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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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In re: Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. April 22, 2011
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STATE OF NEW YORK MOTION TO COMPEL NRC STAFF
TO PRODUCE DOCUMENTS RELIED UPON IN STAFF'S
FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

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TEMPLATE = SECY 041

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I. INTRODUCTION

The State of New York, for the past three months, has repeatedly sought documents on which the NRC Staff rely in its December 2010 Final Supplemental Environmental Impact Statement (“FSEIS”) detailing work performed by Sandia National Laboratory (“Sandia”) and Information Systems Laboratories, Inc. (“ISLI”) as part of NRC Staff’s review required by the National Environmental Policy Act (“NEPA”). Despite repeated requests for the relevant Sandia and ISLI documents, NRC Staff has neither produced nor clearly identified any of these documents. Staff’s unwillingness to produce these documents, which it alludes to in the FSEIS,¹ which are relevant to admitted contentions, and which are clearly a part of the environmental review record in this proceeding, is contrary to the clearly stated Commission policy in favor of public participation and transparency and demonstrates a willful disregard of regulatory obligations. The State now files this motion to compel NRC Staff to produce the relevant documents.²

II. FACTS

On December 3, 2010 Staff released the FSEIS for Indian Point. NUREG-1437, Supplement 38. The FSEIS relied heavily on consulting work performed for Staff as part of its analysis and response to issues raised by the State of New York in its DSEIS. The FSEIS states that “[t]he NRC staff performed its [SAMA] review with contract assistance from Information Systems Laboratories, Inc. and Sandia National Laboratory.” FSEIS, Vol. 1 at 5-4. The FSEIS

¹ Staff does not identify any actual documents in the FSEIS, but as the State details in section IV.B below, the Staff identifies Sandia and/or ISLI analyses or other assistance on more than a dozen occasions in the FSEIS.

² This is the second time the State has had to file a motion to compel NRC Staff to comply with NRC discovery regulations. *See* State of New York’s Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee In Compliance with the National Environmental Policy Act and NRC Disclosure Regulations (Jan. 15, 2010).

also states that “[i]n reviewing the issues raised in these contentions, the NRC staff obtained the technical assistance of Sandia National Laboratory (Sandia). The NRC staff and Sandia performed a comprehensive review of relevant documents and references.” FSEIS, Vol. 3 at Appendix G pp. G-22.³ However, the FSEIS did not specifically identify any Sandia- or ISLI-authored documents that resulted from this collaboration. Moreover, Staff did not identify or produce any Sandia- or ISLI-authored documents in Staff’s disclosures at the end of December 2010 or in its January, February, or March 2011 disclosures.

In January, 2011, when it was evident Staff had not identified or voluntarily produced the Sandia or ISLI documents it referenced in the FSEIS, counsel for the State contacted Staff counsel to specifically request the withheld documents, first by telephone and then in a letter. See April 21, 2011 Declaration of AAG Janice A. Dean (“Dean Decl.”) ¶ 2, Attachment 1.⁴ The State’s January 31 letter request specifically noted Staff’s obligations to produce the Sandia and ISLI documents under NRC regulations and specifically identified the documents the State seeks:

all documents prepared by Sandia, including but not limited to computer input/output files, sensitivity studies of any computer models or the input assumptions that were used, validation of any computer models or the input assumptions that were used, correspondence between NRC Staff and Sandia

³ The issues addressed in the FSEIS Vol. 3, Appendix G at G-22 to G-29 were all raised in the State’s comments on the DSEIS. Comments Submitted by the New York State Office of the Attorney General on the Draft Supplemental Environmental Impact Statement Prepared by the Staff of the Nuclear Regulatory Commission for the Renewal of the Operating Licenses for Indian Points Units 2 and 3, Buchanan, New York (Mar. 18, 2009), ML090771328. NRC regulations at 10 C.F.R. §§ 51.91(a)(1) and 51.91(3)(b) obligate Staff to include analysis of DSEIS comments in the FSEIS. There is no NRC regulation that requires or permits Staff to challenge admitted contentions in the FSEIS and Staff’s characterization of its FSEIS comments as responses to admitted contentions appears to be either an inadvertent error or a deliberate attempt to make it appear that what is discussed is related to litigation. As discussed *infra* the FSEIS characterization of the discussion does not shield the documents relied upon Staff or generated by Sandia and ISLI from disclosure in this proceeding.

