule hampers the NRC's ability to respond to new information or to different environmental issues not listed in the proposed rule." 61 Fed. Reg. at 28,470. The Commission responded that: "the framework for consideration of significant new information has been revised and expanded." *Id.* Thus, the Commission explained that it was revising its regulations to require the NRC Staff to prepare a Supplemental EIS rather than an environmental assessment ("EA") for license renewal, and to require that the Supplemental EIS take into account "new and significant information not considered in the GEIS analysis." *Id.* The Commission also explained that although its regulations excused license applicants from addressing Category 1 impacts in the ERs, that exception

only applied in the absence of "new and significant information" calling the Category 1 determination into question:

> In this final rule, the regulatory requirements for performing a NEPA review for a license renewal application are similar to the NEPA review requirements for other major plant licensing actions. Consistent with the current NEPA practice for major plant licensing actions, this amendment to 10 CFR Part 51 requires the applicant to submit an environmental report that analyzes the environmental impacts associated with the proposed action, considers alternatives to the proposed action, and evaluates any alternatives for reducing adverse environmental effects. Additionally, the amendment requires the NRC staff to prepare a supplemental environmental impact statement for the proposed action, issue the statement in draft for public comment, and issue a final statement after considering public comments on the draft.
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> The amendment deviates from NRC's current NEPA review practice in some areas. First, the amendment codifies certain environmental impacts associated with license renewal that were analyzed in NUREG-1437, "Generic Environmental Impact Statement for License Renewal at Nuclear Plants" (xxx 1996). Accordingly, absent new and significant information, the analyses for certain impacts codified by this rulemaking need only be incorporated by reference in an applicant's environmental report for license renewal and in the Commission's (including NRC staff, adjudicatory officers, and the Commission itself) draft and final SEIS and other environmental documents developed for the proceeding.

61 Fed. Reg. at 28,483 (emphasis added). This language clearly establishes that Category 1 impacts are included in the scope of new and significant impacts that must be discussed in an ER pursuant to 10 C.F.R. § 51.53(c)(3)(iv).[18]

Finally, Entergy's and the NRC Staff's interpretation of the regulations should be rejected because it is inconsistent with NEPA and the NRC's regulatory scheme for

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[18] In support of its position, Entergy cites a statement in a 1993 memorandum from the NRC Staff to the Commissioners in which the NRC Staff proposed to make a number of changes to the 1991 proposed rule, including the provision that "[l]itigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived." Entergy's Pilgrim Answer at 13-14, quoting SECY-93-032, Memorandum to the Commissioners from James M. Taylor, Executive Director for Operations, re: 10 CFF Part 51 Rulemaking on Environmental Review for Renewal of Nuclear Power Plant Operating Licenses at 4 (February 9, 1993).

implementing that statute. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-05-10, 61 NRC 241, 299 (2005), *rev'd on other grounds,* CLI-05-14, 61 NRC 359 (2005) (finding that a proposed interpretation of a regulation was inconsistent with both its plain meaning and the "broader context" of the regulatory scheme.) As discussed in *Marsh,* NEPA is an "action-forcing" statute that requires federal agencies to continue to take a "hard look" at the effects of their proposed actions, even after they have been approved. 490 U.S. at 372-73. NRC's regulatory scheme assigns license applicants broad responsibility to conduct what amounts to a first draft of the NRC's NEPA analysis in its ERs. It would be inconsistent with NEPA for the NRC to excuse licensees from identifying an entire category of new and significant information bearing on the environmental impacts of a proposed nuclear operation, when licensees have a high level of access to that information and when the regulatory scheme places so much reliance on applicants to address environmental issues.

Accordingly, the plain language of 10 C.F.R. § 51.53(c)(3)(iv), its regulatory history, and the statutory framework of NEPA require Entergy to address new and significant information bearing on the environmental impacts of pool fires in its ERs for renewal of the Pilgrim and Vermont Yankee licenses. Moreover, the Attorney General was entitled to challenge the adequacy of the ERs' discussion of the issue.

3. The alternative procedures suggested in *Turkey Point* are inconsistent with NEPA.

Both Entergy and the NRC Staff have cited the Commission's decision in *Turkey Point* for the proposition that the Attorney General should have filed a rulemaking petition with the Commission instead of filing a contention with the ASLB. Entergy's

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But such a provision was never codified in the final rule, nor is it mentioned in the

Pilgrim Answer at 13, NRC Staff's Pilgrim Answer at 11, citing 54 NRC at 12. In *Turkey Point,* the Commission affirmed the denial of a contention seeking consideration of fuel pool accidents, in part on the ground that spent fuel storage impacts constitute Category 1 impacts that are excused from consideration, and that the petitioner had not filed a waiver petition pursuant to 10 C.F.R. § 2.335(b). 54 NRC at 21-23. *Turkey Point* is inapposite, however, because it does not address the license renewal applicant's obligation to discuss new and significant information bearing on the impacts of license renewal in its ER.

Under NRC regulations for the admissibility of NEPA contentions, the Attorney General was required to raise his NEPA concerns about the Pilgrim and Vermont Yankee license renewal reviews by raising a dispute with Entergy regarding Entergy's satisfaction of NRC requirements for the consideration of significant new information. Because he properly submitted his contention to the ASLB, no rulemaking petition should be required in order to gain its admission.

The Attorney General recognizes that while the Commission's duty under NEPA to consider new and significant information is non-discretionary, the choice of means by which it will carry out that duty ultimately lies within the Commission's discretion. *See Turkey Point,* 54 NRC at 14, citing *Baltimore Gas & Electric v. Natural Resources Defense Council,* 462 U.S. 87, 100-01 (1983). Therefore, in Section IV.D below, the Attorney General presents an alternative argument that the Commission should institute a rulemaking to revoke the regulations that arguably bar consideration of spent fuel storage impacts in individual licensing cases.

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preamble to the final rule.

D. Assuming For Purposes of Argument That NRC Regulations Do Bar the Attorney General's Contentions, Revocation of 10 C.F.R. §§ 51.23 and 51.95(C) and Table B-1 of Appendix A To 10 C.F.R. Part 51 is Necessary to Ensure Compliance With NEPA in the Pilgrim and Vermont Yankee License Renewal Cases.

Assuming for purposes of argument that NRC regulations do bar the admission of the Attorney General's contentions, revocation of 10 C.F.R. § 51.53(c)(2), § 51.95(c) and Table B-1 of Appendix A to 10 C.F.R. Part 51 is necessary to ensure compliance with NEPA in the Pilgrim and Vermont Yankee license renewal cases. In addition, the Commission should revoke 10 C.F.R. §§ 51.23(a) and (b), 51.30(b), 51.53, 51.61, and 51.80(b) to the extent that they state, imply, or assume that environmental impacts of high-density pool storage are insignificant and therefore need not be considered in any NEPA analysis. These regulations cannot stand in the face of significant new information which shows that in fact, the environmental impacts of high-density pool storage of spent fuel are significant. *Marsh,* 490 U.S. at 374.

The Commission should also commence a new rulemaking which proposes to treat the environmental impacts of high-density pool accidents as significant.[19] In addition, the Commission should amend its regulations to require that the body of severe accident mitigation alternatives ("SAMAs") that must be discussed in ERs and supplemental EISs for individual plants pursuant to 10 C.F.R. §§ 51.53(c)(3)(ii)(L) and Table B-1 of Appendix A to 10 C.F.R. Part 51 ("Postulated Accidents: severe accidents") must include alternatives to avoid or mitigate the impacts of pool fires. Finally, the NRC should not approve high-density pool

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[19] The risk of a pool fire is significant for all plant designs, and is particularly serious for plants employing boiling water reactors ("BWRs") with the Mark 1 or Mark 2 containments, such as the Pilgrim and Vermont Yankee plants. The increased risk for

storage of spent fuel at any nuclear power plant or spent fuel storage facility unless and until it has evaluated the environmental impacts of the proposal in an EIS.

D. A Rulemaking Is Desirable Because It Would Achieve a Greater and More Consistent Level of Environmental Protection.

Although the Attorney General's primary concern in bringing this rulemaking petition is to ensure adequate consideration of the environmental impacts of renewing the Pilgrim and Vermont Yankee operating licenses, he believes that a generic rulemaking would be the most effective means to ensure broad protection of public health and the environment. The NRC's incorrect conclusion regarding the alleged insignificance of high-density pool storage of spent fuel is contained in numerous NEPA and other licensing documents, and affects many licensing decisions.[20] It should be revoked across the board in order to ensure that future NRC licensing decisions are not based on inadequate consideration of environmental risks or measures for avoiding or reducing those risks. Moreover, the Attorney General has an interest in seeking generic treatment of spent fuel pool hazards because a pool accident at any one of the operating nuclear power plants in the New England and Mid-Atlantic states could have a significant effect on the health, environmental, and economic well-being of the Commonwealth of Massachusetts. *See* Beyea Report, attached to Pilgrim Contention.

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those plants is attributable to two design features: the elevation of the pool and its location within the reactor building. Thompson Declaration, par. VII-1.

20 For instance, *see* the Waste Confidence Rule and the 1979 Spent Fuel Storage GEIS.

V. THE RULEMAKING MUST BE COMPLETED BEFORE THE NRC TAKES ANY LICENSING ACTION THAT WOULD ALLOW THE CONTINUED HIGH-DENSITY POOL STORAGE OF SPENT FUEL.

NEPA requires federal agencies to examine the environmental consequences of their actions *before* taking those actions, in order to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson,* 490 U.S. at 349. Therefore the Attorney General requests that if the Commission accepts this petition for rulemaking, it defer any decision to license the continued high-density pool storage of spent fuel at any nuclear power plant, including the Pilgrim and Vermont Yankee plants, until the requested rulemaking has been completed, including preparation and circulation of a draft Supplemental GEIS, consideration of public comments on the draft Supplemental GEIS, and issuance of a final Supplemental GEIS with respect to the environmental impacts of high-density pool storage of spent fuel.

VI. THE COMMISSION SHOULD SUSPEND THE CONSIDERATION OF THE ATTORNEY GENERAL'S CONTENTIONS IN THE PILGRIM AND VERMONT YANKEE PROCEEDINGS PENDING GENERIC RESOLUTION OF THE ISSUES RAISED BY THIS PETITION FOR RULEMAKING.

If the Commission accepts this petition for rulemaking, the Attorney General requests the Commission to suspend the litigation of the Attorney General's contentions in the individual license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants.

VII. CONCLUSION

For the foregoing reasons, the Commission should:

(a) consider new and significant information showing that the NRC's characterization of the environmental impacts of spent fuel storage as insignificant in the License Renewal GEIS is incorrect,

(b) revoke the regulations which codify that incorrect conclusion and excuse consideration of spent fuel storage impacts in NEPA decision-making documents,

(c) issue a generic determination that the environmental impacts of high-density pool storage of spent fuel are significant, and

(d) order that any NRC licensing decision that approves high-density pool storage of spent fuel at a nuclear power plant or any other facility must be accompanied by an EIS that addresses (i) the environmental impacts of high-density pool storage of spent fuel at that nuclear plant and (ii) a reasonable array of alternatives for avoiding or mitigating those impacts.

Respectfully submitted,

Respectfully submitted,
COMMONWEALTH OF MASSACHUSETTS

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August 25, 2006

Proposed Rules

Federal Register
Vol. 73, No. 154
Friday, August 8, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket No. PRM-51-10, NRC-2006-0022 and Docket No. PRM-51-12, NRC-2007-0019]

The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Petition for rulemaking; denial.

SUMMARY: *The NRC is denying two* petitions for rulemaking (PRM), one filed by the Attorney General of the Commonwealth of Massachusetts (Massachusetts AG) and the other filed by the Attorney General for the State of California (California AG), presenting nearly identical issues and requests for rulemaking concerning the environmental impacts of the high-density storage of spent nuclear fuel in large water pools, known as spent fuel pools (SFPs). The Petitioners asserted that "new and significant information" shows that the NRC incorrectly characterized the environmental impacts of high-density spent fuel storage as "insignificant" in its National Environmental Policy Act (NEPA) generic environmental impact statement (EIS) for the renewal of nuclear power plant licenses. Specifically, the Petitioners asserted that spent fuel stored in high-density SFPs is more vulnerable to a zirconium fire than the NRC concluded in its NEPA analysis.

ADDRESSES: You can access publicly available documents related to these petitions for rulemaking using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC-2006-0022] (PRM-51-10), and [NRC-2007-0019] (PRM-51-12).

