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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

May 6, 2009

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

RE: Burton v. USA, No. 09-0005-ag

Dear Ms. Wolfe:

Enclosed please find the Federal Respondents' Brief for the case referenced above. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

James E. Adler  
Attorney  
Office of the General Counsel

Enclosures: As stated.

cc: service list

# No. 09-0005-ag

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NANCY BURTON,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
U.S. NUCLEAR REGULATORY COMMISSION,  
*Federal Respondents,*

ENERGY NUCLEAR OPERATIONS, INC.,  
*Respondent.*

On Petition for Review of a Final Order of the  
U.S. Nuclear Regulatory Commission

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**BRIEF FOR FEDERAL RESPONDENTS**

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## **JURISDICTIONAL STATEMENT**

Nancy Burton challenges a Nuclear Regulatory Commission (“NRC”) adjudicatory decision denying her petition for intervention and request for hearing in the nuclear power plant license renewal proceeding for Indian Point Units 2 and 3. This Court has subject matter jurisdiction under the Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.*, commonly known as the Hobbs Act. See *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970); see also *Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006).

The NRC issued its decision on November 5, 2008, and Burton filed her petition for review in this Court on January 5, 2009, within the 60-day period set forth under the Hobbs Act. See 28 U.S.C. § 2344. Venue is proper in this Court. 28 U.S.C. § 2343.

## **STATEMENT OF THE ISSUE**

Whether the NRC acted arbitrarily or capriciously in concluding that the rulemaking process, rather than an individual license renewal adjudication, is the proper forum for petitioner’s challenge to generic NRC regulations adopted through notice-and-

comment rulemaking.

## **STATEMENT OF THE CASE**

### *A. Nature of the Case*

In 2007, Entergy Nuclear Operations, Inc. (“Entergy”) applied for renewed operating licenses for Indian Point Units 2 and 3, located in Buchanan, New York. Renewed licenses would allow these units to operate for twenty years beyond the expiration dates of their current operating licenses, which would otherwise expire in 2013 and 2015, respectively.

A number of petitions to intervene and requests for hearing regarding this license renewal application were filed with the NRC, including one by Nancy Burton. Burton’s petition to intervene and request for a hearing (“Hearing Request”)<sup>1</sup> raised a single contention (i.e., claim), which challenged certain generally applicable NRC regulations relating to the radiation-related health consequences of renewing nuclear power plant licenses. JA 4-5, 54-59.

Because the effects of radiation exposure on human beings are

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<sup>1</sup> Burton filed both an initial and a revised petition to intervene and request for hearing. This brief will refer solely to the revised version, which can be found in the Joint Appendix at JA 1.

a concern common to all commercial nuclear activities, the NRC, to ensure a consistent regulatory approach, addresses the issue on an across-the-board basis via rulemaking. See 10 C.F.R. Part 20; 10 C.F.R. Part 50 App. I. As part of this approach, the NRC has promulgated generally applicable radiation release and dose standards for the purpose of protecting nuclear facility workers and local residents from harmful radiation exposure. To obtain and maintain NRC licenses, facilities must comply with these standards.

The NRC also uses these standards to inform its environmental reviews under the National Environmental Policy Act ("NEPA"). Thus, the NRC has made two generic environmental impact findings (one with respect to the general public, and one for plant workers), as part of its Generic Environmental Impact Statement for nuclear power plant license renewal ("GEIS"),<sup>2</sup> that

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<sup>2</sup> The full title for the GEIS is "NUREG-1437, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (May 1996). The GEIS is very lengthy. It is not in the Joint Appendix, but it is fair to characterize it as part of the Administrative Record (by virtue of its being referenced and quoted by numerous documents in the Record), and Burton quotes portions of it in her brief. The GEIS is publicly available on the NRC's website at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437>, and may also be found by  
(continued. . .)

the human health impact of radiation exposure will be “small” (i.e. insignificant) where plants are operating during their renewed license terms in accordance with the NRC standards. The NRC subsequently codified these GEIS findings (and others) in the agency’s regulations via notice-and-comment rulemaking. See Final Rule, *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467 (June 5, 1996), amended by 61 Fed. Reg. 66,537 (Dec. 18, 1996).

Burton’s Indian Point contention challenged these NRC codified generic environmental findings, claiming that the radiation-related human health impacts of renewing the Indian Point licenses would not be small, regardless of whether NRC radiation standards are met. JA 5, 11 (¶ 9), 77-78.

Along with her Hearing Request, Burton filed a petition for a waiver (“Waiver Petition”), pursuant to 10 C.F.R. § 2.335(b), of certain NRC regulations regarding radiation exposure, including the

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(...continued)

accessing the NRC’s public “ADAMS” database, at <http://www.nrc.gov/reading-rm/adams.html>. The ADAMS accession number for the GEIS is MLO40690705.

generic environmental findings on human health effects from radiation. JA 52-60. For this Waiver Petition to succeed, Burton needed to demonstrate that the Indian Point license renewal proceeding presented “special circumstances,” such that applying these NRC radiation regulations at Indian Point “would not serve the purposes for which the rule or regulation was adopted.” § 2.335(b).

For purposes of the Indian Point renewal proceeding, the NRC had appointed an Atomic Safety and Licensing Board (“Licensing Board”) to rule on Hearing Requests and to adjudicate any admitted contentions. While admitting for hearing a number of contentions filed by other parties, the Licensing Board rejected Burton’s contention on the grounds that (1) the contention attempted to challenge generally applicable NRC regulations, and (2) the associated Waiver Petition had not successfully demonstrated the special circumstances necessary to warrant waiving these generally applicable regulations. JA 113. In the Licensing Board’s view, a rulemaking petition, rather than an adjudicatory contention, was the proper procedural vehicle for Burton’s concerns. JA 103.

Rather than filing the recommended rulemaking petition, Burton appealed the Licensing Board decision to the Commission. The Commission upheld the Licensing Board's decision "for the reasons the Board has given." JA 118. Burton subsequently filed the instant petition for review in this Court.

B. *Regulatory Background*

1. *Nuclear Power Plant License Renewal*

The Atomic Energy Act ("AEA"), in sections 103 and 104(b), authorizes the Commission to issue licenses to operate commercial power reactors. 42 U.S.C. §§ 2133 and 2134(b). Section 103 of the AEA limits licenses to terms of 40 years but provides for renewed licenses. 42 U.S.C. § 2133. Section 104(b) neither limits license terms nor provides for license renewal.<sup>3</sup> 42 U.S.C. § 2134(b). In 1956, the Atomic Energy Commission, the NRC's predecessor, promulgated regulations allowing a 40-year term for all commercial reactor licenses, whether issued under section 103 or under section 104(b), and providing for license renewal. See 10 C.F.R. § 50.51.

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<sup>3</sup> Indian Point Units 2 and 3 were licensed under section 104(b).

The NRC subsequently promulgated regulations allowing renewal for up to 20 years. See 10 C.F.R. § 54.31.

Two sets of regulatory requirements govern the agency's review of license renewal applications. Pursuant to 10 C.F.R. Part 54, the NRC conducts a technical review under the AEA, focusing on "aging" questions, to assure that public health and safety requirements are satisfied. Pursuant to 10 C.F.R. Part 51, the NRC completes an environmental review under NEPA, focusing on the potential impacts of 20 additional years of operation.

## 2. *License Renewal Environmental Review*

In 1996, with the first wave of licensed reactors nearing the expiration of their initial 40-year licenses, the NRC amended its existing environmental review requirements in 10 C.F.R. Part 51 to address the scope of environmental review for license renewal applications. 61 Fed. Reg. 28,467. The regulations divide the license renewal environmental review into generic and plant-specific issues. The impacts of operating a plant for an additional 20 years that are common to all plants, or to a specific subgroup of plants, were addressed in a Generic Environmental Impact Statement

“GEIS”), and the GEIS findings were codified in NRC regulations.

See 61 Fed. Reg. 28,467; 10 C.F.R. Part 51, Subpt. A, App. B.

Generic impacts analyzed in the GEIS are designated as “Category 1” impacts. See 10 C.F.R. Part 51 Subpt. A, App. B, Table B-1 n.2 (defining “Category 1”). Category 1 impacts are those that: (1) are common to all plants, or to a specific subgroup of plants; (2) can be assigned (with certain exceptions) a single significance level (*i.e.*, small, moderate, or large); and (3) are unlikely to warrant plant-specific mitigation measures. *Id.* NRC regulations codify these generic findings in 10 C.F.R. Part 51 Subpt. A, App. B, Table B-1 “Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants” (“Table B-1”).

By regulation, license renewal applicants are generally excused from addressing Category 1 issues in the environmental reports accompanying their applications.<sup>4</sup> See 10 C.F.R.

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<sup>4</sup> NRC regulations in 10 C.F.R. Parts 51 and 54 require a license renewal application to include an environmental report describing the environmental impacts of the proposed action and alternatives. See 10 C.F.R. § 51.53(c), § 54.23. The environmental report is intended to assist the NRC staff in preparing the agency's independent environmental impact statement. See *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995) (citing (continued. . .))

§ 51.53(c)(3)(i). The applicant instead may rely on the generic environmental impact findings codified in Table B-1. All other environmental impacts associated with plant license renewal are designated "Category 2" issues, and must be addressed in the applicant's environmental report. 10 C.F.R. § 51.53(c)(3)(ii).

Even where a particular impact is listed in Table B-1 as applying generically (Category 1), a license renewal applicant's environmental report must contain any "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). This includes information about generic, so-called "Category 1" impacts.<sup>5</sup>

*Id.*

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(...continued)  
NRC regulations).