⁴ “Attachment” refers to documents attached to the Dean Declaration.

regarding the consultation, a copy of any contract or task assignment between NRC and Sandia or any such document prepared in consultation with Sandia, during the Staff's review of Entergy's Indian Point relicensing application conducted pursuant to the National Environmental Policy Act ("NEPA"). This request includes but is not limited to any document prepared by or in consultation with Joseph Jones, Nathan Bixler, or Fotini Watson, who are identified in the FSEIS, Appendix B, as Sandia employees having expertise in Severe Accident Mitigation Alternatives at Sandia and are identified as authors of the FSEIS (*see* NRC Bibliographic Data Sheet).

all documents prepared by Information Systems Laboratories, Inc., or prepared in consultation with Information Systems Laboratories, Inc., during the Staff's review of Entergy's Indian Point relicensing application conducted pursuant to the NEPA.

Id. at 1-2.

Over a month later, on March 7, 2011, having had no response to the January 31, 2011 letter, Assistant Attorney General Dean sent an e-mail to Sherwin Turk reminding him of the letter sent a month earlier and noting that none of the requested documents had yet been disclosed. Dean Decl., Attachment 5. Mr. Turk responded on that same day that the person responsible for disclosure analysis was tied up on another hearing, that reference to the State's request would be made in a filing answering the State's proposed Contention 12C, and that Mr. Turk hoped to have a substantive response to the request for documents "within a week or so." Dean Decl., Attachment 1.

Staff's Answer to proposed New York Contention 12-C again deferred a response to the month old request for documents, documents identified three months earlier in the FSEIS. NRC Staff's Answer to State of New York Contention 12-C Concerning the Final SEIS Evaluation of Decontamination and Clean up Costs in a Severe Accident (Mar. 7, 2011) at 18, n. 39 ("The Staff is reviewing its document disclosures to date, and will determine whether the analyses in question were, or should be, disclosed; the Staff will notify the State of that determination promptly"). However, to date, no disclosures have been made, either on the available log or on

the privilege log, of the documents the State seeks which were referenced in the FSEIS.

Out of an abundance of caution, and to make sure Staff had a last chance to identify and produce the documents, Assistant Attorney General Dean called Mr. Turk on April 15th and spoke to him when he returned the call on April 18th. Dean Decl., ¶ 8. Mr. Turk stated Staff's position that the documents had already been listed on privilege logs, perhaps more than once, and that Brian Harris, counsel for NRC Staff, would be sending the State a letter. *Id.* at 9. AAG Dean sent a follow-up email to Mr. Harris seeking the dates of the disclosure logs on which Staff believed the requested documents had been listed; Mr. Turk responded to AAG Dean's email to Mr. Harris, also on April 18th. In this email Mr. Turk asserts that Staff had identified all documents the State requested in earlier Deliberative Process Privilege ("DPP") logs and listed numerous DPP numbers for documents Staff asserts are responsive to the State's request. *See* e-mail from Sherwin Turk to Janice Dean, April 18, 2011, attached to the Dean Declaration as Attachment 5. The State's review of Staff's DPP logs, however, reveals that the documents Mr. Turk listed are not responsive to State's request. Letter, Janice Dean to Sherwin Turk, April 20, 2011 (Dean Decl., Attachment 7). Instead of identifying Sandia- or ISLI-authored documents generated during their review of the DSEIS and comments, Staff has primarily identified either (1) documents *it* authored, not documents authored by Sandia or ISLI; (2) documents commenting on draft language proposed for the FSEIS; or (3) documents which are facially unrelated to the environmental issues raised in the State's DSEIS comments. *See* Dean Decl., Attachment 6 (analysis of each allegedly relevant disclosure).

In her April 20, 2011 letter to Mr. Turk, AAG Dean explained why the State can no longer accept Staff's continued refusal to either identify or produce the documents upon which it relied in reaching the conclusions offered in the FSEIS, and advised Staff that this Motion to

Compel would be filed. Dean Decl., Attachment 7. As the Board is aware, preparation of direct testimony on contentions including Contentions 12/12A/12B and 16/16A/16B is due in less than 60 days. Staff has not provided the documents it should have produced when it issued the FSEIS, documents the State requested three months ago. This Motion to Compel is essential to permit the State to fully prepare its case.