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-899-397-4209, 301-415-4737, or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: L. Mark Padovan, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1423, e-mail *Mark.Padovan@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Petitioners' Requests
III. Public Comments
IV. NEPA and NUREG-1437
V. Reasons for Denial—General
A. Spent Fuel Pools
B. Physical Security
C. Very Low Risk
VI. Reasons for Denial—NRC Responses to Petitioners' Assertions
A. New and Significant Information
B. Spent Fuel Assemblies Will Burn if Uncovered
1. Heat Transfer Mechanisms
2. Partial Drain-Down
3. License Amendments
C. Fuel Will Burn Regardless of its Age
D. SFP Zirconium Fire Will Propagate
E. SFP Zirconium Fire May Be Catastrophic
1. Not New and Significant Information; Very Low Probability
2. Shearon Harris Atomic Safety and Licensing Board Panel (ASLBP) Proceeding
3. SFP Zirconium Fire Does Not Qualify As a DBA
F. Intentional Attack on a SFP is "Reasonably Foreseeable"
1. NAS Report
2. Ninth Circuit Decision
G. SFP Zirconium Fire Should be Considered within the Analysis of SAMAs
VII. Denial of Petitions

I. Background

The NRC received two PRMs requesting that Title 10 of the Code of Federal Regulations (10 CFR), Part 51, be amended. The Massachusetts AG filed its petition on August 25, 2006 (docketed by the NRC as PRM-51-10). The NRC published a notice of receipt and request for public comment in the **Federal Register** on November 1, 2006 (71 FR 64169). The California AG filed its petition on March 16, 2007 (docketed by the NRC as PRM-51-12). PRM-51-12 incorporates by reference the facts and legal arguments set forth in PRM-51-10. The NRC published a notice of receipt and request for public comment on PRM-51-12 in the **Federal Register** on May 14, 2007 (72 FR 27068). The California AG filed an amended petition (treated by the NRC as a supplement to PRM 51-12) on September 19, 2007, to clarify its rulemaking request. The NRC published a notice of receipt for the supplemental petition in the **Federal Register** on November 14, 2007 (72 FR 64003). Because of the similarities of PRM-51-10 and PRM-51-12, the NRC evaluated the two petitions together.

The Petitioners asserted the following in their petitions:

1. "New and significant information" shows that the NRC incorrectly characterized the environmental impacts of high-density spent fuel storage as "insignificant" in the NRC's NUREG-1437, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants,* May 1996. Specifically, the Petitioners asserted that an accident or a malicious act, such as a terrorist attack, could result in an SFP being drained, either partially or completely, of its cooling water. The Petitioners further asserted that this drainage would then cause the stored spent fuel assemblies to heat up and then ignite, with the resulting zirconium fire releasing a substantial amount of radioactive material into the environment.

2. The bases of the "new and significant information" are the following:

a. NUREG-1738, *Technical Study of the Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants,* January 2001

b. 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 (National Academies Press: 2006) (NAS Report)

c. 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 Report)

3. Specifically, the Petitioners asserted that the "new and significant" information shows the following:

a. The fuel will burn if the water level in an SFP drops to the point where the tops of the fuel assemblies are uncovered (complete or partial water loss resulting from SFP drainage being caused by either an accident or terrorist attack).

b. The fuel will burn regardless of its age.

c. The zirconium fire will propagate to other assemblies in the pool.

d. The zirconium fire may be catastrophic.

e. A severe accident caused by an intentional attack on a nuclear power plant SFP is "reasonably foreseeable."

The Petitioners also asserted that new and significant information shows that the radiological risk of a zirconium fire in a high-density SFP at an operating nuclear power plant can be comparable to, or greater than, the risk of a core-degradation event of non-malicious origin (i.e., a "severe accident") at the plant's reactor. Consequently, the Petitioners asserted that SFP fires must be considered within the body of severe accident mitigation alternatives (SAMAs).

II. Petitioners' Requests

PRM–51–10 requested that the NRC take the following actions:

1. Consider new and significant information showing that the NRC's characterization of the environmental impacts of spent fuel storage as insignificant in NUREG–1437 is incorrect.

2. Revoke the regulations which codify that incorrect conclusion and excuse consideration of spent fuel storage impacts in NEPA decision-making documents, namely, 10 CFR 51.53(c)(2), 51.95(c) and Table B–1, "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants," of appendix B to subpart A of 10 CFR Part 51. Further, revoke 10 CFR 51.23(a) and (b), 51.30(b), 51.53, 51.61, and 51.80(b) to the extent that these regulations find, imply, or assume that environmental impacts of high-density pool storage are insignificant, and therefore need not be considered in any plant-specific NEPA analysis.

3. Issue a generic determination that the environmental impacts of high-density pool storage of spent fuel are significant.

4. Require that any NRC licensing decision that approves high-density pool storage of spent fuel at a nuclear power plant, or any other facility, must be accompanied by a plant-specific EIS that addresses the environmental impacts of high-density pool storage of spent fuel at that nuclear plant and a reasonable array of alternatives for avoiding or mitigating those impacts.

5. Amend its regulations to require that SAMAs that must be discussed in utility company environmental reports (ERs) and NRC supplemental EISs for individual plants under 10 CFR 51.53(c)(3)(ii)(L) and Table B–1 of appendix B to subpart A of 10 CFR part 51 ("Postulated Accidents: Severe Accidents") must include alternatives to avoid, or mitigate, the impacts of high-density pool zirconium fires.

PRM–51–12 incorporates by reference PRM–51–10. PRM–51–12 requested that the NRC take the following actions:

1. Rescind all NRC regulations found in 10 CFR part 51 that imply, find, or determine that the potential environmental effects of high-density pool storage of spent nuclear fuel are not significant for purposes of NEPA and NEPA analysis.

2. Adopt, and issue, a generic determination that approval of such storage at a nuclear power plant, or any other facility, does constitute a major federal action that may have a significant effect on the human environment.

3. Require that no NRC licensing decision that approves high-density pool storage of spent nuclear fuel at a nuclear power plant, or other storage facility, may issue without the prior adoption and certification of an EIS that complies with NEPA in all respects, including full identification, analysis, and disclosure of the potential environmental effects of such storage, including the potential for accidental or deliberately caused release of radioactive products to the environment, whether by accident or through acts of terrorism, as well as full and adequate discussion of potential mitigation for such effects, and full discussion of an adequate array of alternatives to the proposed storage project.

III. Public Comments

The NRC's notice of receipt and request for public comment invited interested persons to submit comments. The comment period for PRM 51–10 originally closed on January 16, 2007, but was extended through March 19, 2007. The public comment period for PRM 51–12 closed on July 30, 2007. Accordingly, the NRC considered comments received on both petitions through the end of July 2007. The NRC received 1,676 public comments, with 1,602 of these being nearly identical form e-mail comments supporting the petitions. Sixty-nine other comments also support the petitions. These comments were submitted by States, private organizations, and members of the U.S. Congress. Two letters from the Nuclear Energy Institute (NEI) oppose the petitions, and three nuclear industry comments endorse NEI's comments.

In general, the comments supporting the petitions focused on the following main elements of the petitions:

- NRC should evaluate the environmental impacts (large radioactive releases and contamination of vast areas) of severe accidents and intentional attacks on high-density SFP storage in its licensing decisions (NEPA analysis).
- The 2006 decision of the United States Court of Appeals for the Ninth Circuit, *San Luis Obispo Mothers for Peace* v. *NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied* 127 S. Ct. 1124 (2007), concluded that the NRC must evaluate the environmental impacts of a terrorist attack on SFP storage in its licensing decisions.
- NRC's claim that the likelihood of a SFP zirconium fire is remote is incorrect. Partial loss of water in an SFP could lead to a zirconium fire and release radioactivity to the environment.
- NRC's characterization of the environmental impacts of high-density SFP storage as "insignificant" in NUREG–1437 is incorrect, and the NRC should revoke the regulations which codify this.
- Any licensing decision approving high-density spent fuel storage should have an EIS.

Comments opposing the petitions centered on the following:

- Petitioners failed to show that regulatory relief is needed to address "new and significant" information concerning the potential for spent fuel zirconium fires in connection with high-density SFP storage. None of the documents that the Petitioners cited or referenced satisfy the NRC's standard for new and significant information.
- Petitioners failed to show that the Commission should rescind its Waste Confidence decision codified at 10 CFR 51.23, or change its determination that the environmental impacts of high-density spent fuel storage are insignificant.
- The Commission has recently affirmed its longstanding view that NEPA demands no terrorism inquiry,

and that the NRC therefore need not consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.

• The Commission's rejection of the Ninth Circuit Court's view is consistent with the U.S. Supreme Court's position that NEPA should not be read to force agencies to consider environmental impacts for which they cannot reasonably be held responsible. Moreover, the NRC has, in fact, examined terrorism under NEPA and found the impacts similar to the impacts of already-analyzed, severe reactor accidents.

The NRC reviewed and considered the comments in its decision to deny both petitions, as discussed in the following sections:

IV. NEPA and NUREG-1437

The NRC's environmental protection regulations in 10 CFR Part 51 identify renewal of a nuclear power plant operating license as a major federal action significantly affecting the quality of the human environment. As such, an EIS is required for a plant license renewal review in accordance with the NEPA. The Petitioners challenge NUREG–1437, which generically assesses the significance of various environmental impacts associated with the renewal of nuclear power plant licenses. NUREG–1437 summarizes the findings of a systematic inquiry into the potential environmental consequences of operating individual nuclear power plants for an additional 20 years. The findings of NUREG–1437 are codified in Table B–1 of appendix B to subpart A of 10 CFR part 51.

The NUREG–1437 analysis identifies the attributes of the nuclear power plants, such as major features and plant systems, and the ways in which the plants can affect the environment. The analysis also identifies the possible refurbishment activities and modifications to maintenance and operating procedures that might be undertaken given the requirements of the safety review as provided for in the NRC's nuclear power plant license renewal regulations at 10 CFR part 54.

NUREG–1437 assigns one of three impact levels (small, moderate, or large) to a given environmental resource (e.g., air, water, or soil). A small impact means that the environmental effects are not detectable, or are so minor that they will neither destabilize, nor noticeably alter, any important attribute of the resource. A moderate impact means that the environmental effects are sufficient to alter noticeably, but not to destabilize, important attributes of the resource. A large impact means that the environmental effects are clearly noticeable, and are sufficient to destabilize important attributes of the resource.

In addition to determining the significance of environmental impacts associated with license renewal, the NRC determined whether the analysis in NUREG–1437 for a given resource can be applied to all plants. Under the NUREG–1437 analysis, impacts will be considered Category 1 or Category 2. A Category 1 determination means that the environmental impacts associated with that resource are generic (i.e., the same) for all plants. A Category 2 determination means that the environmental impacts associated with that resource cannot be generically assessed, and must be assessed on a plant-specific basis.

The NRC regulations at 10 CFR part 51, subpart A, appendix B, Table B–1 and NUREG–1437 set forth three criteria for an issue to be classified as Category 1. The first criterion is that the environmental impacts associated with that resource have been determined to apply to all plants. The second criterion is that a single significance level (i.e., small, moderate, or large) has been assigned to the impacts.[1] The third criterion is that the mitigation of any adverse impacts associated with the resource has been considered in NUREG–1437 and further, it has been determined that additional plant-specific mitigation measures are not likely to be sufficiently beneficial to warrant implementation. For Category 1 issues, the generic analysis may be adopted in each plant-specific license renewal review.

A Category 2 classification means that the NUREG–1437 analysis does not meet the criteria of Category 1. Thus, on that particular environmental issue, additional plant-specific review is required and must be analyzed by the license renewal applicant in its ER.

For each license renewal application, the NRC will prepare a draft supplemental EIS (SEIS) to analyze those plant-specific (Category 2) issues. Neither the SEIS nor the ER is required to cover Category 1 issues. However, both are required to consider any new and significant information for Category 1 or unidentified issues. The draft SEIS is made available for public comment. After considering public comments, the NRC will prepare and issue the final SEIS in accordance with 10 CFR 51.91 and 51.93. The final SEIS and NUREG–1437, together, serve as the requisite NEPA analysis for any given license renewal application.

The NUREG–1437 analysis, as shown in Table B–1 of appendix B to subpart A of 10 CFR part 51, found that the environmental impact of the storage of spent nuclear fuel, including high-density storage, in SFPs, during any plant refurbishment or plant operation through the license renewal term, are of a small significance level and meet all Category 1 criteria. It is this finding that the Petitioners challenge. After reviewing the petitions and the public comments received, the NRC has determined that its findings in NUREG–1437 and in Table B–1 remain valid, both for SFP accidents and for potential terrorist attacks that could result in an SFP zirconium fire.

V. Reasons for Denial—General

A. Spent Fuel Pools

Spent nuclear fuel offloaded from a reactor is stored in a SFP. The SFPs at all nuclear plants in the United States are massive, extremely-robust structures designed to safely contain the spent fuel discharged from a nuclear reactor under a variety of normal, off-normal, and hypothetical accident conditions (e.g., loss of electrical power, floods, earthquakes, or tornadoes). SFPs are made of thick, reinforced, concrete walls and floors lined with welded, stainless-steel plates to form a leak-tight barrier. Racks fitted in the SFPs store the fuel assemblies in a controlled configuration (i.e., so that the fuel is both sub-critical and in a coolable geometry). Redundant monitoring, cooling, and makeup-water systems are provided. The spent fuel assemblies are positioned in racks at the bottom of the pool, and are typically covered by at least 25 feet of water. SFPs are essentially passive systems.