*University of Missouri*, as well as other Commission adjudicatory decisions that our brief cites, is available in the publication series *Nuclear Regulatory Commission Issuances* and on Westlaw and Lexis as well.

<sup>5</sup> Information is "new and significant" if it is sufficient to show that the federal action will affect the quality of the human environment either in a significant manner or to a significant extent not already considered in an EIS. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

Purportedly “new and significant information” related to a Category 1 finding does not automatically permit interested parties to challenge the Category 1 finding in the license renewal proceeding; there must still be a waiver of the controlling regulation. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001). *Accord Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3. 65 NRC 13, 19-21 (2007), *pet. for review denied, Massachusetts v. United States*, 522 F.3d 115 (1<sup>st</sup> Cir. 2008).<sup>6</sup>

Under 10 C.F.R. § 2.335(b), a waiver requires a showing of “special circumstances” specific to the plant in question, *see Turkey Point*, 54 NRC at 12, 22-23, which are not “common to a large class of applicants or facilities.” *Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4)*, 2009 WL 406793, 4 n.38 (2009).

This site-specific “special circumstances” requirement ensures

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<sup>6</sup> The First Circuit’s *Massachusetts* decision describes the NRC’s regulatory scheme for license renewal thoroughly and accurately. *Id.* at 118-121.

that issues which are legitimately applicable to all, or at least many, nuclear power plants (as should generally be the case with Category 1 issues) will be resolved in the rulemaking arena, where any interested persons or entities may participate, rather than in individual license renewal adjudications – where only those who demonstrate “standing” with respect to the facility in question may participate. *Compare* 10 C.F.R. § 2.802(a) (“Any interested person may petition the Commission to issue, amend, or rescind any regulation.”), *with* 10 C.F.R. § 2.309(d) (requiring petitioners in individual licensing proceedings to show standing in order to participate).<sup>7</sup>

The general inability to challenge Category 1 findings in individual license renewal proceedings does not leave interested members of the public without recourse. This is because the NRC’s “regulations provide channels through which the agency’s expert

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<sup>7</sup> The requirements for standing in NRC licensing proceedings are comparable to standing principles that courts apply, including the requirements to show “a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision,” as well as a “potential for injury” that is “actual or imminent.” *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311 (2005).

staff may receive new and significant information” about Category 1 issues not just from the applicant, but from the public as well.

*Massachusetts v. United States*, 522 F.3d at 128.

For example, interested parties may challenge a Category 1 finding through the usual process for challenging NRC regulations: that is, by filing a petition for rulemaking under 10 C.F.R. § 2.802. See also 10 C.F.R. § 2.335(e) (stating expressly that § 2.802 rulemaking petitions may be filed regardless of the availability of a § 2.335(b) waiver). The public also has an opportunity to comment on the draft supplemental environmental impact statement (SEIS) that the NRC issues in each license renewal proceeding.<sup>8</sup>

If “new information” emerges through a rulemaking petition or a public comment and “is relevant to the plant and is also relevant

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<sup>8</sup> The purpose of a SEIS is to provide the necessary facility-specific supplement to the GEIS for a given license renewal proceeding. Each SEIS will generally rely upon the Category 1 findings codified in 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1, but must also address any “new and significant” information regarding Category 1 issues, see *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, LBP-06-23, 64 NRC 257, 288 (2006), and provide site-specific environmental analyses for Category 2 issues (which, by definition, the GEIS sets aside as issues to be evaluated on a site-specific basis for each plant). See 10 C.F.R. § 51.71(d).

to other plants (*i.e.*, generic information) and that information demonstrates that the analysis of an impact codified in the rule at Table B-1 is incorrect, the NRC staff will seek Commission approval to either suspend the application of the rule on a generic basis . . . or delay granting the renewal application (and possibly other renewal applications) until the analysis in the GEIS is updated and the rule amended." See 61 Fed. Reg. at 28,470. See also *Massachusetts v. United States*, 522 F.3d at 120-21.

C. *Generic Environmental Impact Findings for Radiation Exposure During License Renewal Period.*

NRC regulations have codified GEIS findings that operating nuclear power plants for an additional twenty years under renewed licenses would result in "small" human health impacts due to radiation exposure. See 10 C.F.R. part 51, Subpt. A, App. B, Table B-1. These findings separately address (1) radiation exposure by the public and (2) radiation exposure by plant workers, and come to the same conclusion for each. *Id.* (listing, within the "Human Health" section of the table, generic findings for "Radiation exposures to public (license renewal term)" and "Occupational radiation exposures (license renewal term)").

Underlying these findings is the NRC's view that its regulatory radiation standards—which were promulgated for the very purpose of protecting public health—are sufficient to protect public health; consequently, the NRC has concluded for NEPA purposes that radiation releases and doses in compliance with these standards will not significantly impact human health. 61 Fed. Reg. at 28,476. The NRC has also projected that plants operating under renewed licenses will likely adhere to these radiation standards. *Id.* These two determinations led to the “Category 1” findings regarding the human health effects of radiation resulting from nuclear power plant license renewal. *Id.*

As a result of these “Category 1” GEIS findings, the impacts of radiation on human health due to license renewal have been resolved by the NRC on a generic basis, and NRC regulations do not permit litigating the issue in individual license renewal proceedings, absent a “special circumstances” waiver. *See Massachusetts v. United States*, 522 F.3d at 127; 10 C.F.R. § 2.335(a)-(b).

#### D. *The “Reference Man” Standard*

As used in NRC regulations at 10 C.F.R. Part 20, the so-called "Reference Man" is defined as:

[A] hypothetical aggregation of human physical and physiological characteristics arrived at by international consensus. These characteristics may be used by researchers and public health workers to standardize results of experiments and to relate biological insult to a common base.

10 C.F.R. § 20.1003. Under Part 20, the "Reference Man" concept is used in determining whether radiation doses received by individuals comply with NRC radiation dose limits. *See, e.g.*, 10 C.F.R. Part 20, App. B (explaining that the "Annual Limits on Intake" of radionuclides in an occupational setting refer to intake by "Reference Man.>").

#### E. *The NRC Hearing Process*

NRC regulations permit anyone with an "interest" (standing) in a licensing proceeding to obtain a hearing on admissible safety and environmental "contentions." *See generally* 10 C.F.R. § 2.309(a); *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

Contentions must include sufficient detail "to show that a genuine dispute exists . . . . on a material issue of law or fact."

*See* 10 C.F.R. § 2.309(f). Unless a party obtains a waiver from the

Commission pursuant to 10 C.F.R. § 2.335, NRC regulations are not “subject to attack” in NRC adjudications. 10 C.F.R. § 2.335(a). Three-judge NRC licensing boards generally preside at NRC hearings. Petitioners and parties may appeal licensing board rulings to the five-member Commission. See 10 C.F.R. §§ 2.311, 2.341.

### **STATEMENT OF FACTS**

#### *A. Indian Point License Renewal Adjudication*

Entergy applied to the NRC in 2007 for renewed operating licenses for Indian Point Units 2 and 3. The NRC subsequently published a notice of opportunity for hearing regarding this license renewal application. See *Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period*, 72 Fed. Reg. 42,134 (Aug. 1, 2007).

The NRC appointed a Licensing Board to preside over the Indian Point license renewal hearing process. Several prospective

intervenors filed hearing requests, presenting a variety of contentions. The Licensing Board heard oral arguments on the admissibility of these contentions, and later issued an order finding some contentions admissible for hearing but rejecting others. See generally *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, LBP-08-13, 68 NRC \_\_ (2008) (excerpted at JA 105-115) (“Hearing Request Decision”). An evidentiary hearing will take place on the contentions found admissible, but it has not yet been scheduled. A final NRC determination on the Indian Point renewal application is not expected until at least 2010.<sup>9</sup>

B. *Burton’s Contention on Health Effects of Radiation*

Burton’s Hearing Request in the Indian Point proceeding was filed jointly on her own behalf and on behalf of Connecticut Residents Opposed to Relicensing of Indian Point (“CRORIP”), whom

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<sup>9</sup> A timeline for the Indian Point renewal process is available on the NRC’s public website at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html>.

Burton was representing in the proceeding.<sup>10</sup> This Hearing Request contained a single contention, which challenged a statement in Entergy's environmental report (filed as part of the license renewal application) that renewing the Indian Point licenses would result in "small" human health effects due to radiation exposure. JA 4. According to Burton, this statement was both incorrect and not supported in Entergy's environmental report. JA 4-5.

To provide substantive support for her contention, Burton attached a Declaration of Joseph J. Mangano ("Mangano Declaration"), JA 9-17, a report by Mr. Mangano entitled *Public Health Risks to Fairfield County, CT of Keeping the Indian Point Nuclear Reactors Open* (Sep. 12, 2007) ("Mangano Report"), JA 18-33, and a Declaration of Helen M. Caldicott, M.D. ("Caldicott Declaration"). JA 34-45.

The materials prepared by Mr. Mangano included general

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<sup>10</sup> NRC hearing procedures do not require that a person be a licensed attorney in order to represent an organization before the NRC in an adjudicatory proceeding. Because the petition for review in this Court was filed solely by Burton, our brief, for simplicity purposes, generally refers only to Burton, even where the action in question may have technically been a joint effort by Burton and CRORIP.

discussions of the health risks from exposure to radioactivity from sources such as nuclear weapons and nuclear power plants, as well as radiation and cancer data for populations in the vicinity of Indian Point. *See generally* JA 10-12, 20-33. Mr. Mangano's Declaration and Report did not attempt to draw comparisons between the Indian Point radiation exposure and cancer data and comparable data from populations surrounding other nuclear plants. *See generally* JA 10-12, 20-33.