III. REGULATORY REQUIREMENTS

Once a hearing is convened mandatory discovery is imposed on NRC Staff by, among other provisions, 10 C.F.R. § 2.336(b) which requires that:

the NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

- (1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;
- (2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;
- (3) *All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;*
- (4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and
- (5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

10 C.F.R. § 2.336(b)(emphasis added).

Staff is also required to comply with 10 C.F.R. § 2.1203 in all Subpart L proceedings:

- (a)(1) Within thirty (30) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall file in the docket, present to the presiding officer, and make available to the parties to

the proceeding a hearing file. . . .

(b) The hearing file consists of the application, if any, and any amendment to the application, and, when available, any NRC environmental impact statement or assessment and *any NRC report related to the proposed action*, as well as any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. Hearing file documents already available at the NRC Web site and/or the NRC Public Document Room when the hearing request/petition to intervene is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file.

(c) *The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials as required in paragraphs (a) and (b) of this section.*

Id. (emphasis added).

Finally, if Staff elects to become a party in a Subpart L proceeding, Staff is obligated, by 10 C.F.R. § 2.1202(b)(3), to fulfill “*all . . . responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.*” *Id.* (emphasis added). Among those responsibilities are the requirements of 10 C.F.R. § 2.336(a)(2)(i) which provide that a party shall provide:

A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are *relevant to the contentions*, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation

Id. (emphasis added). The § 2.336(a) introductory language indicating that its provisions are applicable to “all parties, other than the NRC staff” is superseded by the specific provision in Part L regarding obligations of the Staff once it chooses to be a party as to a particular contention. *See* 10 C.F.R. § 2.1202(b)(3) (“Once the NRC staff chooses to participate as a party, it shall have all the . . . responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.”). Pursuant to 10 C.F.R. § 2.3(a) “[i]n any

conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.” Thus, the obligation imposed by § 2.1202(b)(3) in Subpart L controls and Staff, once it chooses to be a party with regard to a contention, is obligated to comply with all requirements applicable to parties as well as its obligations to make certain disclosures relevant to all matters related to its review of the application pursuant to § 2.336(b)(3)-(5). See 69 Fed.Reg. 2182, 2228 Changes to Adjudicatory Process (Jan. 14, 2004) specifically identifying the Staff obligations under § 2.336(b) without mentioning the obligations under § 2.336(a).⁵

As NRC made clear in its Statement of Considerations for the 2004 Part 2 amendments, “the Commission believes that in all hearing tracks the parties will have sufficient information available to prepare their cases.” 69 Fed. Reg. at 2188. In *Vermont Yankee* the Board concluded:

The scope of the Staff’s duty to make mandatory disclosures is broader than the scope of its duty to provide the hearing file. These required disclosures are the “foundation” of the Commission’s goals of reducing the “burden of discovery”

⁵ Although the regulatory history of the Part 2 regulations does not identify § 2.336(a) as applying to Staff when it becomes a party with respect to a particular contention, the language of the regulations could not be clearer imposing on Staff “all . . . responsibilities of a party ” with respect to any contention on which it chooses to participate. It is well-established that:

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. 1A Sutherland, Statutory Construction § 31.06 (4th ed. 1984); *Lewis v. United States*, 445 U.S. 55, 60 (1980). Further, the entirety of the provision must be given effect. 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1984). Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, *its interpretation may not conflict with the plain meaning of the wording used in that regulation.* *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986), *aff’d*, 484 U.S. 1 (1987); *GUARD v. NRC*, 753 F.2d 1144, 1146 (D.C. Cir. 1985).

In re Calvert Cliffs 3 Nuclear Project, LLC, LBP-9-15, 70 N.R.C. 198, 214 (July 30, 2009) quoting *Long Island Lighting Co.* (Shorcham Nuclear Power Station, Unit 1), ALAB-900, 28 N.R.C. 275, 288 (1988)(footnote and internal citations omitted; emphasis added).

and “enhanc[ing] the participation of ordinary citizens in the discovery process.”
69 Fed. Reg. at 2194.

* * *

As the hearing file and mandatory disclosure are the sole forms of “discovery” imposed on the Staff in Subpart L proceedings, the Staff’s full compliance with these obligations is the “foundation” of the ability of intervenors to effectively participate in, and in the fairness and integrity of, such proceedings.