The water in the SFPs provides radiation shielding and spent fuel assembly cooling. It also captures radionuclides in case of fuel rod leaks. The water in the pool is circulated through heat exchangers for cooling. Filters capture any radionuclides and other contaminants that get into the water. Makeup water can also be added to the pool to replace water loss.

SFPs are located at reactor sites, typically within the fuel-handling (pressurized-water reactor) or reactor building (boiling-water reactor). From a structural point of view, nuclear power plants are designed to protect against external events such as tornadoes, hurricanes, fires, and floods. These structural features, complemented by the deployment of effective and visible

[1] A note to Table B–1 states that significance levels have not been assigned "for collective off site radiological impacts from the fuel cycle and from high level waste and spent fuel disposal." 10 CFR part 51, subpart A, app. B, Table B–1, n. 2.

physical security protection measures, are also deterrents to terrorist activities. Additionally, the emergency procedures and SAMA guidelines developed for reactor accidents provide a means for mitigating the potential consequences of terrorist attacks.

B. Physical Security

The Petitioners raise the possibility of a successful terrorist attack as increasing the probability of an SFP zirconium fire. As the NAS Report found, the probability of terrorist attacks on SFPs cannot be reliably assessed, quantitatively or comparatively. The NRC has determined, however, that security and mitigation measures the NRC has imposed upon its licensees since September 11, 2001, and national anti-terrorist measures to prevent, for example, aircraft hijackings, coupled with the robust nature of SFPs, make the probability of a successful terrorist attack, though numerically indeterminable, very low.

The NRC's regulations and security orders require licensees to develop security and training plans for NRC review and approval, implement procedures for these plans, and to periodically demonstrate proficiency through tests and exercises.[2] In addition, reactor physical security systems use a defense-in-depth concept, involving the following:

- Vehicle (external) barriers.
- Fences.
- Intrusion detection, alarm, and assessment systems.
- Internal barriers.
- Armed responders.
- Redundant alarm stations with command, control, and communications systems.
- Local law enforcement authority's response to a site and augmentation of the on-site armed response force.
- Security and emergency-preparedness procedure development and planning efforts with local officials.
- Security personnel training and qualification.

The NRC's regulatory approach for maintaining the safety and security of power reactors, and thus SFPs, is based upon robust designs that are coupled with a strategic triad of preventive/protective systems, mitigative systems, and emergency-preparedness and response. Furthermore, each licensee's security functions are integrated and coordinated with reactor operations and emergency response functions. Licensees develop protective strategies in order to meet the NRC design-basis threat (DBT).[3] In addition, other Federal agencies such as the Federal Aviation Administration, the Federal Bureau of Investigation, and the Department of Homeland Security have taken aggressive steps to prevent terrorist attacks in the United States. Taken as a whole, these systems, personnel, and procedures provide reasonable assurance that public health and safety, the environment, and the common defense and security will be adequately protected.

C. Very Low Risk

Risk is defined as the probability of the occurrence of a given event multiplied by the consequences of that event.[4] Studies conducted over the last three decades have consistently shown that the probability of an accident causing a zirconium fire in an SFP to be lower than that for severe reactor accidents. The risk of beyond design-basis accidents (DBAs) in SFPs was first examined as part of the landmark *Reactor Safety Study: An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants* (WASH–1400, NUREG–75/014, 1975), and was found to be several orders of magnitude below those involving the reactor core. The risk of an SFP accident was re-examined in the 1980's as Generic Issue 82, *Beyond Design Basis Accidents in Spent Fuel Pools*, in light of increased use of high-density storage racks and laboratory studies that indicated the possibility of zirconium fire propagation between assemblies in an air-cooled environment. The risk assessment and cost-benefit analyses developed through this effort, NUREG–1353, *Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools*, Section 6.2, April 1989, concluded that the risk of a severe accident in the SFP was low and "appear[s] to meet" the objectives of the Commission's "Safety Goals for the Operations of Nuclear Power Plants; Policy Statement," (August 4, 1986; 51 FR 28044), as amended (August 21, 1986; 51 FR 30028), and that no new regulatory requirements were warranted.[5]

SFP accident risk was re-assessed in the late 1990s to support a risk-informed rulemaking for permanently shutdown, or decommissioned, nuclear power plants. The study, NUREG–1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants*, January 2001, conservatively assumed that if the water level in the SFP dropped below the top of the spent fuel, an SFP zirconium fire involving all of the spent fuel would occur, and thereby bounded those conditions associated with air cooling of the fuel (including partial-draindown scenarios) and fire propagation. Even when all events leading to the spent fuel assemblies becoming partially or completely uncovered were assumed to result in an SFP zirconium fire, the study found the risk of an SFP fire to be low and well within the Commission's Safety Goals.

Furthermore, significant additional analyses have been performed since September 11, 2001, that support the view that the risk of a successful terrorist attack (i.e., one that results in an SFP zirconium fire) is very low. These analyses were conducted by the Sandia National Laboratories and are collectively referred to herein as the "Sandia studies."[6] The Sandia studies

[2] For additional related information, please see the NRC fact sheet "NRC Review of Paper on Reducing Hazards From Stored Spent Nuclear Fuel," which is available on the NRC's public Web site at: *http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/reducing-hazards-spent-fuel.html.*

[3] The DBT represents the largest threat against which a private sector facility can be reasonably expected to defend with high assurance. The NRC's DBT rule was published in the Federal Register on March 19, 2007 (72 FR 12705).

[4] The American Society of Mechanical Engineers (ASME) "Standard for Probabilistic Risk Assessment for Nuclear Power Plant Applications," ASME RA–S–2002, defines risk as the probability and consequences of an event, as expressed by the risk "triplet" that is the answer to the following three questions: (1) What can go wrong? (2) How likely is it? and (3) What are the consequences if it occurs?

[5] The Commission's Safety Goals identified two quantitative objectives concerning mortality risks: (1) The risk to an average individual in the vicinity of a nuclear power plant of prompt fatalities that might result from reactor accidents should not exceed one-tenth of one percent (0.1 percent) of the sum of prompt fatality risks resulting from other accidents in which members of the U.S. population are generally exposed; and (2) The risk to the population in the area near a nuclear power plant of cancer fatalities that might result from nuclear power plant operation should not exceed one-tenth of one percent (0.1 percent) of the sum of cancer fatality risks resulting from all other causes.

[6] Sandia National Laboratories, "Mitigation of Spent Fuel Pool Loss-of-Coolant Inventory Accidents and Extension of Reference Plant Analyses to Other Spent Fuel Pools," Sandia Letter Report, Revision 2 (November 2006) incorporates and summarizes the Sandia Studies. This document is designated "Official Use Only—Security Related Information." A version of the Sandia Studies, with substantial redactions, was made public as a response to a Freedom of Information Act request. It is available on the NRC's Agencywide Document Access and Management System (ADAMS). The redacted version can be found under ADAMS Accession No. ML062290362. For access to ADAMS, contact the NRC Public Document Room Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. For additional related information, please see the NRC fact sheet "NRC Review of Paper on Reducing Hazards From Stored Spent Nuclear Fuel," which is available on the NRC's public Web site at: *http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/reducing-hazards-spent-fuel.html.*

are sensitive security related information and are not available to the public. The Sandia studies considered spent fuel loading patterns and other aspects of a pressurized-water reactor SFP and a boiling-water reactor SFP, including the role that the circulation of air plays in the cooling of spent fuel. The Sandia studies indicated that there may be a significant amount of time between the initiating event (i.e., the event that causes the SFP water level to drop) and the spent fuel assemblies becoming partially or completely uncovered. In addition, the Sandia studies indicated that for those hypothetical conditions where air cooling may not be effective in preventing a zirconium fire (i.e., the partial drain down scenario cited by the Petitioners), there is a significant amount of time between the spent fuel becoming uncovered and the possible onset of such a zirconium fire, thereby providing a substantial opportunity for both operator and system event mitigation.

The Sandia studies, which more fully account for relevant heat transfer and fluid flow mechanisms, also indicated that air-cooling of spent fuel would be sufficient to prevent SFP zirconium fires at a point much earlier following fuel offload from the reactor than previously considered (e.g., in NUREG–1738). Thus, the fuel is more easily cooled, and the likelihood of an SFP fire is therefore reduced.

Additional mitigation strategies implemented subsequent to September 11, 2001, enhance spent fuel coolability and the potential to recover SFP water level and cooling prior to a potential SFP zirconium fire. The Sandia studies also confirmed the effectiveness of additional mitigation strategies to maintain spent fuel cooling in the event the pool is drained and its initial water inventory is reduced or lost entirely. Based on this more recent information, and the implementation of additional strategies following September 11, 2001, the probability, and accordingly, the risk, of a SFP zirconium fire initiation is expected to be less than reported in NUREG–1738 and previous studies.

Given the physical robustness of SFPs, the physical security measures, and SFP mitigation measures, and based upon NRC site evaluations of every SFP in the United States, the NRC has determined that the risk of an SFP zirconium fire, whether caused by an accident or a terrorist attack, is very low. As such, the NRC's generic findings in NUREG–1437, as further reflected in Table B–1 of appendix B to subpart A of 10 CFR part 51, remain valid.

VI. Reasons for Denial—NRC Responses to Petitioners' Assertions

A. New and Significant Information

The Petitioners asserted that new and significant information shows that the NRC incorrectly characterized the environmental impacts of spent fuel storage as "insignificant." The information relied upon by the Petitioners, however, is neither "new" nor "significant," within the NRC's definition of those terms. The NRC defines these terms in its Supplement 1 to NRC Regulatory Guide 4.2, *Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses*, Chapter 5 (September 2000) (RG 4.2S1). "New and significant" information, which would require supplementing NUREG–1437, is defined 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 CFR 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 CFR Part 51.

The Petitioners' "new and significant" information does not meet the RG 4.2S1 criteria. NUREG–1437 (Sections 6.4.6.1. to 6.4.6.3.), and the analyses cited therein, including the NRC's "Waste Confidence Rule" (September 18, 1990; 55 FR 38474, 38480–81), extensively considered the risk of SFP accidents. Moreover, to the extent any information submitted by the Petitioners was not considered in NUREG–1437, none of the information is "significant," because, as explained further in this document, it would not lead to "an impact finding different from that codified in 10 CFR Part 51," or as set forth in NUREG–1437.

B. Spent Fuel Assemblies Will Burn If Uncovered

The Petitioners asserted that new and significant information, consisting primarily of the Thompson Report, NUREG–1738, and a government-sponsored study, the NAS Report, show that spent fuel will burn if the water level in an SFP drops to the point where the tops of the fuel assemblies are uncovered. Specifically, the Petitioners asserted that the NRC fails to recognize the danger of a partial loss of water in an SFP, which in the Petitioners' view, is more likely to cause an SFP zirconium fire than a complete loss of water, because the remaining water will block the circulating air that would otherwise act to cool the spent fuel assemblies.

The NRC does not agree with the Petitioners' assertions. The NRC has determined that a zirconium cladding fire does not occur when only the tops of the fuel assemblies are uncovered. In reality, a zirconium fire cannot occur unless fuel uncovering is more substantial. Even then, the occurrence of a zirconium fire requires a number of conditions which are extremely unlikely to occur together. The Sandia studies provide a more realistic assessment of the coolability of spent fuel under a range of conditions and a better understanding of the actual safety margins than was indicated in NUREG–1738. The Sandia studies have consistently and conclusively shown that the safety margins are much larger than indicated by previous studies such as NUREG–1738.

1. Heat Transfer Mechanisms

Past NRC studies of spent fuel heatup and zirconium fire initiation conservatively did not consider certain natural heat-transfer mechanisms which would serve to limit heatup of the spent fuel assemblies and prevent a zirconium fire. In particular, these studies, including NUREG–1738, did not consider heat transfer from higher-decay-power assemblies to older, lower-decay-power fuel assemblies in the SFP. This heat transfer would substantially increase the effectiveness of air cooling in the event the SFP is drained, far beyond the effectiveness of air cooling cited in past studies. Both the Sandia studies and the NAS Report confirm the NRC conclusion that such heat transfer mechanisms allow rapid heat transfer away from the higher-powered assemblies. The NAS Report also noted that such heat transfer could air-cool the assemblies to prevent a zirconium fire within a relatively short time after the discharge of assemblies from the reactor to the SFP.[7] Thus, air cooling is an effective, passive mechanism for cooling spent fuel assemblies in the pool.