The Caldicott Declaration, meanwhile, addressed "the medical hazards of nuclear power generation," *see* JA 34-35 (¶ 8), and also included, apparently for illustrative purposes, one example specific to Indian Point. *See generally* JA 34-38.

C. *Burton's Petition to Waive NRC Regulations*

To further support her Hearing Request, Burton concurrently filed a Waiver Petition under 10 C.F.R. § 2.335(b). JA 52-53. The Waiver Petition sought to waive certain generally applicable regulations that would otherwise bar litigation of the issues raised in her contention. Specifically, the Waiver Petition requested waiver of (1) the codified GEIS findings in Table B-1 regarding human

health effects of radiation during the license renewal term, and (2) the “Reference Man” approach used in radiation dose calculations for licensed nuclear facilities under NRC regulations. See JA 52-53. Attached to the Waiver Petition was an affidavit, prepared by Burton herself, specifying the bases for her Waiver Petition. JA 54-59.

The Burton Affidavit contended that the NRC should address the human health effects of radiation in individual licensing adjudications, rather than on a generic basis through notice-and-comment rulemaking, because the issue is “arguably the most critical issue involved in continuation of operations during the license renewal term.”<sup>11</sup> JA 57 (¶ 14A). The Burton Affidavit also

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<sup>11</sup> While Burton did technically seek waiver of two distinct generic human health findings (the “public” finding and the “occupational” finding), little differentiation was made between the two in the proceedings before the NRC, and Burton’s brief does not address them separately. See, e.g., JA 101-02 (explaining Licensing Board’s justification for denying request to waive the public and occupational human health findings); Burton Brief at 24 (characterizing as “[t]he major conclusions drawn by the GEIS which are pertinent to these proceedings” two sections from the discussion of human health impacts upon the public in section 4.6.2 of the GEIS, but not mentioning the separate discussion of occupational impacts in section 4.6.3 of the GEIS.). Likewise, this Brief will generally address the two findings as a pair rather than discussing them separately, because there appear to be no distinctions between the two that are material to this case.

claimed that the Indian Point facility “cannot be completely disregarded as a possible factor” behind allegedly high strontium-90 findings for populations near Indian Point found in a study that the Mangano materials discuss, JA 57-58 (¶ 14B); and that the health effects of any past or future radioactive leaks at Indian Point need to be examined, JA 58 (¶ 14C).

As to the “Reference Man” issue, the Burton Affidavit claimed that this regulatory standard is insufficient because it does not sufficiently take into account variations in radiation susceptibility based upon age and gender. JA 58-59 (¶¶ 15-20).

D. *Licensing Board and Commission Decisions*

The Licensing Board held three days of oral argument regarding contention admissibility in the Indian Point proceeding. Oral argument regarding Burton’s Hearing Request took place on the final day (March 12, 2008). See JA 61-96. The Waiver Petition, which the Licensing Board had not yet ruled upon, was also discussed at the oral argument. See generally JA 61-96.

Subsequently, the Licensing Board issued two orders related to Burton’s contention. One order denied Burton’s Waiver Petition,

on the ground that it had failed to demonstrate the sort of site-specific “special circumstances” necessary to obtain a waiver of generally applicable NRC regulations in a licensing proceeding. JA 97-104 (“Waiver Decision”).

The second order, issued the same day as the first, denied Burton’s Hearing Request, on the ground that Burton’s sole contention constituted an attack on Commission regulations that could not be litigated in a plant-specific licensing proceeding absent a waiver of the sort the Licensing Board had just denied. JA 113.

The Licensing Board’s Waiver Decision recognized that “the alleged ‘special circumstances’ relied upon by [Burton and CRORIP] are increased levels of Strontium-90 and cancer related illnesses in areas surrounding the Indian Point nuclear facility.” JA 101. The Licensing Board went on to find, however, that Burton had “presented no evidence that radiation levels differ for Indian Point as a unique problem compared to other nuclear power plants. Rather, this is an issue common to a large group of nuclear power plants.” *Id.* The Licensing Board further found that the Burton contention did not claim that Indian Point had, or would, violate

NRC radiation standards. *Id.* Finally, the Licensing Board determined that Burton's request for a waiver of the "Reference Man" model "presents an argument against use of the Reference Man dose in any relicensing proceeding," rather than presenting special circumstances specific to Indian Point. JA 103.

Having failed to find the necessary "special circumstances," the Licensing Board denied the Waiver Petition. JA 103-04. The Licensing Board did, however, specifically note in its decision that Burton and CRORIP "may file a petition for rulemaking under 10 C.F.R. § 2.802, which would be 'the appropriate means for requesting Commission consideration of generic issues.'" JA 103 (quoting from a prior Commission decision in another proceeding).

Next, in its Hearing Request Decision, the Board determined that Burton's contention was "a direct challenge to the Commission's GEIS for the relicensing of nuclear power generating facilities." JA 113. Pointing out that such a contention requires a § 2.335 waiver in order to be litigated in an individual licensing proceeding, the Licensing Board, having already denied the Waiver Petition, found the contention inadmissible and denied the Hearing

Request. *Id.*

Despite the Board's advice to Burton and CRORIP that a rulemaking petition would be the appropriate vehicle for their concerns about the NRC's radiation regulations, they filed no such petition and continued to pursue the matter in the Indian Point adjudication by appealing the two Licensing Board decisions to the Commission. The Commission denied the appeal, affirming the Licensing Board's decisions as "comprehensive and well-reasoned" and adopting the Board's rationale as its own. JA 118.

### **SUMMARY OF ARGUMENT**

The human health effects of radiation exposure is an issue pertinent to any commercial nuclear activity, including the operation of nuclear power plants under renewed licenses. Rather than addressing this ubiquitous issue on a potentially inconsistent basis in individual license renewal proceedings, the NRC has addressed it in a centralized fashion via rulemaking.

By using the rulemaking process, the NRC ensures that all persons and institutions with an interest in the matter have had, and will continue to have, the opportunity to contribute to the

NRC's decisionmaking process, regardless of their ability to show standing with respect to any particular nuclear plant. Further, to prevent these sorts of rulemaking initiatives from being undermined, NRC hearing procedures generally prohibit litigation in individual licensing proceedings of challenges to rules developed through notice-and-comment rulemaking.

Despite the NRC's clear policy of addressing this radiation health effects issue in an organized, generic fashion through rulemaking, Burton has petitioned the NRC to litigate the issue in an individual license renewal adjudicatory proceeding for Indian Point Units 2 and 3. Because Burton failed to demonstrate that anything unique or special about Indian Point justified an *ad hoc* departure from the NRC's longstanding procedural approach to this issue, the NRC cannot be said to have acted arbitrarily or capriciously in denying her Hearing Request.

#### **STANDARD OF REVIEW**

Courts will uphold an agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). Under this "narrow and

particularly deferential” standard, *Env'tl. Defense v. U.S. EPA*, 369 F.3d 193, 201 (2d Cir. 2004), a court “is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Rather, a reviewing court must consider whether “the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

To the extent this case implicates the NRC’s interpretation of its own regulations, this Court should give the NRC’s interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *In re New Times Securities Services, Inc.*, 371 F.3d 68, 87 (2d Cir. 2004), citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Accord *Massachusetts v. United States*, 522 F.3d at 127.

## **ARGUMENT**

### ***The NRC Properly Denied Burton’s Request for a Hearing on an Issue Addressed Generically in NRC Regulations.***

Burton’s Hearing Request, and the associated Waiver Petition,

requested that the NRC set aside (a) its generic environmental impact findings regarding the human health effects of radiation exposure during the term of a nuclear power plant's renewed license and (b) the generic "Reference Man" standard used in calculating permissible radiation doses. The NRC's denial of Burton's contention was not arbitrary or capricious, because the Waiver Petition did not demonstrate, as required under NRC regulations, that the Indian Point proceeding presents special circumstances justifying a waiver of the pertinent generally applicable rules. The proper procedural vehicle for Burton's claim, therefore, would be a rulemaking petition filed pursuant to 10 C.F.R. § 2.802 – as the Licensing Board itself told Burton. JA 103.

A. *Except in Special Circumstances, Generally Applicable Regulations Cannot Be Attacked in Individual NRC Licensing Proceedings*

It is well-settled that "[a]dministrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Vermont Yankee v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Pottsville Broadcasting*

Co., 309 U.S. 134, 143 (1940)). This rule is especially applicable to the NRC, because its enabling legislation, the Atomic Energy Act, is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). The Atomic Energy Act “is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends.” *Massachusetts v. United States*, 522 F.3d at 126-127 (internal quotation and citation omitted).

Burton’s contention challenging the NRC’s codified generic human health findings was prohibited by an NRC procedural rule – 10 C.F.R. § 2.335(a) – which rests on basic principles of administrative law.<sup>12</sup> It is “hornbook administrative law that an agency need not – indeed should not – entertain” an adjudicatory challenge to a regulation. *New Jersey Dept. of Environmental Protection v. NRC*, 561 F.3d 132, 143 (3d Cir. 2009) (quoting *Tribune*

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<sup>12</sup> Burton is not challenging the validity of § 2.335 or any of the NRC’s other 10 C.F.R. Part 2 procedural rules governing hearings.