62 N.R.C. at 841, 842 (footnotes omitted). The only exception to Staff’s obligation to produce documents is if the documents are privileged or subject to protected status. 10 C.F.R. § 2.336(4). Such documents are to be identified on a log “with sufficient information for assessing the claim of privilege or protected status.” 10 C.F.R. § 2.336(b)(5). “[T]he fact that the Staff puts a document on a privilege log, and thus labels a document as ‘deliberative,’ is not sufficient to assess whether it is.” *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee), LBP-05-33, 62 N.R.C. 828, 852 (2005). “The general purpose of the deliberative process privilege is ‘to prevent injury to the quality of agency decisions’ and to do so by ‘ensur[ing] that the mental processes of decision-makers are not subject to public scrutiny.’” *In the Matter of David Geisen*, LBP-06-25, 64 N.R.C. 367, 380 (2006)(footnote references omitted). However, “[i]t is settled law that factual material ‘must be segregated and released unless ‘inextricably intertwined’ with privileged communications, or the disclosure of such factual material would reveal the agency’s decisionmaking process.’” *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-6, 39 N.R.C. 105, 108 (1994)(footnote references omitted). Even if a claim meets the criteria for a deliberative process privilege, the claim may be rejected where the party seeking the document has a great need for it:

The [deliberative process] privilege may be invoked in NRC proceedings. It is a qualified privilege, however, which can be overcome by an appropriate showing of need. A balancing test must be applied to determine whether a litigant’s demonstrated need for the documents outweighs the asserted interest in confidentiality. In this respect, the government agency bears the burden of demonstrating that the privilege is properly invoked, but the party seeking the

withheld information has the burden of showing that there is an overriding need for its release.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19

N.R.C. 1333, 1341 (1984)(citations omitted).

Documents Staff rely upon and allude to in the FSEIS are essential for a party to prepare its case, particularly where, as here, the documents relate specifically to Staff's analysis and criticism of the bases for DSEIS comments by a party, and Staff relies on those documents and others created by other reviewing entities in the FSEIS. As the Board in *Vermont Yankee* concluded:

a fair adjudicatory hearing process, whereby members of the public are afforded the opportunity to raise, and have resolved, appropriate challenges to safety and technical aspects of a proposed licensing action, helps to promote NRC's mission to protect the public against unreasonable risks to health and safety, and is itself a key "statutory function" of the agency. See 42 U.S.C. § 2239(a).

62 N.R.C. at 850.

IV. ARGUMENT

A. NRC Regulations Obligate Staff to Produce the ISLI and Sandia Documents

Staff is obligated by 10 C.F.R. § 2.336(b)(3) to produce:

All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application.

10 C.F.R. § 2.336(b)(3). In addition, as a party challenging NYS Contentions 12/12A/12B and 16/16A/16B, Staff is obligated to produce "all documents and data compilations in [Staff's] possession, custody, or control ... that are relevant to the contentions." 10 C.F.R.

§ 2.336(a)(3)(i). Staff used the ISLI and Sandia documents and work done by ISLI and Sandia in preparing the FSEIS, including Staff's review of Entergy's SAMA analysis and Staff's critique of the State's admitted contentions. FSEIS, Vol. 1 at 5-4 and Vol. 3 at G-22 to G-29.

Staff has refused to produce the requested documents.

Staff first refused to produce the ISLI and Sandia documents in its Answer to Contention 12-C, where Staff makes the factually and legally inaccurate argument that the documents were not used to review the application but were instead used in the portion of the FSEIS in which Staff challenges the bases for the State's contentions, and thus need not be produced. *See* NRC Staff's Answer to State of New York Contention 12-C Concerning the Final SEIS Evaluation of Decontamination and Clean up Costs in a Severe Accident (Mar. 7, 2011), ML110670302 at 18-19. This argument is factually inaccurate because the FSEIS clearly states that "NRC staff performed its [SAMA] review with contract assistance from Information Systems Laboratories, Inc. and Sandia National Laboratory," making clear that the reports were not produced solely to challenge the State's contentions. FSEIS Vol. 1 at 5-4. It is legally inaccurate because it erroneously assumes that documents generated in responding to critiques of Staff's environmental review, performed as part of that review, do not constitute "documents . . . supporting the NRC staff's review of the application." 10 C.F.R. § 2.336(b)(3). Staff's statements also ignore the duties imposed on Staff under the NEPA and 10 C.F.R. Part 51; NEPA places an unconditional and non-delegable duty upon Staff to conduct a thorough evaluation of environmental issues, evaluate alternatives to the proposed action, and to prepare a Final Environmental Impact Statement. 42 U.S.C. § 4332; 10 C.F.R. § 51.90; 40 C.F.R. § 1503.4. NRC regulations require that the FSEIS include Staff's responses to comments received on the DSEIS. *See* 10 C.F.R. §§ 51.91(a)(1) and 51.91(3)(b). Thus, the EIS is an inherent portion of Staff's review of Entergy's application, and that includes the analysis and response to criticism of the DSEIS. Documents generated as part of that process, whether by the Staff

directly or by experts on which it relies, are part of the Staff review and must be disclosed.⁶