2. Partial Drain-Down

Air cooling is less effective under the special, limited condition where the water level in the SFP drops to a point where water and steam cooling is not sufficient to prevent the fuel from overheating and initiating a zirconium fire, but the water level is high enough to block the full natural circulation of air flow through the assemblies. This condition has been commonly referred to as a partial draindown, and is cited in the Thompson Report. Under those

[7] NAS Report at 53.

conditions, however, it is important to realistically model the heat transfer between high- and low-powered fuel assemblies. The heat transfer from hot fuel assemblies to cooler assemblies will delay the heat-up of assemblies, and allow plant operators time to take additional measures to restore effective cooling to the assemblies. Further, for very low-powered assemblies, the downward flow of air into the assemblies can also serve to cool the assembly even though the full-circulation flow path is blocked. Also, as discussed further in this document, all nuclear plant SFPs have been assessed to identify additional, existing cooling capability and to provide new supplemental cooling capability which could be used during such rare events. This supplemental cooling capability specifically addresses the cooling needs during partial draindown events, and would reduce the probability of a zirconium fire even during those extreme events.

3. License Amendments

In January 2006, the nuclear industry proposed a combination of internal and external strategies to enhance the spent fuel heat removal capability systems at every operating nuclear power plant. The internal strategy implements a diverse SFP makeup system that can supply the required amount of makeup water and SFP spray to remove decay heat. The external strategy involves using an independently-powered, portable, SFP coolant makeup and spray capability system that enhances spray and rapid coolant makeup to mitigate a wide range of possible scenarios that could reduce SFP water levels. In addition, in cases where SFP water levels can not be maintained, leakage control strategies would be considered along with guidance to maximize spray flows to the SFP. Time lines have been developed that include both dispersed and non-dispersed spent fuel storage. The NRC has approved license amendments and issued safety evaluations to incorporate these strategies into the plant licensing bases of all operating nuclear power plants in the United States.

C. Fuel Will Burn Regardless of Its Age

The NRC disagrees with the Petitioners' assertion that fuel will burn regardless of age. Older fuel (fuel which has been discharged from the reactor for a longer time) is more easily cooled and is less likely to ignite because of its lower decay power. A study relied upon by the Petitioners, NUREG–1738, did conservatively assume that spent fuel stored in an SFP, regardless of age, may be potentially vulnerable to a partial drain down event, and that the possibility of a zirconium fire could not be ruled out on a generic basis. This conclusion, however, was in no sense a statement of certainty and was made in order to reach a conclusion on a generic basis, without relying on any plant-specific analyses.

Furthermore, the SFP zirconium fire frequency in NUREG–1738 was predicated on a bounding, conservative assumption that an SFP fire involving all of the spent fuel would occur if the water level in the SFP dropped below the top of the spent fuel. The NUREG–1738 analysis did not attempt to specifically address a number of issues and actions that would substantially reduce the likelihood of a zirconium fire, potentially rendering the frequency estimate to be remote and speculative. For example, NUREG–1738 did not account for the additional time available following the spent fuel being partially or completely uncovered, but prior to the onset of a zirconium fire, that would allow for plant operator actions, makeup of SFP water levels, and other mitigation measures. In addition, NUREG–1738 did not consider the impact of plant and procedure changes implemented as a result of the events of the September 11, 2001, terrorist attacks. NUREG–1738 did clarify that the likelihood of a zirconium fire under such conditions could be reduced by accident management measures, but it was not the purpose of NUREG–1738 to evaluate such accident management measures.

D. SFP Zirconium Fire Will Propagate

Although it is possible that once a spent fuel assembly ignites, the zirconium fire can propagate to other assemblies in the SFP, the NRC has determined (as explained previously) that the risk of an SFP zirconium fire initiation is very low.

E. SFP Zirconium Fire May Be Catastrophic

1. Not New and Significant Information; Very Low Probability

The Massachusetts AG states that "while such a catastrophic accident is unlikely, its probability falls within the range that NRC considers reasonably foreseeable." Thus, the Petitioners asserted that an SFP zirconium fire qualifies as a DBA and, that the impacts of an SFP fire must be discussed in the ER submitted by the licensee and the NRC's EIS, as well as designed against under NRC safety regulations.

The facts that a SFP contains a potentially large inventory of radionuclides and that a release of that material could have adverse effects are not new. These facts are well known, and were considered in the risk evaluation of spent fuel storage contained in NUREG–1738. Even with the numerous conservatisms in the NUREG–1738 study, as described previously, the NRC was able to conclude that the risk from spent fuel storage is low, and is substantially lower than reactor risk.

A study relied upon by the Petitioners, the Thompson Report, claimed that the probability (frequency) of an SFP zirconium fire would be 2E–5 per year[8] for events excluding acts of malice (e.g., terrorism) and 1E–4 per year[9] for acts of malice. With respect to random events (i.e., excluding acts of malice), the NRC concludes that the Thompson Report estimate is overly conservative. A more complete and mechanistic assessment of the event, as described in section VI.E.2. of this Notice, and associated mitigation measures, leads to considerably lower values. With respect to events initiated by a terrorist attack, the NRC concludes that such probability (frequency) estimates are entirely speculative. The NRC also concludes that the additional mitigation measures for SFP events implemented since September 11, 2001, together with the more realistic assessment of spent fuel cooling, indicates that the likelihood of a zirconium fire, though numerically indeterminable, is very low.

The 2E–5 per year estimate for events excluding acts of malice is based on an unsubstantiated assumption that 50 percent of all severe reactor accidents that result in an early release of substantial amounts of radioactive material will also lead to a consequential SFP zirconium fire. The Thompson Report does not identify the necessary sequence of events by which such scenarios might lead to SFP zirconium fires, or discuss the probability of their occurrence. The NRC analysis in the Shearon Harris ASLBP proceeding (described in section VI.E.2. of this Notice) showed that a more complete and mechanistic assessment of the event and associated mitigation measures leads to considerably lower values. This assessment includes the following:

- Frequency and characteristics of the releases from the containment for each release location;
- Transport of gases and fission products within the reactor building;

[8] Two occurrences in 100,000 reactor years.

[9] One occurrence in 10,000 reactor years.

• Resulting thermal and radiation environments in the reactor building, with emphasis on areas in which SFP cooling and makeup equipment is located, and areas in which operator access may be needed to implement response actions;

• Availability/survivability of SFP cooling and makeup equipment in the sequences of concern; and

• Ability and likelihood of successful operator actions to maintain or restore pool cooling or makeup (including consideration of security enhancements and other mitigation measures implemented in response to the terrorist attacks of September 11, 2001).

2. Shearon Harris Atomic Safety and Licensing Board Panel (ASLBP) Proceeding

In the proceeding regarding the expansion of the SFP at the Shearon Harris nuclear power plant, located near Raleigh, North Carolina, the Shearon Harris intervenor described a scenario similar to that raised by the Petitioners, namely, that a severe accident at the adjacent reactor would result in a SFP zirconium fire.[10] The Shearon Harris proceeding considered the probability of a sequence of the following seven events:

a. A degraded core accident.

b. Containment failure or bypass.

c. Loss of SFP cooling.

d. Extreme radiation levels precluding personnel access.

e. Inability to restart cooling or makeup systems due to extreme radiation doses.

f. Loss of most or all pool water through evaporation.

g. Initiation of a zirconium fire in the SFP.

Based on a detailed probabilistic risk assessment, the licensee calculated the probability of a severe reactor accident that causes an SFP zirconium fire to be 2.78E–8 per year. The NRC staff calculated the probability to be 2.0E–7 per year. The intervenor calculated the probability to be 1.6E–5 per year. The ASLBP concluded that the probability of the postulated sequence of events resulting in an SFP zirconium fire was "conservatively in the range described by the Staff: 2.0E–7 per year (two occurrences in 10 million reactor years) or less."[11] Accordingly, the ASLBP found that the occurrence of a severe reactor accident causing an SFP zirconium fire "falls within the category of remote and speculative matters."[12] The Commission affirmed the ASLBP's decision, and the United States Court of Appeals, District of Columbia Circuit, upheld the Commission decision.[13]

In the Shearon Harris proceeding, the intervenor assumed that, given an early containment failure or bypass, a spent fuel zirconium fire would occur (i.e., a conditional probability of 1.0). In order for a reactor accident to lead to a SFP zirconium fire a number of additional conditions must occur. The reactor accident and containment failure must somehow lead to a loss of SFP cooling and must lead to a condition where extreme radiation levels preclude personnel access to take corrective action. There must be then an inability to restart cooling or makeup systems. There must be a loss of significant pool water inventory through evaporation (which can take substantial time). Finally, the event must also lead to a zirconium fire. In contrast to the intervenor's estimate, the licensee and the NRC staff estimated a conditional probability of about one percent that a severe reactor accident with containment failure would lead to a SFP accident. The NRC staff expects that the conditional probability of a SFP zirconium fire, given a severe reactor accident, would be similar to that established in the Shearon Harris proceeding. As such, the probability of a SFP zirconium fire due to a severe reactor accident and subsequent containment failure would be well below the Petitioners' 2E–5 per year estimate.

The 1E–4 per year estimate in the Thompson Report for events involving acts of malice assumes that there would be one attack on the population of U.S. nuclear power plants per century, and that this attack will be 100 percent successful in producing a SFP zirconium fire (thus, fire frequency = 0.01 attack/year × 1.0 fire/attack × 1/104 total reactors = 1E–4/year). The security-related measures and other mitigation measures implemented since September 11, 2001, however, have significantly reduced the likelihood of a successful terrorist attack on a nuclear power plant and its associated SFP. Such measures include actions that would improve the likelihood of the following:

a. Identifying/thwarting the attack before it is initiated.

b. Mitigating the attack before it results in damage to the plant.

c. Mitigating the impact of the plant damage such that an SFP zirconium fire is avoided.

Given the implementation of additional security enhancements and mitigation strategies, as well as further consideration of the factors identified above, the NRC staff concludes that the frequency of SFP zirconium fires due to acts of malice is substantially lower than assumed by the Petitioners.

3. SFP Zirconium Fire Does Not Qualify As a DBA

Regarding the Petitioners' assertion that a SFP zirconium fire qualifies as a design-basis accident (DBA), the NRC staff has concluded that a realistic probability estimate would be very low, such that these events need not be considered as DBAs or discussed in ERs and EISs. Moreover, the set of accidents that must be addressed as part of the design basis has historically evolved from deterministic rather than probabilistic considerations. These considerations, which include defense-in-depth, redundancy, and diversity, are characterized by the use of the single-failure criterion.[14] The single-failure criterion, as a key design and analysis tool, has the direct objective of promoting reliability through the enforced provision of redundancy in those systems which must perform a safety-related function. The single failure criterion is codified in Appendix A and Appendix K to 10 CFR Part 50 and other portions of the regulations. The SFP and related systems have been designed and approved in accordance with this deterministic approach.

F. Intentional Attack on a SFP is "Reasonably Foreseeable."

The Petitioners asserted that an intentional attack targeting a plant's SFP is "reasonably foreseeable." Specifically, the Petitioners raised both the NAS study and the decision by the United States Court of Appeals for the Ninth Circuit, *San Luis Obispo Mothers for Peace* v. *NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied* 127 S. Ct. 1124 (2007), to support the assertion that the NRC's NEPA analysis of a license renewal action for a given facility must include analysis of the environmental impacts associated with a terrorist attack on that facility. The NRC has

[10] *Carolina Power Light Co.*, LBP–01–9, 53 NRC 239, 244–245 (2001).

[11] *Id.*, 53 NRC at 267.

[12] *Id.*, 53 NRC at 268.

[13] *Carolina Power Light Co.*, Commission Law Issuance (CLI)–01–11, 53 NRC 370 (2001), *pet. for review denied, sub nom, Orange County, NC* v. *NRC*, 47 Fed. Appx. 1, 2002 WL 31098379 (D.C. Cir. 2002).

[14] "A single failure means an occurrence which results in the loss of capability of a component to perform its intended safety functions * * * Fluid and electric systems are considered to be designed against an assumed single failure if neither (1) a single failure of any active component * * * nor (2) a single failure of a passive component * * * results in a loss of the capability of the system to perform its safety functions." 10 CFR Part 50, App. A.

considered both the NAS Report and the Ninth Circuit decision, and remains of the view that an analysis of the environmental impacts of a hypothetical terrorist attack on an NRC-licensed facility is not required under NEPA.[15] But, if an analysis of a hypothetical terrorist attack were required under NEPA, the NRC has determined that the environmental impacts of such a terrorist attack would not be significant, because the probability of a successful terrorist attack (i.e., one that causes an SFP zirconium fire, which results in the release of a large amount of radioactive material into the environment) is very low and therefore, within the category of remote and speculative matters.