*Co. v. F.C.C.*, 133 F.3d 61, 68 (D.C. Cir. 1998)). *Accord San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1026-27 (9th Cir. 2006).

Section 2.335 simply codifies this “hornbook” principle. It bars adjudicatory contentions attacking NRC regulations, absent a waiver based on a showing of “special circumstances.” *See New Jersey Dept. of Environmental Protection*, 561 F.3d at 143; *Massachusetts v. United States*, 522 F.3d at 127. Section 2.335, at bottom, places challenges to NRC regulations in the forum where they belong – the NRC’s generic rulemaking process, rather than its site-specific licensing process.

“It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to ... all plants across the board than to litigate in particular adjudications whether generic findings in the GEIS are impeached by ... claims of new information.” *Vermont Yankee*, 65 NRC at 21. Addressing issues through rulemaking allows anyone, regardless of his or her reason for having an interest in the matter, to participate in the NRC’s decision-making through the public

comment process, *see* 5 U.S.C. § 553(a)-(c), or by filing a petition for rulemaking asking the NRC to issue a new rule or amend or repeal an existing rule. *See* 10 C.F.R. § 2.802; 5 U.S.C. § 553(e).

If the decision reached by the NRC following the public comment or rulemaking petition process is not to a participant's liking, that participant may obtain review of the NRC's decision in the courts of appeals. *See* 28 U.S.C. § 2342(4); 42 U.S.C. § 2239; *see also, e.g., Spano v. NRC*, 293 Fed.Appx. 91 (2d Cir. 2008) (reviewing NRC denial of a petition for rulemaking); *Reytblatt v. NRC*, 105 F.3d 715 (D.C. Cir. 1997) (reviewing NRC decision to promulgate a rule). In contrast, NRC rules on standing would prohibit similarly broad public participation in individual licensing proceedings. 10 C.F.R. § 2.309(d); *American Centrifuge*, CLI-05-11, 61 NRC at 311.

In sum, NRC procedural rules reasonably prohibit litigants in individual licensing proceedings from attacking NRC regulations, absent special circumstances.

B. *Burton's Contention is Inadmissible without a "Special Circumstances" Waiver.*

Exercising its discretion, the NRC has decided it can evaluate

some of the environmental impacts of nuclear power plant license renewal generically. See 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1; *Massachusetts v. United States*, 522 F.3d at 119-20. Generic analysis is "clearly an appropriate method" of meeting the agency's statutory obligations under NEPA. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 101 (1983); see *New Jersey Dept. of Environmental Protection*, 561 F.3d at 143. Agencies need not "continually . . . relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). Agency authority to rely on rulemaking to determine generic environmental issues that do not require case-by-case consideration applies "even where an agency's enabling statute expressly requires it to hold a hearing." *Id.*

Here, Burton's sole adjudicatory contention challenges NRC generic environmental findings. Burton's contention objected to Entergy's failure in its environmental report to provide an analysis, specific to Indian Point, of the human health effects of radiation releases upon both plant workers and the public. JA 5; Burton

Brief at 17. Her contention thus directly challenges the GEIS findings codified in Table B-1 that classify radiation-induced health effects as a “Category 1” issue *not* requiring site-specific analysis in individual license renewal proceedings.

As the First Circuit recently confirmed, contentions challenging codified GEIS findings constitute attacks on NRC regulations, and NRC procedural rules “are clear” that such contentions “cannot be litigated in individual licensing adjudications without a [§ 2.335] waiver.” *Massachusetts v. United States*, 522 F.3d at 127. Thus, the usual § 2.335(a) bar against attacking NRC regulations in individual licensing proceedings applies with full force to Burton’s contention challenging the GEIS (and its implementing regulation).

Seeking nonetheless to have her contention adjudicated in the Indian Point proceeding, Burton filed a § 2.335(b) waiver petition along with her Hearing Request, asking the Licensing Board to waive both the pertinent GEIS findings and another aspect of NRC regulations relating to radiation (the “Reference Man” dose model). *See* JA 52.

NRC's waiver rule requires an affidavit substantiating a claim of "special circumstances" warranting a departure from a regulation in a particular case:

[t]he sole ground for petition of waiver...is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

10 C.F.R. § 2.335(b). Circumstances are "special" only if they are not "common to a large class of applicants or facilities." *Bellefonte*, 2009 WL 406793, 4 n.38.

Because, as we explain below, Burton's Waiver Petition failed to satisfy these standards, § 2.335(a) required denial of her contention and the associated Hearing Request.

C. *Burton's Waiver Petition Did Not Establish that the NRC, for Purposes of the Indian Point License Renewal Proceeding, Should Waive Any of Its Generally Applicable Regulations.*

Burton's § 2.335(b) Wavier Petition sought waivers of two

aspects of NRC regulations. First, the petition sought to waive the NRC's generic regulatory findings that the human health effects of radiation from operation of a nuclear plant under a renewed license is a "Category 1" issue with "small" (i.e. insignificant) environmental impacts. JA 54, ¶ 3; JA 57-58, ¶ 14. Second the petition sought to waive the NRC's use of the so-called "Reference Man" in radiation dose calculations. JA 58, ¶ 15. In both cases, however, as the Licensing Board held, Burton failed to show that Indian Point is a special case requiring special rules.

1. *Request to Waive Human Health Findings*

With respect to the codified generic human health findings that Burton sought to waive, the key basis underlying these findings is that NRC radiation standards are sufficient to protect public health. As the Licensing Board noted, "[f]or purposes of assessing radiological impacts, the Commission has concluded that impacts are of small significance if doses to individuals and releases do not exceed the permissible levels in the Commission's regulations." JA 100 (quoting 61 Fed. Reg. at 28,476). The GEIS's findings of "small" impacts from radiation doses meeting NRC dose-

limit regulations are unsurprising, indeed self-evident. After all, the primary statutory authority for NRC regulatory activities—the Atomic Energy Act—*prohibits* the NRC from licensing nuclear facilities if, in the NRC’s view, the facility’s operation would be “inimical...to the health and safety of the public.” See 42 U.S.C. § 2133(d). The NRC expressly noted this prohibition when codifying the GEIS findings, stating that “[t]he Atomic Energy Act requires the Nuclear Regulatory Commission to promulgate, inspect and enforce standards that provide an adequate level of protection of the public health and safety and the environment. The implementation of these regulatory programs provides a margin of safety.” 61 Fed. Reg. at 28,476. Thus, almost by definition, a facility that complies with NRC radiation standards would not, in the NRC’s view, be releasing radiation in a manner that significantly impacts human health.

The only additional question to be answered for purposes of the generic human health findings was whether the NRC could project, on a generic basis, that nuclear plants would likely remain within NRC radiation standards while operating under renewed

licenses. The NRC determined that such a projection was, in fact, appropriate.<sup>13</sup> See 61 Fed. Reg. at 28,476 (“A review of the regulatory requirements and the performance of facilities provides the bases to project continuation of performance within regulatory standards.”).

Burton’s Waiver Petition did not show that Indian Point presents “special circumstances” with respect to either of these key underpinnings of the generic human health findings. Her Waiver Petition listed three justifications for waiving the human health

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<sup>13</sup> Burton’s brief in this Court notes that the GEIS described an apparent general industry trend of declining radiation emissions over time, a trend which provided further support for the GEIS’s conclusions regarding human health impacts upon the public. See Burton Brief at 24. Given the basic premise for the generic finding, though, even an upward trend would not undermine the finding if emissions still remain below regulatory limits and do not appear to be in danger of exceeding them. Indeed, as Burton failed to mention when listing the GEIS’s pertinent “major conclusions,” Burton Brief at 24, the GEIS found that, “[i]n about 5 percent of the plants, maximum individual doses are approximately 20 percent of the Appendix I design objective. All other plants are operating far below this level.” GEIS at 4.6.2.5. In other words, even the highest-emission plants were still roughly 80% *below* NRC limits. In any event, as will be explained in Argument section D, *infra*, Burton’s assertions that Indian Point’s emissions have been increasing in recent years appear to lack any meaningful foundation.

findings: (1) the NRC's reliance upon the generic findings "entirely removes from the proceedings arguably the most critical issue involved in continuation of operations during the license renewal term: the very health of the plant's workers and the public surrounding the plant"; (2) "Indian Point's radiological emissions cannot be completely disregarded as a possible factor in the high levels of strontium-90 found in baby teeth near the plant and the correlation found between high strontium-90 levels and elevated cancer incidences in the communities closest to the plant"; and (3) the possibility of "continued and/or worsening leakages" of radioactive material from Indian Point during the term of a renewed license, as well as past alleged occurrence of such leakages, "need to be considered for their environmental impact to human health." Burton Brief at 20-21 (quoting ¶¶ 14A-C from JA 57-58).

None of these statements, however, support Burton's apparent view that this issue should be addressed on an individualized basis in the Indian Point adjudication rather than on a generic basis through rulemaking. All amount to claims that NRC's generic environmental impact findings on the human health effects of

radiation are inadequate as a general matter.

The first statement, in essence, says it was a mistake for the NRC to make generic human health findings in the first place, on the ground that the issue is “arguably the most critical issue involved in...license renewal.” In other words, Burton claims that the issue, because of its “critical” nature, should be fair game for individual licensing adjudications rather than being addressed – absent special circumstances – through rulemaking. It is not apparent, though, why Burton’s statement would not apply to all nuclear power plant license renewal proceedings. Therefore, her statement shows no special circumstances specific to Indian Point justifying a waiver of the generic rules.