In addition, there cannot be any question that the documents generated by ISLI and Sandia are “relevant” to admitted contentions and, pursuant to both §§ 2.336(a)(2)(i) and 2.336(b)(3) must be produced. Staff appears to believe its obligations under § 2.336(b)(3) are narrower than the obligations imposed by § 2.336(a)(2)(i). In fact, the Commission’s clear intent in drafting § 2.336(b) was to expand Staff’s obligations so that they would not only be producing everything required by § 2.336(a)(2)(i), but more:

We agree that the Staffs disclosure obligations under 10 C.F.R. § 2.336(b) are broader than the subject matter of the admitted contentions. Under 10 C.F.R. § 2.336(b)(3) the Staff must provide “all documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staffs review of the application or proposed action that is the subject of the proceeding.” This broad language contrasts with 10 C.F.R. § 2.336(a)(2), which only requires that parties (other than the Staff) disclose documents that are “relevant to the contentions.” The Commission recognized this distinction and understood that the broader language obligated the Staff to disclose documents that are beyond the scope of the contentions.

Vermont Yankee, 62 N.R.C. at 840.

The Commission has declared the hearing file obligations imposed on NRC Staff pursuant to 10 C.F.R. § 2.1203 to be an additional basis for requiring all documents relevant to

⁶ Staff suggests that the documents might be privileged because they were prepared in anticipation of litigation. E-mail, Sherwin Turk to Janice Dean, April 18, 2011 (Dean Decl. Attachment 1) at 2. Not only was this privilege not asserted in Staff’s logs or in the three months during which the State repeatedly sought these documents, but the information in the FSEIS and all the work done to prepare it was done to fulfill Staff’s obligations under 10 C.F.R. §§ 51.91(a)(1) (“The final environmental impact statement will include responses to any comments on the draft environmental impact statement or on any supplement to the draft environmental impact statement”) and 51.91(3)(b) (“The final environmental impact statement will discuss any relevant responsible opposing view not adequately discussed in the draft environmental impact statement or in any supplement to the draft environmental impact statement, and respond to the issues raised”). Since the FSEIS statements and the work upon which they rely were prepared in the ordinary course of Staff meeting its NEPA obligations, they are not protected by the claim that they were *also* allegedly prepared for litigation. See *Long Island Lighting Company* (Shorcham Nuclear Power Station, Unit 1) LBP-82-82, 16 N.R.C. 1144, 1162 (1982).

the licensing process be produced by NRC Staff. 69 Fed Reg. at 2194-95. NRC Staff is obligated under § 2.1203 to produce “any NRC report related to the proceeding.” *Id.* This imposes the duty on Staff to produce not only the DSEIS and FSEIS, but the critical documents upon which those reports rely and whose output is critical to the conclusions reached in the DSEIS and FSEIS.

B. NRC Staff Has Not Logged Any Responsive Document As Privileged, and Cannot Because the Deliberative Process Privilege Does Not Apply to the Documents the State Seeks

The State’s review of Staff’s privilege logs do not reveal any documents created by Sandia or ISLI as part of their analysis of the State’s comments on the DSEIS or the State’s SAMA-related contentions. Thus, NRC Staff’s discussion of deliberative process privilege and listing of numerous logged items is irrelevant. The State does not seek to overturn any privilege designation made to date in this proceeding. Rather, the State seeks documents which Staff has not produced and not logged but which are clearly relevant to the State’s admitted contentions. The deliberative process privilege cannot apply to these documents, as explained below.