1. NAS Report

The Petitioners rely, in part, upon the NAS Report, the public version of which was published in 2006 and is available from NAS.[16] In response to a direction in the Conference Committee's Report accompanying the NRC's FY 2004 appropriation,[17] the NRC contracted with NAS for a study on the safety and security of commercial spent nuclear fuel. The NAS made a number of findings and recommendations, including:

- SFPs are necessary at all operating nuclear power plants to store recently discharged fuel;
- Successful terrorist attacks on SFPs, though difficult, are possible;
- The probability of terrorist attacks on spent fuel storage cannot be assessed quantitatively or comparatively;
- If a successful terrorist attack leads to a propagating zirconium cladding fire, it could result in the release of large amounts of radioactive material; and
- Dry cask storage has inherent security advantages over spent fuel storage, but it can only be used to store older spent fuel.

The NAS Report found, and the NRC agrees, that pool storage is required at all operating commercial nuclear power plants to cool newly discharged spent fuel. Freshly discharged spent fuel generates too much decay heat to be placed in a dry storage cask.

The NRC agrees with the NAS finding that the probability of terrorist attacks on spent fuel storage cannot be assessed quantitatively or comparatively. However, the NRC concludes that the additional mitigation measures for SFP events implemented since September 11, 2001, together with a more realistic assessment of spent fuel cooling, as shown by the Sandia studies, indicates that the likelihood of a zirconium fire, though numerically indeterminate, is very low.

Furthermore, the NAS Report states that "[i]t is important to recognize, however, that an attack that damages a power plant or its spent fuel storage facilities would not necessarily result in the release of *any* radioactivity to the environment. There are potential steps that can be taken to lower the potential consequences of such attacks."[18] The NAS Report observed that a number of security improvements at nuclear power plants have been instituted since September 11, 2001, although the NAS did not evaluate the effectiveness and adequacy of these improvements and has called for an independent review of such measures. Nevertheless, the NAS Report states that "the facilities used to store spent fuel at nuclear power plants are very robust. Thus, only attacks that involve the application of large energy impulses or that allow terrorists to gain interior access have any chance of releasing substantial quantities of radioactive material."[19]

As discussed previously, following the terrorist attacks of September 11, 2001, the NRC has required that nuclear power plant licensees implement additional security measures and enhancements the Commission believes have made the likelihood of a successful terrorist attack on an SFP remote.

2. Ninth Circuit Decision

The Petitioners asserted that the NRC should follow the decision of the United States Court of Appeals for the Ninth Circuit, *San Luis Obispo Mothers for Peace* v. *NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied* 127 S. Ct. 1124 (2007), by considering the environmental impacts of intentional attacks on nuclear power plant fuel storage pools in all licensing decisions. The Ninth Circuit held that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility on the Diablo Canyon reactor site.

The NRC's longstanding view is that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities. NEPA requires that there be a "reasonably close causal relationship" between the federal agency action and the environmental consequences.[20] The NRC renewal of a nuclear power plant license would not cause a terrorist attack; a terrorist attack would be caused by the terrorists themselves. Thus, the renewal of a nuclear power plant license would not be the "proximate cause" of a terrorist attack on the facility.

If NEPA required the NRC to consider the impacts of a terrorist attack, however, the NRC findings would remain unchanged. As previously described, the NRC has required, and nuclear power plant licensees have implemented, various security and mitigation measures that, along with the robust nature of SFPs, make the probability of a successful terrorist attack (*i.e.*, one that causes an SFP zirconium fire, which results in the release of a large amount of radioactive material into the environment) very low. As such, a successful terrorist attack is within the category of remote and speculative matters for NEPA considerations; it is not "reasonably foreseeable." Thus, on this basis, the NRC finds that the environmental impacts of renewing a nuclear power plant license, in regard to a terrorist attack on an SFP, are not significant.

The NRC has determined that its findings related to the storage of spent nuclear fuel in pools, as set forth in NUREG–1437 and in Table B–1 of Appendix B to Subpart A of 10 CFR Part 51, remain valid. Thus, the NRC has met and continues to meet its obligations under NEPA.

G. SFP Zirconium Fire Should Be Considered Within the Analysis of SAMAs

The Petitioners asserted that SFP fires should be considered within the analysis of severe accident mitigation alternatives (SAMAs). While a large radiological release is still possible, and

[15] In the wake of the Ninth Circuit's *Mothers for Peace* decision, the Commission decided against applying that holding to all licensing proceedings nationwide. *See, e.g., Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI–07–8, 65 NRC 124, 128–29 (2007), *pet. for judicial review pending*, No. 07–2271 (3d Cir.). The Commission will, of course, adhere to the Ninth Circuit decision when considering licensing actions for facilities subject to the jurisdiction of that Circuit. *See id.* Thus, on remand in the Mothers for Peace case itself, the Commission is currently adjudicating intervenors' claim that the NRC Staff has not adequately assessed the environmental consequences of a terrorist attack on the Diablo Canyon Power Plant's proposed facility for storing spent nuclear fuel in dry casks. *See, Pacific Gas & Elec. Co.*, CLI–07–11, 65 NRC 148 (2007). The Commission's ultimate decision in that case will rest on the record developed in the adjudication.

[16] The NRC response to the NAS Report is available at ADAMS Accession No. ML0502804280.

[17] Conference Committee's Report (H. Rept. 108–357) accompanying the *Energy and Water Development Act, 2004* (Pub. L. 108–137, December 3, 2003).

[18] NAS Report at 6 (emphasis in the original).

[19] NAS Report at 30.

[20] *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 767 (2004) *citing Metropolitan Edison* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

was assessed as part of Generic Issue 82, *Beyond Design Basis Accidents in Spent Fuel Pools*, and later, in NUREG–1738, the NRC considers the likelihood of such an event to be lower than that estimated in Generic Issue 82 and NUREG–1738. Based on the Sandia studies, and on the implementation of additional strategies implemented following September 11, 2001, the probability of a SFP zirconium fire is expected to be less than that reported in NUREG–1738 and previous studies. Thus, the very low probability of an SFP zirconium fire would result in an SFP risk level less than that for a reactor accident.

For example, in NUREG–1738, the SFP fire frequencies were conservatively estimated to be in the range of 5.8E–7 per year to 2.4E–6 per year. NUREG–1738 conservatively assumed that if the water level in the SFP dropped below the top of the spent fuel, an SFP zirconium fire involving all of the spent fuel would occur, and thereby bounded those conditions associated with air cooling of the fuel (including partial-drain down scenarios) and zirconium fire propagation. It did not mechanistically analyze the time between the spent fuel assemblies becoming partially or completely uncovered and the onset of a SFP zirconium fire, and the potential to recover SFP cooling and to restore the SFP water level within this time. NUREG–1738 also did not consider the possibility that air-cooling of the spent fuel alone could be sufficient to prevent SFP zirconium fires.

Furthermore, the Sandia studies indicated that air cooling would be much more effective in cooling the spent fuel assemblies. In those cases where air cooling is not effective, the time before fuel heatup and radiological release would be substantially delayed, thus providing a substantial opportunity for successful event mitigation. The Sandia studies, which more fully account for relevant heat transfer and fluid flow mechanisms, also indicated that air-cooling of spent fuel would be sufficient to prevent SFP zirconium fires much earlier following fuel offload than previously considered (e.g., in NUREG–1738), thereby further reducing the likelihood of an SFP zirconium fire. Additional mitigation strategies implemented subsequent to September 11, 2001, will serve to further enhance spent fuel coolability, and the potential to recover SFP cooling or to restore the SFP water level prior to the initiation of an SFP zirconium fire.

Given that the SFP risk level is less than that for a reactor accident, a SAMA that addresses SFP accidents would not be expected to have a significant impact on total risk for the site. Despite the low level of risk from fuel stored in SFPs, additional SFP mitigative measures have been implemented by licensees since September 11, 2001. These mitigative measures further reduce the risk from SFP zirconium fires, and make it even more unlikely that additional SFP safety enhancements could substantially reduce risk or be cost-beneficial.

VII. Denial of Petitions

Based upon its review of the petitions, the NRC has determined that the studies upon which the Petitioners rely do not constitute new and significant information. The NRC has further determined that its findings related to the storage of spent nuclear fuel in pools, as set forth in NUREG–1437 and in Table B–1, of Appendix B to Subpart A of 10 CFR Part 51, remain valid. Thus, the NRC has met and continues to meet its obligations under NEPA. For the reasons discussed previously, the Commission denies PRM–51–10 and PRM–51–12.

Commissioner Gregory B. Jaczko's Dissenting View on the Commission's Decision To Deny Two Petitions for Rulemaking Concerning the Environmental Impacts of High-Density Storage of Spent Nuclear Fuel in Spent Fuel Pools

I disagree with the decision to deny the petition for rulemaking as included in this **Federal Register** notice. In general, I approve of the decision not to initiate a new rulemaking to resolve the petitioners' concerns, but because information in support of the petition will be considered when the staff undertakes the rulemaking to update the Generic Environmental Impact Statement for license renewal, I believe that the decision should have been to partially grant the petition rather than deny it.

The petitioners requested the agency review additional studies regarding spent fuel pool storage they believe would change the agency's current generic determination that the impacts of high-density pool storage are "small". I believe that the agency could commit to reviewing the information provided by the petitioners, along with any other new information, when the agency updates the Generic Environmental Impact Statement (GEIS) for License Renewal in the near future. Regardless of whether or not the information will change the GEIS' conclusions, at a minimum, the agency should be committing to ensure that this information is part of the analysis performed by the staff upon the next update of the GEIS. While we can not predict the outcome of the significance level that will ultimately be assigned to the spent fuel category in the GEIS, it seems an obvious commitment to ensure that the ultimate designation will be appropriately based upon all information available to the staff at the time. Thus, I believe this decision should be explained as a partial granting of the petition. It may not provide the petitioners with everything they want, but it would more clearly state the obvious—that this information, and any other new information, will be reviewed by the agency and appropriately considered when the staff begins its update of the license renewal GEIS.

This specific issue illustrates a larger concern about how the agency handles petitions for rulemaking in general. I find it unfortunate that the agency appears to limit its responses to petitions based upon the vocabulary that has been established surrounding this program. Currently, when the agency discusses these petitions, we discuss them in the context of "granting" or "denying" the rulemaking petitions. We then appear to be less inclined to "grant" unless we are committing to the precise actions requested in the petition. But these petitions are, by their very definition, requests for rulemakings; which means, even if we do "grant" a petition for rulemaking, we can not guarantee a particular outcome for the final rule. The final rulemaking is the result of staff's technical work regarding the rule, public comments on the rule, and resolution of those comments. Rulemaking petitions are opportunities for our stakeholders to provide us with new ideas and approaches for how we regulate. By limiting our responses, we limit our review of the request, and thus, we risk missing many potential opportunities to improve the way we regulate.

Additional Views of the Commission

The Commission does not share Commissioner Jaczko's dissenting view. We appreciate his statement of concern about the petition for rulemaking (PRM) process, but believe these matters are extraneous to the Commission's analyses of the petitioners' technical bases for this particular rulemaking request and, consequently, they had no bearing on the majority view. Specifically, the Commission does not agree that the petitions should be granted in part on the basis of the agency's plan to update the Generic Environmental Impact Statement (GEIS) for License Renewal and make attendant

rule changes in the future. The Commission's detailed statement of reasons for denial of the petitions is the product of a careful review of the petitioners' assertions and other associated public comments, and is supported by the facts before us. In these circumstances, the Commission does not believe the petitioners' request can fairly, or reasonably, be "granted" in part based on a future undertaking which itself had no genesis in the petitioners' requests.

The Commission's timely and decisive action in response to the two petitions serves the interests of the Commission and other participants in an effective, disciplined, and efficient rulemaking petition process. In this instance, a decision now has particular value since it directly addresses the petitioners' statements of significant concern about certain, generic aspects of ongoing and future license renewal reviews. While the analyses performed to respond to these petitions will also undoubtedly inform NRC staff proposals regarding the next update of the GEIS, the Commission does not yet have such proposals before it. Any final Commission decisions on an updated GEIS would be preceded by proposed changes, solicitation of public comment, and evaluation of all pertinent information and public comments. Furthermore, a partial "granting" of the petition could imply that the Commission endorses the petitioners' requests and will give them greater weight than other points of view during the GEIS rulemaking.

As to the other matter raised in Commissioner Jaczko's dissent—that of agency review and disposition of petitions for rulemaking more generally—while petitions for rulemaking are indeed opportunities for stakeholders to suggest new considerations and approaches for regulation, Commissioner Jaczko's general concerns about the agency's process for handling rulemaking petitions go beyond the subject of the Commission's action on these petitions. However, this subject matter is being considered, as the Commission has instructed NRC staff [SRM dated August 6, 2007] to conduct a review of the agency's PRM process. At such time as staff may recommend, as an outgrowth of this review, specific proposals for Commission action which would strengthen the agency PRM process, the Commission will assess such recommendations and act on them, as appropriate.