Burton’s second statement (regarding strontium-90 and cancer data) does, at least, refer specifically to the area around Indian Point. Yet, the specifics it provided did not support a waiver. It too is tantamount to a general critique of the NRC’s generic human health findings. As the Licensing Board found, the Mangano Declaration and Report, which Burton cited as the basis for this statement, see JA 58 ¶ 14B, claims neither (1) that Indian

Point is likely to exceed the NRC's radiation dose standards during the license renewal period nor (2) that the radiation that Indian Point Units 2 and 3 have emitted or will emit distinguishes Indian Point from other power plants that have sought, are seeking, or will potentially be seeking renewed licenses. JA 101-02.

Indeed, Burton acknowledged at oral argument before the Licensing Board that adherence, or lack thereof, to NRC radiation standards was *immaterial* to her contention, stating that "the point of our contention here is that it doesn't matter for purposes of the health effects if Entergy is complying strictly with the NRC's limits of radiation." JA 77. And Burton does not appear to make any contrary claims in her brief before this Court.

In light of the basic logic behind the pertinent NRC GEIS findings, Burton's failure even to *allege*, much less demonstrate, that Indian Point Units 2 and 3 will be likely to violate NRC radiation regulations during the license renewal period eliminates one of the conceivable routes to a special circumstances waiver with regard to the generic findings at issue here.

Furthermore, viewing the expert materials submitted by

Burton as a whole, *see* JA 10-38, rather than focusing merely on the handful of excerpts that Burton refers to in her brief, *see* Burton Brief at 27-29, it is clear that Burton's experts were seeking primarily to portray radiation-related health effects as a problem associated with nuclear plants generally. As the Licensing Board found, Mr. Mangano's presentation of information regarding Strontium-90 in baby teeth did not attempt to demonstrate that this issue is unique to Indian Point, or claim that it was not an issue common to most nuclear plants. JA 101-02. The Board's finding is well-rooted in Mr. Mangano's own declaration.<sup>14</sup> Similarly, the Mangano Report (underlying his declaration) appears intended

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<sup>14</sup> *See* JA 10, ¶¶ 3-4 (explaining how "all nuclear power reactors" emit the types of radiation that Indian Point emits); JA 10-12, ¶¶ 6-7, 11-12, 14 (discussing various findings related to population living near Indian Point, but making no comparisons vis-à-vis other plants); JA 11, ¶¶ 8-9 (making claims about low-dose radiation risks that would seemingly apply to any nuclear plant); JA 11, ¶ 10 (comparing radiation susceptibility of persons based upon age, but not linking this specifically to Indian Point); JA 12, ¶ 13 (citing a medical journal article regarding infant and fetal death rates near the Grand Gulf nuclear plant in Mississippi, but drawing no specific connection to Indian Point). *See also* JA 84 (Burton stating that "[i]t may well be that the GEIS should be updated as to all nuclear power plants. We're not the ones to say that. We haven't done the research as to other nuclear power plants.").

to make the case that radiation exposure is a concern around nuclear power plants generally, not merely Indian Point.<sup>15</sup>

Indeed, Burton herself asserted during oral argument before the Licensing Board that the foundation of her contention is the proposition “that there is no level of radiation exposure that is safe,” JA 77-78, and the Mangano Declaration contained a similar claim. JA 11, ¶ 9. Because, as Mr. Mangano’s Declaration states, “all nuclear power reactors” emit some amount of radiation, Burton’s contention cannot reasonably be portrayed as uniquely applicable to Indian Point.

Burton’s attempt in this Court to demonstrate otherwise, *see* Burton Brief at 27-29, is simply a *post hoc* attempt to depict a

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<sup>15</sup> *See, e.g.*, JA 26 (stating that Strontium-90 concentrations were found in a baby tooth study to be “30-50% higher in counties closest to six U.S. nuclear plants,” but not claiming this finding to be unique to these six plants); JA 27 (lumping together Indian Point reactors with Millstone and Connecticut Yankee reactors to support alleged general correlation between reactor operation and childhood cancer); JA 32 (arguing that Indian Point closure would reduce childhood cancer cases because, according to one study looking at a set of closed nuclear reactors that did *not* include Indian Point, incidences of childhood cancers decreased downwind of *all of the reactors looked at in the study* following their closure).

generic discussion of nuclear power plant radiation as somehow demonstrating that there is something “special” about Indian Point. Further, as explained more fully in Section D of this Argument, *infra*, the arguments in Burton’s brief would not be persuasive with respect to the “special circumstances” question even if they *did* accurately characterize her expert’s submissions.

In sum, regardless of how much support (if any) the Mangano Declaration and Mangano Report may provide for concerns about radiation exposure at or near nuclear reactors in general,<sup>16</sup> they do *not* substantiate Burton’s argument that such concerns are somehow special or unique to Indian Point. Thus, the concerns raised are generic and best addressed through rulemaking, such as through a rulemaking petition filed under § 2.802. The Board (and subsequently the Commission) accordingly did not rule on the

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<sup>16</sup> Although the substantive merits of Mr. Mangano’s statements are not strictly at issue in the instant case, the NRC does note that the research upon which many of Mr. Mangano’s statements are based is not new to the NRC, and the NRC has previously issued a public fact sheet on the topic. See “Backgrounder on Radiation Protection and the “Tooth Fairy” Issue,” *available at* <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/tooth-fairy.html>.

substantive merits of Burton's claims, but instead reasonably and correctly found that her claims did not satisfy the § 2.335(b) waiver criteria.

The third and final statement Burton's Waiver Petition provided in support of her waiver request regarding the generic human health findings is also unavailing. Burton asserted that "substantial leaks of radioactive material have occurred at the plant since GEIS was enacted in 1996." Yet, Burton did not explain how this runs contrary to any of the assumptions underlying the pertinent GEIS findings so as to render inappropriate those findings' application to the Indian Point. Burton never asserted that Indian Point has a pattern of past failures, or will fail in the future, to adhere to NRC radiation standards, and, as noted above, she has expressly stated that it is immaterial to her contention whether Indian Point does, or does not, comply with NRC radiation standards. JA 77.

As discussed above, a key rationale behind the pertinent GEIS findings is that adherence to NRC radiation standards is sufficient to protect public health. In light of this rationale, there is simply

nothing incongruous about applying these GEIS findings to a plant that has not been shown to have violated NRC radiation standards in the past or to be likely to do so in the future.

Accordingly, Burton's various claims did not meet the "special circumstances" requirement. The Licensing Board, and the Commission, therefore did not act arbitrarily or capriciously in denying her Waiver Petition as to the GEIS findings on human health effects of radiation.

2. *Request to Waive "Reference Man" Standard*

With respect to the generic "Reference Man" standard, which Burton also seeks to waive, the Waiver Petition provided no explanation why Indian Point Units 2 and 3 should be treated differently from other nuclear plants. Instead, the Waiver Petition made two claims that show on their face why the Licensing Board acted reasonably in denying the "Reference man" waiver request.

First, the Waiver Petition asserted that the "Reference Man" standard does not sufficiently account for women, children, and fetuses. JA 58-59, ¶¶ 16-19. One must assume, however, that this asserted defect would implicate the women, children, and fetuses in

the vicinity of *any* nuclear power plant, not merely Indian Point. Burton, not surprisingly, provides no basis to dispute this assumption.

Second, the Waiver Petition claimed that “[r]adiation releases – planned and unplanned, monitored and unmonitored are likely to increase as Indian Point’s physical plant ages,” citing to the Caldecott Declaration for support. JA 59, ¶ 20. Yet, the Caldecott Declaration does not claim that Indian Point Units 2 and 3 are aging in a fashion materially different from any other plant seeking license renewal near the end of its initial 40-year operating license. Moreover, the basic premise of the NRC’s license renewal process is that (1) plants age and (2) the effects of aging must be properly managed. *See* 10 C.F.R. § 54.29 (setting forth criteria for granting license renewal applications); *see also generally* Final Rule, *Nuclear Power Plant License Renewal; Revisions*, 60 Fed. Reg. 22,461 (May 8, 1995) (explaining basis for NRC’s renewal process). Therefore, for purposes of Burton’s request to waive the Reference Man standard, the fact that Indian Point is aging would hardly constitute a “special circumstance” differentiating Indian Point from other nuclear plants

at the license renewal stage.

In addition to making a number of seemingly general statements about nuclear power plant radiation and nuclear power plant aging, JA 35-38, ¶¶ 9-24, 26-28, the Caldecott Declaration does cite to “[o]ne example,” specific to Indian Point Unit 2, of the “equipment failures associated with aging of...mechanical parts” that “are more likely” to occur “[a]s nuclear reactors age.” JA 38, ¶¶ 24-25. But referencing a single example from Indian Point’s history to support an apparently generic concern about all nuclear reactors does not demonstrate anything “special” about Indian Point.

Burton’s brief claims that the Licensing Board’s decision was nonetheless in error because her waiver “request has specific reference to Indian Point and its unique operational history – including its 40 percent increase in capacity factor over the past six years.” Burton Brief at 29. But Burton makes no attempt to explain how Indian Point’s operational history justifies applying a human radiation dose model for Indian Point different from the model used to calculate doses from radiation originating from other nuclear power plants. Simply mentioning some facts about Indian

Point, without tying them to the purpose and effect of the regulation at issue, does not satisfy the waiver standard in § 2.335(b).