The following excerpts from the FSEIS demonstrate that Staff did not merely seek or obtain “opinions” from Sandia and ISLI, but that Staff tasked them with specific analyses in which data was gathered and analyzed. The State is entitled to see that work to assess the validity of the conclusions asserted in the FSEIS:

- This section presents a summary of the SAMA evaluation for IP2 and IP3, conducted by Entergy, and the NRC staff’s review of that evaluation. The NRC staff performed its review with contract assistance from Information Systems Laboratories, Inc. and Sandia National Laboratory. FSEIS Vol. 1 at 5-4.⁷

⁷ This is the only mention of ISLI in the FSEIS discussion of the SAMA analysis and because Staff has not identified any ISLI documents generated after April 28, 2008, it is not possible for the State to be more specific about ISLI documents that have not been produced. What is clear is that ISLI took part in the SAMA review and presumably generated documents in

- The staff and Sandia reviewed the inputs and assumptions regarding particle size distribution and decontamination costs used in the SAMA analysis, and determined that the particle size utilized in the analysis was reasonable and acceptable. (G-23)⁸
- Sandia performed a comparison of the decontamination cost factors derived from the Site Restoration study to those used in the SAMA analysis. The approach to the cost comparison included identifying basic considerations of each type of accident (e.g., contaminants, half life of contaminants, and health and safety considerations), identifying the decontamination methods required, and comparing the Site Restoration study cost values (as applied to the urban area of New York City) to those used in Entergy's analysis. (G-23)
- Sandia noted that the primary constituent in weapons grade plutonium, Pu239, is an alpha emitter, whereas the primary contaminant from an NPP accident, Cs137, is a gamma emitter. (G-23)
- Sandia considered the decontamination activities described in the Site Restoration study together with the differences in health hazards posed by Pu239 versus Cs137, and concluded that the activities required to support clean-up of moderate plutonium contamination align more closely with clean-up activities for heavy cesium contamination. Sandia performed the comparison of decontamination cost values on this basis. (G-24)
- Sandia conservatively limited its cost comparison to urban areas (non-farmland) because urban areas are more costly to decontaminate than farmland, and because farmland makes up a very small percentage of land area within the Indian Point area, with most counties having less than 1 percent farmland. To further simplify the cost analysis and provide a comparison of the highest cost areas, the cost comparison was performed only for New York City, which includes five counties (the Bronx, Kings, New York, Queens, and Richmond). The population density of New York City is about 12,000 persons/km². (G-24)
- The staff and Sandia reviewed Entergy's baseline and projected population values and its population projection methodology, and developed independent estimates of the baseline and projected population. (G-24)

doing its work. Once Staff fulfills its obligations to identify all the ISLI documents that were generated as part of the ISLI assistance on the SAMA review, the State can be more specific in its demands.

⁸ "G" references are to the pages in Appendix G of Vol. 3 of the FSEIS.

- Because there is a peak within the projection period, Sandia agreed that use of a polynomial projection to the year 2035 is a more appropriate approach than a linear projection for these counties. (G-25)
- Sandia performed an independent assessment of the population data within a 50-mile radius of Indian Point using the SECPOP2000 computer program. (G-25)
- Sandia also performed two analyses of projected population growth to the year 2035, and determined that Entergy's projected population growth was reasonable. (G-25)
- Sandia performed a separate population projection for the five counties comprising New York City. (G-25)
- NYS Contention 16/16A/16B argues that the ATMOS air dispersion module utilized in the MACCS2 code is being used beyond its range of validity (beyond thirty-one miles), which could affect the validity of decontamination cost estimates for areas beyond that range. The NRC staff and Sandia National Laboratory addressed this issue in detail, in the NRC staff's October 13, 2009 response to a NYS motion for partial summary disposition. (G-26)
- The staff and Sandia considered the State's concerns regarding ATMOS, and concluded that ATMOS provides an acceptable plume model for the calculation of doses and radioactive contamination in a SAMA analysis. In response to this concern, Sandia assessed the impact of using a Gaussian plume model on accident consequences, and evaluated the population distribution and meteorological data used in Entergy's SAMA analysis. (G-27)
- Sandia reviewed the MACCS2 input files used in the Entergy baseline analysis to determine whether input parameter selection might contribute to non-conservative geographical distribution of radioactive dose within the 50-mile radius of Indian Point. (G-28)
- The NRC staff, with the assistance of Sandia National Laboratory, evaluated the concerns raised in NYS Contentions 12/12A/12B and 16/16A/16B. Based on this review, the staff concludes that the issues raised in these contentions do not alter the staff's conclusions, set forth in the DSEIS, regarding the acceptability of Entergy's SAMA analysis. (G-29)

Not only do these excerpts reveal the extent to which Sandia generated analyses and reports that Staff never disclosed or logged as privileged, but each identified task performed by

Sandia is then followed by a description of the advice and opinions Sandia provided. Thus, ironically, Staff has readily disclosed Sandia's opinions – opinions Staff asserts are entitled to protection as deliberative process – but has asserted that the underlying documents which purportedly provide support for those opinions and which contain facts and analyses, which documents are essential to the State's ability to test the validity and reliability of Sandia's opinions, are not subject to disclosure. This position is nonsensical and not supported by law or regulation.