Dated at Rockville, Maryland, this 1st day of August 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8-18291 Filed 8-7-08; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 901

[SATS No. AL-074-FOR; Docket No. OSM-2008-0015]

Alabama Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Alabama regulatory program (Alabama program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Alabama proposes revisions to its regulations regarding permit fees and civil penalties. Alabama intends to revise its program to improve operational efficiency.

This document gives the times and locations that the Alabama program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: Comments on the proposed rule must be received on or before 4 p.m., c.t., September 8, 2008, to ensure our consideration. If requested, we will hold a public hearing on the amendment on September 2, 2008. We will accept requests to speak at a hearing until 4 p.m., c.t. on August 25, 2008.

ADDRESSES: You may submit comments by either of the following two methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* The proposed rule is listed under the agency name "OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT" and has been assigned Docket ID: OSM-2008-0015. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and do the following. Click on the "Advanced Docket Search" button on the right side of the screen. Type in the Docket ID OSM-2008-0015 and click the submit button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM-2008-0015, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.
- *Mail/Hand Delivery/Courier:* Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209. Please include the Docket ID (OSM-2008-0015) with your comments.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the two listed above will be included in the docket for this rulemaking and considered.

For additional information on the rulemaking process and the public availability of comments, see "III. Public Comment Procedures" in the **SUPPLEMENTARY INFORMATION** section of this document.

You may receive one free copy of the amendment by contacting OSM's Birmingham Field Office. See below **FOR FURTHER INFORMATION CONTACT.**

You may review a copy of the amendment during regular business hours at the following locations:

Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209, Telephone: (205) 290-7282, *swilson@osmre.gov.*

Randall C. Johnson, Director, Alabama Surface Mining Commission, 1811 Second Avenue, P.O. Box 2390, Jasper, Alabama 35502-2390, Telephone: (205) 221-4130.

FOR FURTHER INFORMATION CONTACT: Sherry Wilson, Director, Birmingham Field Office. Telephone: (205) 290-7282. E-mail: *swilson@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Alabama Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Alabama Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance

ATTACHMENT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEATH OF MASSACHUSETTS,	)	
Petitioner,	)	
v.	)	No. 08-2267
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

UNOPPOSED RESPONDENT'S MOTION FOR AUTOMATIC TRANSFER PURSUANT TO 28 U.S.C. § 2112(a)(5)

The U.S. Nuclear Regulatory Commission (NRC) hereby moves for a transfer of the above-captioned proceeding to the United States Court of Appeals for the Second Circuit in accordance with 28 U.S.C. § 2112(a)(5).[1]

[1] Matthew Brock, counsel for the Commonwealth of Massachusetts, was provided a copy of the instant motion and stated that the Commonwealth does not oppose the motion,
(continued. . .)

On August 1, 2008, the NRC issued a single order denying petitions for rulemaking PRM-51-10 and PRM-51-12, which had been submitted to the NRC by the Commonwealth of Massachusetts and the State of California, respectively, and which sought very similar changes to NRC regulations relating to the environmental impacts of spent fuel pool storage of spent nuclear fuel. On August 8, 2008, the State of New York filed in the Second Circuit a petition for review of the NRC's joint denial of these rulemaking petitions. The New York petition for review was docketed by the Second Circuit on August 8, 2008 as case number 08-3903-ag, and was received by the NRC on August 11, 2008. In accordance with the deadline established by the Second Circuit, the

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(. . .continued)

provided, however, that the Commonwealth reserves the right to request the Second Circuit to transfer the case back to the First Circuit in accordance with 28 U.S.C. § 2112(a)(5), which provides that "[f]or the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals."

NRC filed a certified index of the record in that court on October 10, 2008.

On September 29, 2008, the Commonwealth of Massachusetts filed in this Court the instant petition for review of the NRC's denial of the rulemaking petitions.[2] The Court instituted proceedings with respect to the Massachusetts petition on September 30, 2008.

When review of a single federal agency order is sought concurrently in multiple federal courts, 28 U.S.C. § 2112(a) applies. That provision first sets forth the rules for determining the destination court for the agency's administrative record, *see* § 2112(a)(1)-(3), and then requires all other courts to transfer their cases to that court, *see* § 2112(a)(5).

With respect to the scenario presented by the instant case, § 2112(a)(1) states:

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[2] The Attorney General of Connecticut also filed a petition for review of PRM-51-10 and PRM-51-12 in the Second Circuit on September 30, 2008. That petition, because it is already in the Second Circuit, is not relevant to the instant motion to transfer.

> If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order.

§ 2112(a)(1). The NRC received New York's petition for review on August 11, 2008, which is within the ten-day window following the August 1, 2008 issuance of the NRC's order. No other petition seeking review of this NRC order was received by the NRC within that ten-day period. Therefore, the Second Circuit is the proper court to receive the administrative record in this matter.

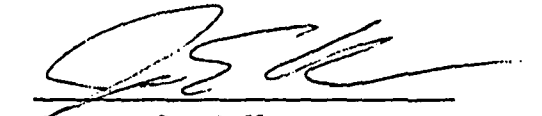
Section 2112(a)(5) prescribes that "[a]ll courts in which proceedings are instituted with respect to the same [agency] order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed." Accordingly, because the Second Circuit is the proper court for the filing of the administrative record in these proceedings, § 2112(a)(5) requires that this Court transfer the instant proceeding to the Second Circuit. The statute is ministerial

in nature. It leaves no room for judicial discretion at this stage of the proceeding. [3]

Therefore, the NRC respectfully requests that this Court transfer the instant proceeding to the Second Circuit.

Respectfully submitted,

John F. Cordes, Jr.
Solicitor



James E. Adler
Attorney
U.S. Nuclear Regulatory Commission
Respondent

Dated at Rockville, Maryland
this 16th day of October, 2008.

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[3] Section 2112(a)(5) further provides that, *following* the transfer of all proceedings to the court in which the record is filed, the latter court, "[f]or the convenience of the parties in the interest of justice...may thereafter transfer all proceedings with respect to [the agency order] to any other court of appeals."

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2008, copies of the enclosed Unopposed Respondent's Motion for Automatic Transfer Pursuant to 28 U.S.C. § 2112(a)(5) were served by mail, postage prepaid, upon the following:

Matthew Brock, Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Robert Snook
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

John J. Sipos
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, NY 12224

John E. Arbab
Appellate Section
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026

John Cordes by JA

John F. Cordes, Jr.

ATTACHMENT 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-293-LR ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)	)	

COMMONWEALTH OF MASSACHUSETTS
PETITION FOR REVIEW OF LBP-08-22

I. Introduction

In January, 2006, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Entergy) submitted an application to the Nuclear Regulatory Commission (NRC or Commission) to extend the operating license for the Pilgrim nuclear power plant for another twenty years, which otherwise will expire in June, 2012. In May, 2006, the Commonwealth of Massachusetts (Commonwealth) filed a contention in the Pilgrim license extension proceeding on grounds that Entergy's application failed to comply with the National Environmental Policy Act and other applicable law because the application failed to address new and significant information on the risk of severe accidents involving spent fuel pools (SFPs) caused by terrorist attack, natural phenomena, equipment failure, or operator error.[1]

1 *See* 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 Pilgrim Nuclear Power Plant Operating License. May 26, 2006. ADAMS No. ML061630088.

The NRC determined that the SFP issue raised by the Commonwealth was a generic one and in effect divided the Pilgrim relicensing proceeding into two parts: the generic SFP issue would be considered by the Commission through a separate rulemaking process while the remaining issues would be addressed by the Pilgrim Atomic Safety and Licensing Board (Pilgrim ASLB) in the individual relicensing proceeding. However, claiming it was "premature" to do so, the Commission refused the Commonwealth's request to ensure that the agency would take account of, or otherwise apply, any final generic decision on SFP issues to the individual Pilgrim license extension proceeding in which these issues arose.

Subsequently the NRC terminated the rulemaking proceeding and denied the Commonwealth's rulemaking petition on SFP issues. *See* Notice of Denial of Petitions for Rulemaking PRM-51-10 and PRM 51-12. ADAMS No. ML081890124. 73 Fed. Reg. 46,204 (Aug 8, 2008). (Rulemaking Decision). The Pilgrim ASLB has now resolved all remaining issues before it and terminated the Pilgrim license extension proceeding.[2]

The Commonwealth and two other states have appealed the Rulemaking Decision, and those three appeals are pending in the United States Court of Appeals for the Second Circuit.[3] In its appeal, the Commonwealth will argue, inter alia, that to deny the Commonwealth's rulemaking petition, the NRC improperly relied on extra-record evidence, classified studies, and other undisclosed documents never subject to public

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[2] Licensing Board Initial Decision at 26. (LBP-08-22). Oct. 30, 2008. Reference Nos. 06-848-02-LR, 50-293-LR, RAS J-162. ADAMS No. ML083040206 (Initial Decision).
[3] *Massachusetts v. United States Nuclear Regulatory Commission*, No. 08-2267 (1st Cir. filed Sept. 30, 2008)(now under Order of transfer to the Second Circuit). *State of New York v. United States Nuclear Regulatory Commission*, No. 08-3903-ag (2nd Cir. filed Aug. 8, 2008). *Blumenthal v. United States Nuclear Regulatory Commission*, No. 08-4833-ag (2nd Cir. filed Oct. 1, 2008).

review or comment or an environmental impact statement process, and it repeatedly offered only conclusory statements or assurances, without record support, on the adequacy of its mitigation measures to address the SFP risks raised by the Commonwealth's rulemaking petition. In lieu of litigating these substantive issues in what remains of the individual relicensing proceeding, we will raise them in the pending appeal of the Rulemaking Decision, which is consistent with the First Circuit's prior review of the Pilgrim relicensing process. See *Massachusetts v. NRC*, 522 F. 3d 115, 127 (1st Cir. 2007). In the relicensing proceeding, however, the question remains what to do about the fact that whether the NRC has adequately addressed the SFP risks is still actively being litigated in a separate pending proceeding.

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (NEPA), requires the NRC to take a hard look at the new and significant information that the Commonwealth presented on the risks of spent fuel pool accidents in a manner that informs its decision whether to grant an operating license extension for the Pilgrim plant for another twenty years. It follows that the NRC cannot, consistent with NEPA, reach final closure on the relicensing in a manner that does not take account of the Commonwealth's pending challenge to the Rulemaking Decision, in the event that the Commonwealth prevails in that proceeding. To remedy this problem, the NRC should not issue a final ruling in the relicensing process while the appeal of the Rulemaking Decision is adjudicated. Alternatively, if the NRC chooses to move forward with the relicensing, it should at a minimum expressly condition any approval of the license extension on a provision that the relicensing decision must be made consistent with any court ruling on the Rulemaking Decision. Through such a provision, the NRC can ensure

that final resolution of the SFP issues – as adjudicated by the Courts -- will be given due consideration by NRC decision makers in the Pilgrim relicensing process.

Pursuant to 10 C.F.R. § 2.341, the Commonwealth therefore petitions the NRC:

(a) to review and reverse the October 30, 2008 Initial Decision by the Pilgrim ASLB, that approved the application by Entergy to extend the operating license for the Pilgrim nuclear power plant for another twenty years, and which, unless reversed, will represent final action by the Commission, because the Pilgrim ASLB failed to make the Initial Decision and the Pilgrim license extension conditioned upon, or otherwise properly structured to take account of, the Commonwealth's new and significant information regarding the risks of SFP accidents, as may be finally determined by the Courts;[4] and

(b) review and correct the Commission's own errors and omissions for failure to ensure that final decision in the pending Circuit Court proceeding on the NRC's Rulemaking Decision, regarding these SFP risks, will be applied back to, made a condition of, or otherwise properly be taken account of, as a material part of the Pilgrim license extension process in which these issues arose.