Thus, the Licensing Board reasonably and correctly concluded that Burton's Reference Man waiver request, like the request to waive the NRC's generic human health findings, was "a generalized grievance with Commission rules and regulations" that lacked "any evidence of special circumstances" warranting a § 2.335 waiver. JA 103. The Board and the Commission were far from arbitrary or capricious in denying Burton's Waiver Petition as to the "Reference Man" standard.

D. *Additional Specific Claims in Burton's Brief Do Not Demonstrate "Special Circumstances."*

As discussed above, Burton's supporting expert affidavits and report, as the Licensing Board and Commission found, demonstrated that the true concern being raised was a generic one. Relying upon these materials, however, Burton makes certain claims in her brief in this Court that attempt to show that she did, in fact, demonstrate the necessary "special circumstances" to justify her requested waiver of NRC regulations. These claims are unpersuasive.

First, Burton claims that there have been “enormously increased levels of airborne radiation released by Indian Point” since the generic environmental findings on human health effects of radiation were issued by the NRC in 1996. Burton Brief at 22-23. The Burton Brief does not, however, cite to any specific basis for this assertion or other similar assertions (see Burton Brief at 25, 27, 28, 30). The only conceivable basis for these assertions appears at a different place in her brief (p. 13) and discusses the Mangano Report’s analysis of 2001-2004 Indian Point airborne emissions data. See Burton Brief at 13 (describing discussion and data from Mangano Report at JA 24-25).

Yet, even a cursory glance at the pertinent data tables in the Mangano Report reveals that the claimed “increases” hardly establish a trend. The data show seemingly pattern-free fluctuations in airborne radioactivity releases from quarter to quarter – including both increases *and* decreases (see JA 25, Table 4). The Mangano Report merely cherry picks from among the increases while ignoring the various comparably significant decreases.

For instance, the Mangano Report points out an “increase” in fission gas releases between the 1<sup>st</sup> quarter of 2001 and the 1<sup>st</sup> quarter of 2002 that yielded a value “about 100 times higher than 1<sup>st</sup> quarter 2001” (91 millicuries increasing to 8180), but then makes no mention of the subsequent *decrease* of similar magnitude between the 1<sup>st</sup> quarter 2002 and the 4<sup>th</sup> quarter of 2002 (8180 decreasing to 55). See JA 24-25.

Similarly, the report points out that fission gas releases in the 2<sup>nd</sup> quarter of 2004 (1450 millicuries) were higher than “typical 2003 releases,” but fails to mention that each other quarter of 2004 shows releases that are clearly *lower* than “typical 2003 releases,” and also fails to mention that the aforementioned 2<sup>th</sup> quarter release in 2004 was *lower* than the 3<sup>rd</sup> quarter release in 2003 (1590 millicuries). See JA 24-25.

How Burton extracts a trend of increasing emissions from this seemingly meaningless analysis of quarter-to-quarter fluctuations is unclear, and Burton does not attempt to explain it. Indeed, the Mangano Report itself ultimately characterizes this data as revealing “swings in emissions over time,” as opposed to a sustained

increase, and makes no apparent attempt to understand the reasons for these “swings” or to explain their significance. See JA 24.<sup>17</sup>

Another claim in the Burton Brief is that Indian Point’s atmospheric radiation releases between 1970 and 1993 were “the fifth highest of 72 nuclear power stations then operating in the U.S.” Burton Brief at 13. What Burton neglects to note, however, is that *her own expert* stated in his report that the data underlying this purported ranking was later revised after a clerical error was discovered, yielding a ranking of 12<sup>th</sup>, rather than 5<sup>th</sup>, for Indian Point. JA 24.

More importantly, the GEIS specifically referenced the report that includes the data upon which Mangano relies. See JA 24 (listing the “Source” for the data in “Table 3” as NUREG/CR-2907,

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<sup>17</sup> Having found that Burton was not alleging any violations by Indian Point of NRC radiation standards, the Licensing Board had no occasion to assess whether Indian Point had, in fact, complied with NRC radiation regulations. See JA 101. In response to a Board question at oral argument, however, counsel for the NRC staff did state that the NRC staff had “not seen anything that would indicate [Indian Point does] not meet the regulations” on radiation releases and doses. JA 79.

authored by J. Tichler of Brookhaven National Laboratory); GEIS at 4.11 (citing NUREG/CR-2907). Accordingly, when issuing the GEIS findings on human health effects of radiation, the NRC was aware that some plants have historically emitted more radiation than others; yet, the NRC did not condition the GEIS findings to cover only those plants at the lower end of the spectrum or to exclude plants at the higher end. See 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1.

Therefore, Burton's comparison of Indian Point's emissions to those of other plants between 1970 and 1993 does not meaningfully challenge the rationale for applying the pertinent generic environmental impact findings to the Indian Point proceeding. What matters, again, is whether Indian Point's emissions and worker doses will satisfy NRC regulatory standards, not whether Indian Point has emitted, or will emit, more or less radiation than other plants.

Burton also suggests that the generic human health effects findings, because they were made in 1996, should not apply at Indian Point because they could not have accounted for the

subsequent 12 years of Indian Point's operating history. Burton Brief at 24. Needless to say, the purpose of any generic environmental impact finding is to avoid duplicative work or inconsistent results in *future* proceedings. Accordingly, the passage of time, on its own, does not undermine the basis for a particular GEIS finding. Moreover, a similar passage-of-time/operating-history argument could presumably be made with respect to any other plant seeking license renewal after the GEIS was issued.<sup>18</sup> Therefore, Burton's assertion here that the GEIS findings fail to incorporate up-to-date operating history does not show that Indian Point presents "special circumstances."

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<sup>18</sup> As noted previously at pp. 9, 12, *supra*, new information regarding a plant that is pertinent to a generic "Category 1" issue (including information from a plant's operating history) can be raised by the applicant in its environmental report, or through public comments on the NRC's plant-specific SEIS, or through a rulemaking petition. Upon receiving new and significant information, the NRC staff can seek to suspend the pertinent generic environmental impact finding(s) or delay the granting of renewed licenses until any concerns are resolved. See pp. 12-13, *supra*. Thus, the fact that such new operating history information might not support an adjudicatory contention absent a "special circumstances" waiver does not mean that the NRC lacks mechanisms to consider such information, or that the NRC would ignore the new information if it is significant and pertinent.

Additionally, Burton claims that increases since 1996 in Indian Point's "capacity factor" and its authorized power output constitute the necessary "special circumstances." See Brief at 27-28. A plant's "capacity factor" is a measure of its operating efficiency that compares the plant's actual power production to its capacity for power production. Thus, Burton is claiming that Indian Point's increased efficiency in recent years is a "special circumstance" justifying a waiver.

Burton does not explain how this efficiency increase differentiates Indian Point from other nuclear plants, much less how it does so in a manner material to her waiver request.<sup>19</sup> Burton also does not explain how Indian Point's power uprates (i.e., increases in a plant's authorized maximum power output) qualify as "special circumstances" for waiver purposes.<sup>20</sup> As discussed above,

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<sup>19</sup> In actuality, substantial capacity factor increases have been an industry-wide phenomenon over the past decade, and so are hardly unique to Indian Point. See "NRC 2008-2009 Information Digest" 22, Table 4 (entitled "U.S. Nuclear Power Reactor Average Net Capacity Factor and Net Generation, 1996-2007"), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v20/sr1350v20.pdf>.

<sup>20</sup> As the NRC's public website indicates, the NRC has granted  
(continued...)

the NRC views emissions as causing only “small” human health effects if they remain within NRC regulatory standards, and Burton makes no attempt to argue that these capacity factor or power output increases show that NRC radiation standards will be exceeded. Therefore, these claims do not provide any basis to question the validity of the NRC’s decision on her Waiver Petition.<sup>21</sup>

Burton simply has not demonstrated that Indian Point presents the sort of “special circumstances” that would justify a

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(...continued)

over eighty power uprates in the years since 1996, with Indian Point accounting for only four of those eighty. See “Approved Power Uprates,” <http://www.nrc.gov/reactors/operating/licensing/power-uprates/approved-applications.html>. Thus, the issue of power uprates subsequent to 1996 is hardly “special” to Indian Point. In addition, by the start of 1996, the NRC had already granted nearly thirty power uprates. See *id.* The possibility of power uprates, therefore, was in no way foreign to the NRC when it issued the GEIS in 1996.

<sup>21</sup> The Licensing Board chairman did agree with Burton during oral argument, as Burton states in her brief, that Indian Point’s capacity factor change was “site-specific to Indian Point.” Burton Brief at 27. However, as confirmed by the fact that the Board unanimously denied her Waiver Petition, it is not enough merely to present some site-specific information about the facility in question; rather, the site-specific information must demonstrate that the waiver criteria are satisfied. Burton’s capacity factor information, as explained above, did not do so.

waiver of generally applicable NRC regulations. The appropriate procedural vehicle for her claims, as the Board explained, would be a rulemaking petition under 10 C.F.R. § 2.802, rather than the adjudicatory contention that Burton insists on pursuing. She has filed no rulemaking petition.<sup>22</sup>

E. *Burton Mischaracterizes the "Special Circumstances" Standard Used by the Licensing Board*

Burton's brief in this Court asserts that the Licensing Board "set an impossible hurdle for any petitioner to overcome" when trying to establish "special circumstances" to support a waiver of NRC regulations. Burton Brief at 28-29. Burton's assertion, however, is based entirely upon her misinterpretation of a single footnote regarding the materiality of past and current regulatory violations to the NRC's license renewal process.<sup>23</sup>

Past or current violations of NRC rules are not technically the

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<sup>22</sup> Burton can still file a rulemaking petition, as there are no deadlines for doing so.

<sup>23</sup> The Licensing Board footnote states: "Even if excessive radiological emissions have occurred at Indian Point they would pertain to current operations and therefore would not be within the scope of this proceeding." JA 101 n.18.

issue in license renewal proceedings, which look to the plant's expected future performance during a future period (i.e. during the term of the applied-for renewed license). *See generally* 10 C.F.R. Part 54. If a member of the public wishes to assert that a nuclear plant has failed, or is failing, to comply with one or more NRC regulations, the proper mode under NRC procedures would be a request for enforcement action under 10 C.F.R. § 2.206, not a contention filed in a license renewal proceeding. *See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3)*, CLI-06-4, 63 NRC 32, 38, (2006) (available on Lexis, but not Westlaw).

Accordingly, the Licensing Board was simply attempting, in the midst of discussing Burton's failure to allege prior regulatory violations by Indian Point, to clarify in this brief footnote that past regulatory violations *per se* "would not be within the scope of [the Indian Point license renewal] proceeding." *See* JA 101-02 n.18. By characterizing past violations as outside "the scope" of the proceeding, the Board was *not* claiming that past operating history would be *irrelevant* to the proceeding. Indeed, in the main text

associated with the footnote, the Licensing Board made an express finding on the question whether Burton has claimed that any “radiological releases that have occurred in the past...exceed established radiological dose limits.” JA 101 (emphasis added). If, as Burton claims, the Licensing Board had actually viewed past operating history as entirely irrelevant, that finding would have been pointless, and the Licensing Board presumably would not have included it.

Further, if the Licensing Board’s footnote were given the meaning Burton ascribes to it, the footnote would be inconsistent with prior handling by Licensing Boards of license renewal contentions. This is another reason why this Court should decline to read the footnote in the manner proposed by Burton.

For example, a recently admitted, and litigated, license renewal contention regarding the Oyster Creek nuclear plant focused upon the sufficiency of Oyster Creek’s plans to ensure that corrosion of the reactor’s “drywell shell,” which had occurred during the plant’s operation under its initial license, would not threaten the drywell shell’s integrity during the term of a renewed license.

This contention focused specifically upon the frequency with which the drywell shell's thickness would be monitored, claiming that the applicant's proposed frequency was insufficient. *See Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, LBP-06-22, 64 NRC 229, 240-43 (2006). As the basis for its contention, the intervenor looked to past rates of corrosion of the drywell shell, compared them to the current thickness of the shell, and reasoned that a monitoring frequency of at least once per year would be necessary to account for the possibility of similar rates of corrosion occurring in the future. *Id.* at 240-41. The Licensing Board in the Oyster Creek proceeding found this basis for the contention sufficient for admissibility, even though it relied heavily upon extrapolations from Oyster Creek's past history of drywell shell corrosion. *Id.*

Finally, the NRC decision cited by the Licensing Board as the basis for the footnote in question did not hold that past operating history is irrelevant to license renewal proceedings. In that decision, the intervenor's motion to reopen the Millstone license renewal proceeding to add a new contention was denied because

the intervenor "did not explain how the [intervenor's allegation of a current regulatory violation] falls within the framework of a license renewal proceeding, which focuses on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues." *Millstone*, 63 NRC at 37.<sup>24</sup> Thus, the *Millstone* contention failed because it focused upon past operating history without linking it to future operation during the license renewal term, not because past operating history is automatically irrelevant to license renewal.

In short, Burton's assertion that the Board employed an

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<sup>24</sup> Burton, incidentally, was serving as the intervenor's representative in the *Millstone* case. In that case, the intervenor (Connecticut Coalition Against Millstone, or "CCAM") claimed that the Millstone nuclear plant's emissions of Strontium-90 *did* violate NRC radiation standards. 63 NRC at 35. Because the NRC relies upon the enforcement process, rather than the license renewal process, to ensure that current licensees are complying with NRC regulations and to act against those who are not, the Commission determined it should treat CCAM's license renewal contention as a 10 C.F.R. § 2.206 request for action. Accordingly, the Commission referred the matter to the agency staff for appropriate action rather than adjudicating the matter in the license renewal proceeding.

In the instant case, however, Burton has *not* claimed that Indian Point has been violating NRC radiation standards. Thus, there was no basis for the NRC to treat her contention as a request for action under § 2.206.

“impossible” standard to meet when evaluating her “special circumstances” claims is incorrect. Rather, the Board applied the standard that it said it was applying, namely whether Burton had shown “special circumstances with respect to the subject matter of the particular proceeding...such that the application of the rule or regulation...would not serve the purposes for which the rule or regulation was adopted.” JA 99.

F. *Burton’s Discussion of 10 C.F.R. § 2.309(f)(1) Factors is Irrelevant to the Agency Decision Being Challenged*

Burton devotes the first half of the Argument section in her brief to addressing the threshold factors in 10 C.F.R. § 2.309(f)(1) that contentions must satisfy in order to be admissible in NRC proceedings. Burton Brief at 10-18.

However, because the NRC denied Burton’s Hearing Request on the ground that her contention constituted a challenge to generally applicable (and unwaived) NRC regulations, the NRC did not actually reach the question whether Burton’s contention satisfied the full slate of § 2.309(f)(1) admissibility factors.<sup>25</sup> See JA

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<sup>25</sup> The NRC did technically address *one* of the § 2.309(f)(1) factors— § 2.309(f)(1)(iii)—when it found that Burton’s contention  
(continued. . .)

111-113. Accordingly, in the absence of any NRC ruling on the question, this Court need not and should not consider whether Burton's contention satisfies the § 2.309(f)(1) factors. *See INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002).

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(...continued)

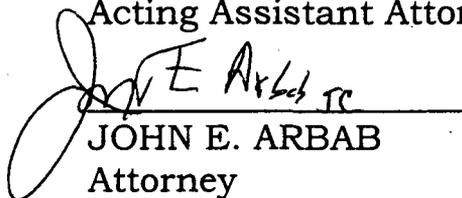
was "outside the scope of [the Indian Point] proceeding" and therefore inadmissible JA 113. But this determination depended entirely upon the fact that Burton's Waiver Petition was denied. *See id* ("Having denied the Section 2.335 Petition, we find this contention inadmissible.") (emphasis deleted).

**CONCLUSION**

For the foregoing reasons, the Court should deny the petition  
for review.

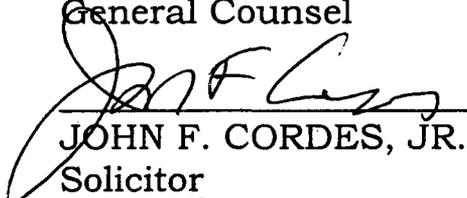
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**Special Appendix (Regulatory Addendum)**

10 C.F.R. § 2.335.....SPA-2  
10 C.F.R. § 2.802.....SPA-3  
10 C.F.R. § 51.53.....SPA-5  
10 C.F.R. Part 51, Subpt. A, App. B.....SPA-8  
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# 10 C.F.R. 2.335

## § 2.335

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### § 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examina-

tion or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima facie* showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

# 10 C.F.R. 2.802

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## Subpart H—Rulemaking

for example, via Electronic Information Exchange, e-mail, or CD-ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by calling (301) 415-0439, by e-mail to [EIE@nrc.gov](mailto:EIE@nrc.gov), or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The guidance discusses, among other topics, the formats the NRC can accept, the use of electronic signatures, and the treatment of non-public information.

(b) A prospective petitioner may consult with the NRC before filing a petition for rulemaking by writing to the Chief, Rulemaking, Directives, and Editing Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. A prospective petitioner also may telephone the Rulemaking, Directives, and Editing Branch on (301) 415-7163, or toll free on (800) 368-5642, or send e-mail to [NRCREP@nrc.gov](mailto:NRCREP@nrc.gov).

(1) In any consultation prior to the filing of a petition for rulemaking, the assistance that may be provided by the NRC staff is limited to—

(i) Describing the procedure and process for filing and responding to a petition for rulemaking;

(ii) Clarifying an existing NRC regulation and the basis for the regulation; and

(iii) Assisting the prospective petitioner to clarify a potential petition so that the Commission is able to understand the nature of the issues of concern to the petitioner.

(2) In any consultation prior to the filing of a petition for rulemaking, in providing the assistance permitted in paragraph (b)(1) of this section, the NRC staff will not draft or develop text or alternative approaches to address matters in the prospective petition for rulemaking.

(c) Each petition filed under this section shall:

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or

### §2.802 Petition for rulemaking.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent either by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; by facsimile; by hand delivery to the NRC's offices at 11555 Rockville Pike, Rockville, Maryland; or, where practicable, by electronic submission,

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specify the regulation which is to be revoked or amended;

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

(3) Include a statement in support of the petition which shall set forth 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. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.

(e) If it is determined that the petition includes the information required by paragraph (c) of this section and is complete, the Director, Division of Administrative Services, Office of Administration, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC Web site, <http://www.nrc.gov>. Public comment may be requested by publication of a notice of the docketing of the petition in the FEDERAL REGISTER, or, in appropriate cases, may be invited for the first time upon publication in the FEDERAL REGISTER of a proposed rule developed in response to the petition. Publication will be limited by the requirements of Section 181 of the Atomic Energy Act of 1954, as amended, and may be limited by order of the Commission.