II. Statement of Facts

A. The Commonwealth contentions on the risks of spent fuel pool accidents.

On May 26, 2006, the Commonwealth of Massachusetts, through its Attorney General, submitted hearing requests and contentions in the separate license renewal

[4] *See* LBP-08-22 at 1.

proceedings for the Pilgrim and Vermont Yankee nuclear power plants.[5] In each proceeding, the Commonwealth filed a virtually identical contention claiming that Entergy's relicensing applications violated NEPA, and NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(iv), because Entergy did not address significant new information about the environmental risks of operating the Pilgrim and Vermont Yankee nuclear power plants for an additional twenty years. *See* Pilgrim and Vermont Yankee Contentions at 21-50. This new and significant information, set forth in the NRC Staff's 2001 Report, a report by the National Academy of Sciences, and the expert report prepared by Dr. Gordon Thompson, showed that if a fuel pool were to suffer even a partial loss of cooling water, whether caused by terrorist attack, natural phenomena, equipment failure, or operator error, the high-density racks would, over a wide range of scenarios, inhibit the flow of water, air or steam over the exposed portion of the fuel assemblies, causing some of the fuel to ignite within hours. The fire could then propagate within the pool and lead to a large atmospheric release of radioactive isotopes extending beyond Massachusetts borders (Pilgrim) or across the border into Massachusetts communities (Vermont Yankee). In a separate expert report submitted by the Commonwealth in support of the contentions, Dr. Jan Beyea concluded that such a large atmospheric release could cause thousands of cases of cancer and billions of dollars

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5 *See* 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 Pilgrim Nuclear Power Plant Operating License (May 26, 2006). Ref. Nos. 50-293-LR, ASLBP 06-848-02-LR, RAS 11753. ADAMS No. ML061630088 (Pilgrim Contention); *see also* 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 (May 26, 2006). Ref Nos. 50-271-LR, ASLBP 06-849-03-LR, RAS 11758. ADAMS No. ML061640065 (Vermont Yankee Contention).

in economic damage. *See Massachusetts v. NRC*, 522 F.3d 115, 122 – 123 (1st Cir. 2008); *see also* Pilgrim Contention, Exhibit 2, Report to the Massachusetts Attorney General on the Potential Consequences of a Spent-Fuel-Pool Fire at the Pilgrim or Vermont Yankee Nuclear Plant at 5-25.

The Commonwealth contended that in light of this new and significant information, the NRC must revisit the conclusion of its 1996 License Renewal Generic Environmental Impact Statement (GEIS) that spent fuel storage poses no significant environmental impacts. *See* Pilgrim and Vermont Yankee Contentions at 21-23. Consistent with the U.S. Court of Appeals for the Ninth Circuit's recent decision in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert. denied,* 127 S.Ct. 1124 (2007), the Commonwealth also requested the NRC to reverse its policy of refusing to consider the environmental impacts of intentional attacks on nuclear facilities.[6] In *San Luis Obispo Mothers for Peace*, the Ninth Circuit held that "none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness," and remanded the case to the agency to fulfill its responsibilities under NEPA. 449 F. 3d at 1035.

B. The NRC Rejects the Commonwealth's Contentions.

In each relicensing proceeding for Pilgrim and Vermont Yankee, a separate panel of the NRC's Atomic Safety and Licensing Board (ASLB) rejected the Commonwealth's contention on the procedural ground that the contention impermissibly challenged NRC regulation 10 C.F.R. Part 51, Appendix B. *See* Entergy Nuclear Generation Company

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6 *See* Letters from the Commonwealth of Massachusetts to the ASLBs for the Pilgrim and Vermont Yankee License Renewals, dated 6/16/06 at 1. *See also* Pilgrim and Vermont Yankee Contentions at 33-47.

and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257 (2006); Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131 (2006). That regulation precludes consideration of the environmental impacts of spent fuel storage in NRC license renewal proceedings. LBP-06-23 at 288. Appendix B is based on the 1996 License Renewal GEIS, which concluded that spent fuel storage impacts are insignificant. *Id.* at 278.

In each case, the ASLB also ruled that Appendix B precludes the Commonwealth from seeking consideration of new and significant information regarding the environmental impacts of terrorist attacks on the Pilgrim and Vermont Yankee spent fuel pools. *Id.* at 288, LBP-06-20 at 154-162. The ASLBs concluded that, in order to challenge the Pilgrim or Vermont Yankee license renewal application's failure to address this new and significant information, the Commonwealth must first petition the NRC to change its rules or seek a waiver of the regulations prohibiting consideration of these impacts in license renewal hearings. *Id.* (LBP-06-23 at 288 and LBP-06-20 at 156).

C. The Commonwealth files an alternative Rulemaking Petition.

While disagreeing with the ASLBs' procedural rulings that the contentions were inadmissible under NRC regulations, the Commonwealth submitted a rulemaking petition to the NRC in the summer of 2006 to address the alternative rulemaking process.[7] The rulemaking petition sought revocation of the regulation promulgated by the NRC in 1996 prohibiting consideration of the environmental impacts of spent fuel storage in individual

[7] Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (PRM-51-10). Aug. 25, 2006. ADAMS No. ML062640409. 71 Fed.Reg. 64, 169 (November 1, 2006).

license renewal cases, based on the new and significant information set forth in the Pilgrim and Vermont Yankee contentions. *Id.* The Commonwealth also asserted that NEPA requires the NRC to apply or otherwise take due account of any decision on the generic rulemaking petition as part of the individual Pilgrim and Vermont Yankee licensing proceedings. *Id.*

D. The Commonwealth files administrative appeals of ASLB decisions.

To protect its rights to ensure that the NRC complies with NEPA for the license extensions at the specific plants of concern – Pilgrim and Vermont Yankee – the Commonwealth also appealed LBP-06-20 and LBP-06-23 to the NRC Commissioners, claiming that the ASLBs erred in refusing to admit the Commonwealth's contentions.[8] In the alternative, the Commonwealth asserted that if the NRC intended to use the rulemaking process to address the Commonwealth's substantive concerns regarding the environmental impacts of high-density spent fuel storage at the Pilgrim and Vermont Yankee nuclear power plants, NEPA requires the NRC to apply or otherwise take account of the results of the rulemaking in the individual license renewal proceedings before the licenses can be extended. *See* Brief on Appeal of LBP-06-20 at 2-3.

In CLI-07-03, the Commission affirmed LBP-06-20 and LBP-06-23 on procedural grounds, holding that the ASLBs had correctly concluded that the Commonwealth's contentions were inadmissible because they challenged an NRC

[8] Massachusetts Attorney General's Brief on Appeal of LBP-06-20. Oct. 3, 2006. Ref. Nos. 50-271-LR, ASLBP 06-849-03-LR, LBP-06-20, RAS 12359. ADAMS No. ML062860156. Massachusetts Attorney General's Brief on Appeal of LBP-06-23. Oct. 31, 2006. Ref Nos. 50-293-LR, ASLBP 06-848-02-LR, LBP-06-23, RAS 12485. ADAMS No. ML063120343.

regulation.[9] The Commission also found that the Commonwealth's rulemaking petition was the "appropriate way" to address the Commonwealth's substantive concerns about the environmental risks posed by the Pilgrim and Vermont Yankee spent fuel pools, including the risks posed by terrorist attacks.[10]

However, claiming it was "premature," the Commission refused the Commonwealth's request that the NRC apply or otherwise take account of the results of the rulemaking as part of the individual licensing proceedings, so that the Commonwealth's concerns regarding severe accidents at Pilgrim and Vermont Yankee can be considered in those cases as part of the licensing process.

> The Mass AG's rulemaking petition (at 3) asked the NRC to withhold final decisions in the *Vermont Yankee* and *Pilgrim* license renewal proceedings until the rulemaking petition is resolved. But final decisions in those proceedings are not expected for another year or more. Those proceedings involve many issues unrelated to the Mass AG's rulemaking petition. It is therefore premature to consider suspending proceedings or delaying final decisions.

Id. at 22.

E. Initial Proceedings Before the First Circuit Court of Appeals

On March 22, 2007, the Commonwealth filed petitions for review in the United States Court of Appeals for the First Circuit seeking review of the NRC's decisions in both the Pilgrim and Vermont Yankee license renewal cases. In its appeal, the

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[9] Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-03, 65 NRC 13 (2007) at 20.

[10] *Id.* at 20-21. ("It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to spent fuel storage for all plants across the board rather than to litigate in particular adjudications whether generic findings in the GEIS are impeached by the Mass AG's claims of new information.")

Commonwealth argued that the NRC had taken final agency action with respect to the Commonwealth's contention, because the contention was denied and the Commonwealth had been dismissed as a party from the individual licensing proceedings for Pilgrim and Vermont Yankee, and because the NRC refused to ensure that its generic rulemaking decision would be applied back to the individual plants where the issue arose: Pilgrim and Vermont Yankee. As the Commonwealth requested:

> For the foregoing reasons, this Court should reverse and remand CLI-07-03 with directions that the Commission withhold any final decision in the individual license renewal proceedings for Pilgrim and Vermont Yankee **unless and until the Commission considers and rules upon the Commonwealth's new and significant information in accordance with NEPA and the AEA and any further rulings by the Court, and the Commission applies those considerations and rulings to the individual Pilgrim and Vermont Yankee relicensing proceedings.** (emphasis added)[11]

However, based on representations by the NRC to the Court that the Commonwealth would have the opportunity in the future to raise these issues as an Interested State and, as appropriate, to seek judicial review,[12] and while binding the agency to those representations, the First Circuit ruled that the NRC's decision to dismiss the Commonwealth from the individual proceedings was not a final order with respect to the Commonwealth's AEA, NEPA and related claims involving the new and significant information on the risk of severe SFP accidents.

> The Commonwealth argues separately that the NRC violated NEPA and acted arbitrarily and capriciously when it refused to ensure that the results of the rulemaking would apply to the Pilgrim and Vermont Yankee licensing proceedings...We cannot review the NRC's treatment of that petition [for

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11 Brief for Petitioner Commonwealth of Massachusetts at 43, *Massachusetts v. US Nuclear Regulatory Commission*, 522 F.3d 115 (1st Cir. 2008) Nos. 07-1482; 07-1483.
12 *Massachusetts v. US Nuclear Regulatory Commission*, 522 F3d 115, 132.

rulemaking], however, because the agency has not issued a final order regarding the rulemaking petition.[13]

Subsequently, the NRC issued its Rulemaking Decision to deny the Commonwealth's petition (PRM 51-10), as well as a parallel petition filed by the state of California (PRM 51-12).[14] The Pilgrim ASLB then issued its LBP-08-22 to resolve the remaining issues before it and approve a twenty year license extension for the Pilgrim nuclear plant.[15] The Pilgrim ASLB determined that, unless appealed, LBP-08-22 "shall become final action of the Commission," and terminated the Pilgrim relicensing proceeding.[16]

Therefore, but for this appeal, the individual Pilgrim licensing proceeding is concluded, and the NRC still has failed to ensure that the final judicial review on the NRC's Rulemaking Decision will be applied back to, made a condition of, or otherwise be taken due account of, as part of the Pilgrim license extension.

III. The NRC Cannot Close Out the Pilgrim Relicensing While the Question of Whether It Complied with Statutory Preconditions to Relicensing Is Still Being Adjudicated in a Separate Pending Proceeding.

A. NEPA's Statutory and Regulatory Framework

1. NEPA's statutory purpose is to protect the environment

The National Environmental Policy Act of 1969 mandates that federal agencies consider the environmental impacts of major federal actions. "Congress has *direct(ed)*

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13 *Id.* at 132.
14 Denial of Petitions for Rulemaking PRM-51-10 and PRM-51-12. (2008)
15 Consistent with the First Circuit decision, the Commonwealth subsequently provided notice of its intent to participate as an interested State in the Pilgrim relicensing proceeding. *See* Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State, May 6, 2008. ADAMS No. ML081500531. *See also*10 CFR § 2.315.
16 LBP-08-22 at 26.

that, *to the fullest extent possible*: (1) the policies, regulations, and public laws of the United States *shall* be interpreted and administered in accordance with the policies set forth in (NEPA*).*" *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973)(quoting 42 U.S.C. § 4332 (1))(emphasis Court)).

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. Its fundamental purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment." *Id.* NEPA "insure[s] that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1.

Consistent with those policies, NEPA requires that an "agency take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas and Elec. Co.*, 462 U.S. 87, 97. NEPA's duties "are not discretionary, but are specifically mandated by Congress, and are to be reflected in the procedural process by which agencies render their decisions." *Silva*, 473 F. 2d. at 292.

2. NEPA review must be completed before taking major federal action

NEPA requires an agency to consider the environmental impacts "*before* decisions are made and *before* actions are taken," 40 C.F.R. § 1500.1 (emphasis added), in order to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson,* 490 U.S. at 349.

Whether an agency addresses NEPA's requirements through individual licensing proceedings or generic rulemaking can be determined by an agency. *Baltimore Gas Elec. Co.*, 462 U.S. at 100 ("NEPA does not require agencies to adopt any particular internal decision-making structure.") However, NEPA requires that, whether the process adopted by the agency is generic rulemaking or case specific, the agency must consider the environmental impacts of its decisions before taking the action in the particular proceeding.