(f) If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be made within 30 days from

the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete, the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition.

(g) The Director, Division of Administrative Services, Office of Administration, will prepare on a semiannual basis a summary of petitions for rulemaking before the Commission, including the status of each petition. A copy of the report will be available for public inspection and copying at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room.

[44 FR 61322, Oct. 25, 1979, as amended at 46 FR 35487, July 9, 1981; 52 FR 31609, Aug. 21, 1987; 53 FR 52993, Dec. 30, 1988; 54 FR 53315, Dec. 28, 1989; 56 FR 10360, Mar. 12, 1991; 59 FR 44895, Aug. 31, 1994; 59 FR 60552, Nov. 25, 1994; 62 FR 27495, May 20, 1997; 63 FR 15742, Apr. 1, 1998; 64 FR 48949, Sept. 9, 1999; 68 FR 58799, Oct. 10, 2003; 73 FR 5717, Jan. 31, 2008]

10 C.F.R. 51.53  
(Pertinent Subsections)

Nuclear Regulatory Commission

§51.53

**§51.53 Postconstruction environmental reports.**

(a) *General.* Any environmental report prepared under the provisions of this section may incorporate by reference any information contained in a prior environmental report or supplement thereto that relates to the pro-

duction or utilization facility or site, or any information contained in a final environmental document previously prepared by the NRC staff that relates to the production or utilization facility or site. Documents that may be referenced include, but are not limited to,

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the final environmental impact statement; supplements to the final environmental impact statement, including supplements prepared at the license renewal stage; NRC staff-prepared final generic environmental impact statements; and environmental assessments and records of decisions prepared in connection with the construction permit, operating license, early site permit, combined license and any license amendment for that facility.

modifications directly affecting the environment or affecting plant effluents that affect the environment. In addition, the applicant shall discuss in this report the environmental impacts of alternatives and any other matters described in § 51.45. The report is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives to the proposed action except insofar as such costs and benefits are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. The environmental report need not discuss other issues not related to the environmental effects of the proposed action and the alternatives. In addition, the environmental report need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).

(3) For those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995, the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations:

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

(ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part. The required analyses are as follows:

(A) If the applicant's plant utilizes cooling towers or cooling ponds and withdraws make-up water from a river whose annual flow rate is less than  $3.15 \times 10^{12}$  ft<sup>3</sup>/year ( $9 \times 10^{10}$  m<sup>3</sup>/year), an assessment of the impact of the proposed action on the flow of the river and related impacts on instream and riparian

(c) *Operating license renewal stage.* (1) Each applicant for renewal of a license to operate a nuclear power plant under part 54 of this chapter shall submit with its application a separate document entitled "Applicant's Environmental Report—Operating License Renewal Stage."

(2) The report must contain a description of the proposed action, including the applicant's plans to modify the facility or its administrative control procedures as described in accordance with § 54.21 of this chapter. This report must describe in detail the

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ecological communities must be provided. The applicant shall also provide an assessment of the impacts of the withdrawal of water from the river on alluvial aquifers during low flow.

(B) If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment.

(C) If the applicant's plant uses Ranney wells or pumps more than 100 gallons (total onsite) of ground water per minute, an assessment of the impact of the proposed action on groundwater use must be provided.

(D) If the applicant's plant is located at an inland site and utilizes cooling ponds, an assessment of the impact of the proposed action on groundwater quality must be provided.

(E) All license renewal applicants shall assess the impact of refurbishment and other license-renewal-related construction activities on important plant and animal habitats. Additionally, the applicant shall assess the impact of the proposed action on threatened or endangered species in accordance with the Endangered Species Act.

(F) If the applicant's plant is located in or near a nonattainment or maintenance area, an assessment of vehicle exhaust emissions anticipated at the time of peak refurbishment workforce must be provided in accordance with the Clean Air Act as amended.

(G) If the applicant's plant uses a cooling pond, lake, or canal or discharges into a river having an annual average flow rate of less than  $3.15 \times 10^{12}$  ft<sup>3</sup>/year ( $9 \times 10^{10}$  m<sup>3</sup>/year), an assessment of the impact of the proposed action on public health from thermophilic organisms in the affected water must be provided.

(H) If the applicant's transmission lines that were constructed for the specific purpose of connecting the plant to the transmission system do not meet

the recommendations of the National Electric Safety Code for preventing electric shock from induced currents, an assessment of the impact of the proposed action on the potential shock hazard from the transmission lines must be provided.

(I) An assessment of the impact of the proposed action on housing availability, land-use, and public schools (impacts from refurbishment activities only) within the vicinity of the plant must be provided. Additionally, the applicant shall provide an assessment of the impact of population increases attributable to the proposed project on the public water supply.

(J) All applicants shall assess the impact of highway traffic generated by the proposed project on the level of service of local highways during periods of license renewal refurbishment activities and during the term of the renewed license.

(K) All applicants shall assess whether any historic or archaeological properties will be affected by the proposed project.

(L) If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.

(M) [Reserved]

(iii) The report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues in appendix B to subpart A of this part. No such consideration is required for Category 1 issues in appendix B to subpart A of this part.

(iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.

# 10 C.F.R. Pt. 51, Subpt. A, App. B

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## APPENDIX B TO SUBPART A OF PART 51— ENVIRONMENTAL EFFECT OF RENEW- ING THE OPERATING LICENSE OF A NUCLEAR POWER PLANT

The Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995. Table B-1 summarizes the Commission's findings on the scope and magnitude of environmental impacts of renewing the operating license for a nuclear power plant as required by section 102(2) of the National Environmental Policy Act of 1969, as amended. Table B-1, subject to an evaluation of those issues identified in Category 2 as requiring further analysis and possible significant new information, represents the analysis of the environmental impacts associated with renewal of any operating license and is to be used in accordance with §51.95(c). On a 10-year cycle, the Commission intends to review the material in this appendix and update it if necessary. A scoping notice must be published in the FEDERAL REGISTER indicating the results of the NRC's review and inviting public comments and proposals for other areas that should be updated.

10 C.F.R. PT. 51, SUBPT. A, APP. B  
 TABLE B-1 (PERTINENT PORTIONS)

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Pt. 51, Subpt. A, App. B

TABLE B-1—SUMMARY OF FINDINGS ON NEPA ISSUES FOR LICENSE RENEWAL OF NUCLEAR POWER PLANTS<sup>1</sup>—Continued

Issue	Category <sup>2</sup>	Findings <sup>3</sup>
<b>Human Health</b>		
Radiation exposures to public (license renewal term). Occupational radiation exposures (license renewal term).		<sup>1</sup> SMALL. Radiation doses to the public will continue at current levels associated with normal operations. <sup>1</sup> SMALL. Projected maximum occupational doses during the license renewal term are within the range of doses experienced during normal operations and normal maintenance outages, and would be well below regulatory limits.

TABLE B-1—SUMMARY OF FINDINGS ON NEPA ISSUES FOR LICENSE RENEWAL OF NUCLEAR POWER PLANTS<sup>1</sup>—Continued


<sup>1</sup> Data supporting this table are contained in NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996) and NUREG-1437, Vol. 1, Addendum 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report Section 6.3—Transportation," Table 9.1 "Summary of findings on NEPA issues for license renewal of nuclear power plants," Final Report" (August 1999).

<sup>2</sup> The numerical entries in this column are based on the following category definitions:  
 Category 1: For the issue, the analysis reported in the Generic Environmental Impact Statement has shown:  
 (1) The environmental impacts associated with the issue have been determined to apply either to all plants or, for some issues, to plants having a specific type of cooling system or other specified plant or site characteristic;  
 (2) A single significance level (i.e., small, moderate, or large) has been assigned to the impacts (except for collective off site radiological impacts from the fuel cycle and from high level waste and spent fuel disposal); and  
 (3) Mitigation of adverse impacts associated with the issue has been considered in the analysis, and it has been determined that additional plant-specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation.  
 The generic analysis of the issue may be adopted in each plant-specific review.

Category 2: For the issue, the analysis reported in the Generic Environmental Impact Statement has shown that one or more of the criteria of Category 1 cannot be met, and therefore additional plant-specific review is required.

<sup>3</sup> The impact findings in this column are based on the definitions of three significance levels. Unless the significance level is identified as beneficial, the impact is adverse, or in the case of "small," may be negligible. The definitions of significance follow:

**SMALL**—For the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. For the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in this table.

**MODERATE**—For the issue, environmental effects are sufficient to alter noticeably, but not to destabilize, important attributes of the resource.

**LARGE**—For the issue, environmental effects are clearly noticeable and are sufficient to destabilize important attributes of the resource.

For issues where probability is a key consideration (i.e., accident consequences), probability was a factor in determining significance.

<sup>4</sup> NA (not applicable). The categorization and impact finding definitions do not apply to these issues.

[61 FR 66546, Dec. 18, 1996, as amended at 62 FR 59276, Nov. 3, 1997; 64 FR 48507, Sept. 3, 1999; 66 FR 39278, July 30, 2001]

**ANTI-VIRUS CERTIFICATION FORM**

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

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and as calculated by my word processing software (Word), contains 11,536 words.

  
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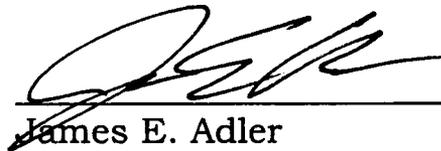
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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 6<sup>th</sup> day of May 2009 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of **Brief for Federal Respondents**:

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