> The key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

Id. at 96.[17]

B. The NRC's failure to "plug in" or otherwise take account of the final decision on SFP issues in the individual Pilgrim Relicensing Proceeding

In CLI-07-03, the Commission rejected the Commonwealth's contentions and dismissed the Commonwealth from the Pilgrim and Vermont Yankee license renewal proceedings, on the procedural ground that it "makes more sense" to consider the concerns raised by the Commonwealth's contentions in a generic rulemaking. CLI-07-03, 65 NRC 13 (2007) at 20. However, once the Commonwealth complied with the NRC's suggestion and submitted an alternative rulemaking petition, the Commission then refused to ensure that it would, as required by NEPA, take a hard look at this new

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[17] NEPA's mandate applies "regardless of [the agency's] eventual assessment of the significance of this information." *Marsh,* 490 U.S. at 385 (1989). "[F]ailure to do so ignores the central role assigned by NEPA to public participation." *Natural Resources Defense Council v. Lujan,* 768 F.Supp. 870, 889 (D.C. Cir. 1991).

and significant information as part of the generic rulemaking process in a manner that would ensure that any final decision – as rendered by the Circuit Court of Appeals – will be applied back to, made a condition of, or otherwise be made a part of the individual Pilgrim licensing proceeding that gave rise to these same SFP concerns. Under the NRC regulations to address new and significant information, 10 C.F.R. § 51.53(c)(3)(iv), and the agency's regulations addressing SFP issues as part of the findings the agency must make to support relicensing, 10 C.F.R. Part 51, Appendix B, these SFP issues are material to the license extension requirements and Entergy must be required to comply with them, as finally interpreted and ordered by the court. "[T]he critical agency decision" must be made after the new information has been considered in good faith; otherwise, "the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." *Natural Resources Defense Council v. Calloway*, 524 F. 2d 79, 92 (2nd Cir. 1975). Here the NRC has established a licensing process for Pilgrim that avoids any consideration of SFP issues -- as may be finally determined by the Circuit Court -- prior to granting the plant a license extension for another twenty years.

While the NRC has discretion to select a generic rulemaking process to resolve environmental issues arising in an individual proceeding, it still must:

> consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

Natural Resources Defense Council v. NRC, 685 F. 2d 459, 482-483 (D.C. Cir. 1980), *rev'd on other grounds, Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 96 (1983) (Natural Resources Defense Council II).

In short, as the Supreme Court observed, the results of the generic rulemaking process are required to be "plugged into" the individual licensing decisions from which the rulemaking issues arose. *Baltimore Gas & Elec. Co.*, 462 U.S. at 101 ("[T]he Commission has the discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be 'plugged into' individual licensing decisions."). Here, the NRC to date has refused to ensure, or otherwise take account of, the final judicial decision on the agency's denial of the Commonwealth's rulemaking petition on SFP issues and has refused to ensure that the decision will be "plugged into" the individual Pilgrim proceeding in which the issue arose. Given that the NRC's compliance with NEPA is still subject to pending litigation, it would be improper for the NRC to terminate the Pilgrim relicensing proceeding without accounting for this litigation. As set forth above, the NRC either should 1) defer concluding the relicensing until the litigation is completed and the court ruling is properly addressed in the relicensing or 2) expressly condition the Pilgrim license extension on compliance with the court ruling.

As the D.C. Circuit observed:

> In the course of such a generic rulemaking . . . , the agency [NRC] must consider and disclose the actual environmental effects it has assessed in a manner that will ensure that the overall process, including both generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

* * * *

> As we have emphasized above, NEPA requires an agency to consider the environmental risks of a proposed action in a manner that allows the existence of such risks to influence the agency's decision to take the action.

Natural Resources Defense Council II, 685 F. 2d at 482 – 483.

B. APA Violation

Moreover, it would be arbitrary and capricious for the NRC to decouple the merits of the Commonwealth's significant new information from the individual licensing proceedings, supposedly to address it in a "more appropriate" generic rulemaking, and then refuse to ensure it will in fact reconnect and "plug in" the final ruling from the Court on this issue. This process would violate the APA's requirement for reasoned decision making, see *Dubois v. U.S. Dept. of Agriculture,* 102 F.3d 1273, 1284 (1st Cir. 1996), citing 5 U.S.C. § 706(2)(A), and functionally would exempt Entergy from compliance with requirements for relicensing involving SFP risks, as determined by the Circuit Court of Appeals. *See Citizens Awareness Network v. NRC*, 59 F. 3d 284, 291 (1st Cir. 1995).

In *Citizens Awareness Network*, the First Circuit found that "the Commission's action in allowing [the licensee] to complete ninety percent of the decommissioning at a nuclear power plant prior to NEPA compliance lacked any rational basis, and was thus arbitrary and capricious." 59 F.3d at 293. The Court concluded that the NRC "essentially exempt[ed] a licensee from regulatory compliance," a practice the Court found to be 'skirt[ing]NEPA" and "manifestly arbitrary and capricious." *Id.*

C. AEA and NRC Regulatory Violation

Finally, under the AEA, the Commonwealth has a right to a hearing on all material licensing issues, including the question of whether the NRC has complied with its NEPA duties. 42 U.S.C. § 2239(a), *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1439 (D.C. Cir.1984), *cert. denied*, 469 U.S. 1132 (1985). Compliance with NEPA and NRC regulations to address new and significant information regarding SFP issues are requirements material to the NRC's regulatory relicensing process and must be satisfied as a condition of licensing.[18]

In this case, the Commission has failed to comply with the AEA's nondiscretionary hearing requirement and NRC licensing regulations because it has refused (a) to grant the Commonwealth's hearing request on SFP issues in the individual Pilgrim license renewal proceeding; or (b) to apply, condition, or otherwise take account of, in any license extension the final judicial decision on the NRC's SFP rulemaking process.

---

18 *See* Brief for Petitioner Commonwealth of Massachusetts (August 22, 2007) at 23-30. *Massachusetts v. US Nuclear Regulatory Commission*, 522 F.3d 115 (1st Cir. 2008).

III. Conclusion

The Commonwealth requests that its Petition for Review be granted and that the Commission grant the relief as requested herein.

MARTHA COAKLEY
ATTORNEY GENERAL

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November 12, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION)	)	Docket No. 50-293-LR
COMPANY AND ENTERGY NUCLEAR	)	ASLBP No. 06-848-02-LR
OPERATIONS, INC.	)	
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Commonwealth of Massachusetts Petition for Review of LBP-08-22 have been served upon the following persons this 12th day of November 2008, by electronic mail and by deposit of paper copies in the U.S. mail, first class, except as noted.

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Docket No. 50-293-LR
ASLBP No. 06-848-02-LR

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Matthew Brock

ATTACHMENT 5

United States Court of Appeals
For the First Circuit

No. 08-2267

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.,

Respondents.

Before

Boudin, Lipez and Howard,
Circuit Judges.

JUDGMENT

Entered: November 6, 2008

In accordance with respondent NRC's unopposed motion for automatic transfer, this proceeding is transferred to the United States Court of Appeals for the Second Circuit. 28 U.S.C. § 2112(a).

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc:
John E. Arbab
Lauren Bregman
Matthew T. Brock
Marcia Carpentier
John F. Cordes
Jessica L. Ellsworth
Steven C. Hamrick
David R. Lewis
Michael B. Mukasey
Catherine Steson

United States Code

ATTACHMENT 6

- United States Code
- TITLE 28 — JUDICIARY AND JUDICIAL PROCEDURE
- PART V — PROCEDURE
- CHAPTER 133 — REVIEW — MISCELLANEOUS PROVISIONS

28 U.S.C. § 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section **2072** of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized

by section **1407** of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section **2072** of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section **2072** of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection,

and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

(Added Pub.L. 85-791, Sec. 2, Aug. 28, 1958, 72 Stat. 941; amended Pub.L. 89-773, Sec. 5(a), (b), Nov. 6, 1966, 80 Stat. 1323; Pub.L. 100-236, Sec. 1, Jan. 8, 1988, 101 Stat. 1731.)

AMENDMENTS

1988 — Subsec. (a). Pub.L. 100-236 substituted "If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:" and pars. (1) to (5) for "If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals."

1966 — Subsec. (a). Pub.L. 89-773, Sec. 5(a), substituted "The rules prescribed under the authority of section **2072** of this title may provide for the time and manner of filing" for "The several courts of appeal shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing." See section **2072** of this title.

Subsec. (b). Pub.L. 89-773, Sec. 5(b), substituted "the rules prescribed under the authority of section **2072** of this title" for "the said rules of the court of appeals" and for "the rules of such court".

EFFECTIVE DATE OF 1988 AMENDMENT

Section 3 of Pub.L. 100-236 provided that: "The amendments made by this Act (amending this section and section **1369** of Title 33, Navigation and Navigable Waters) take effect 180 days after the date of the enactment of this Act (Jan 8, 1988), except that the

judicial panel on multidistrict litigation may issue rules pursuant to subsection (a)(3) of section **2112** of title 28, United States Code (as added by section 1), on or after such date of enactment."

SAVINGS PROVISION

Section 5(c) of Pub.L. 89-773 provided that: "The amendments of section **2112** of title 28 of the United States Code made by this Act shall not operate to invalidate or repeal rules adopted under the authority of that section prior to the enactment of this Act (Nov. 6, 1966), which rules shall remain in effect until superseded by rules prescribed under the authority of section **2072** of title 28 of the United States Code as amended by this Act."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section **2346** of this title; title 5 section **7123**; title 7 sections **8**, **9**, **136n**, **194**, **228b-3**, 1115, **1600**, **1601**; title 12 sections **1467a**, **1786**, **1818**, **1848**, **2266**, **2268**, **4583**, **4634**; title 15 sections **21**, **45**, **57a**, **78y**, **79x**, **80a-42**, **80b-13**, **687e**, **717r**, **1193**, **1262**, **1474**, **1710**, **1825**, **2060**, **2618**, **3416**; title 16 sections **773f**, **825l**, **1536**, **1858**, **2437**, **3142**, **3373**, **5010**, **5507**; title 19 sections **81r**, **1677f**; title 20 sections **1234g**, **1412**, **1416**, **7372**, **7711**, **8896**; title 21 sections **346a**, **348**, **355**, **360g**, **360kk**, **371**; title 22 section **1631f**; title 25 section **4161**; title 26 section **3310**; title 27 section **204**; title 29 sections **160**, **210**, **660**, **667**, **727**, **1578**; title 30 sections **816**, **1462**; title 31 section 1263; title 33 section **921**; title 39 section **3628**; title 40 section **333**; title 42 sections **263a**, **263b**, **291h**, **504**, **1316**, **1320a-7a**, **1320a-8**, **2022**, **3027**, **3785**, **5311**, **5405**, **6029**, **6306**, **6869**, **7525**, **8412**, **9152**; title 43 sections 355, **1349**; title 46 App. section 1181; title 47 section **402**; title 49 section **46110**.

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Second Circuit Miscellaneous Forms
Notice of Appearance

Short Title: Massachusetts v. US Nuclear Regulatory Commission Docket No. 08-5571-ag

NOTICE OF APPEARANCE

Appearance for (provide name of party): Commonwealth of Massachusetts

Status of Party:

- [x] Appellant/Petitioner
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- [ ] Cross-Appellant/Cross-Petitioner
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- [ ] Intervenor
- [ ] Amicus Curiae

[x] An attorney will argue this appeal.

- Name of attorney who will argue appeal, if other than counsel of record: -Subject to motion to transfer venue. See below.
- Date of arguing attorney's admission to this Court (month, day, year): _____
- Other Federal/State Bar admissions: (month, day, year): _____

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I understand that the person who will argue the appeal must be ready at any time during or after the week of argument which appears on the scheduling order.

[x] I know of no dates which would be inconvenient.
[ ] I request that the argument of this appeal not be calendared for the following dates, which are inconvenient. I have included religious holidays.

COUNSEL OR *PRO SE* LITIGANT MUST ADVISE THE COURT IN WRITING OF ANY CHANGE IN AVAILABILITY. FAILURE TO DO SO MAY BE CONSIDERED BY THE COURT IN DECIDING MOTIONS FOR ADJOURNMENT BASED ON UNAVAILABILITY.

RELATED CASES

[ ] This case has not been before this Court previously.
[ ] This case has been before this Court previously. The short title, docket number and citation are: _____

[x] Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers and citations are: Commonwealth of Massachusetts motion to transfer venue & for stay of proceedings; the State of New York v. United States Nuclear Regulatory Commission, no.(s)08-3903 -ag (L); 08-4833 -ag (CON).

Signature of counsel of record or *pro se* litigant:

Type or Print Name Matthew Brock
Name of Firm: Office of the Attorney General
Address: One Ashburton Place, Boston, Massachusetts 02108
Telephone: (617) 963-2425 Date 11/20/08

Signature of counsel who will argue the appeal, if different:

Type or Print Name

Telephone: Date:

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See Second Circuit Interim Local Rule 25(a)6.

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Short Caption: Mass. v. US Nuclear Regulatory Commission

Docket Number: 08-5571-ag

Matthew Brock
Attorney Name (print)

Attorney Signature

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Environmental Protection Division
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Short Caption: New York v. US Nuclear Regulatory Commission

Docket Number: 08-3903-ag (L); 08-4833-ag (CON)

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