In his February 2011 Report, David Chanin, the State's SAMA expert, confirms the critical importance of the underlying Sandia analyses:

Moreover, while the FSEIS makes several references to assistance and analysis performed by Sandia National Laboratories in this proceeding, this work by Sandia is not cited or otherwise identified in the FSEIS's list of references. As NRC Staff has not supplied or identified the Sandia work that went into the FSEIS, it is difficult to comment on the specifics of that work and it is impossible to judge the validity of that work.

Errors and Omissions in NRC Staff's Economic Cost Estimates of Severe Accident Mitigation Alternatives Analysis Contained in December 2010 Indian Point Final Supplemental Environmental Impact Statement (FSEIS), NUREG-1437, Supplement 38 (David I. Chanin) February 2011 ("Chanin 2011 Report") at 1-2, attached to State of New York New Contention 12-C Concerning NRC Staff's December 2010 Final Environmental Impact Statement and the Underestimation Of Decontamination and Clean Up Costs Associated With a Severe Reactor Accident in the New York Metropolitan Area (Feb. 3, 2011) ML110680212 (see PDF p. 37 of 63). Mr. Chanin's Report mentioned some of the assertions in the FSEIS that relied on undisclosed Sandia work. Chanin 2011 Report at 3 and 15, n.17. Thus, if there were any documents to which the deliberative process privilege applies, Mr. Chanin has provided ample basis to demonstrate that the State's need for the documents exceeds any alleged harm that

would occur if the documents were produced, particularly since Staff has already revealed Sandia's opinions, which are the only proper subject of the deliberative process privilege, in the FSEIS.

As noted above and revealed in Attachment 6 to the Dean Declaration, NRC Staff has logged virtually none of the documents the State requested as privileged. Staff *has* logged documents that appear to communicate Sandia or ISLI opinions to Staff, opinions which Staff readily reveals and relies on in the FSEIS, or which involve matters unrelated to the State's request for the documents that form the basis for the opinions ISLI and Sandia reached and that now appear in the FSEIS. The State does not challenge Staff's privilege designation over documents the State has not asked for. However, the relevant documents have never been included on any disclosure log from Staff and never been produced.⁹

The inapplicability of the deliberative process or any other privilege to the documents the State seeks is underscored by the fact Sandia personnel have co-authored the FSEIS (*see* FSEIS Vol. 3, Appendix B at B-2 listing three Sandia employees as authors of the SAMA portion of the FSEIS) and are likely to be designated as testifying experts when NRC Staff makes such a designation,¹⁰ as it has done in other proceedings where issues arise regarding the SAMA

⁹ Even if Staff does intend to assert the deliberative process privilege for Sandia's yet-unproduced documentation, the State reminds Staff that failure to identify the recipient of an email in order to show its inter-agency nature is fatal to a claim of deliberative process privilege, as can be an inadequate description such as that often found in Staff's logs produced to date. *See* DPP-10-001 (an email with no recipient listed, described only as "Internal Transmission of Comments Regarding the EIS"); *see also* DPP-14-003 (same). For the purposes of this motion, the State does not challenge Staff's existing privilege designations, but does note the insufficiency of information provided on Staff's logs to date under 10 C.F.R. § 2.336(b)(5).

¹⁰ Staff has not identified, as other parties in this proceeding have, a list of experts nor provided documents relied upon or generated by them. However, public NRC documents make clear that Staff relies on the expertise of Nathan Bixler and Joe Jones, both of whom are employed at Sandia and both of whom participated in telephone conferences with Entergy on SAMA-related matters at Indian Point. *See, e.g.*, Email, Kimberly Green to Michael D. Stroud,

analysis. *See, e.g., In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.*, Docket No. 50-293-LR. (Pilgrim Nuclear Power Station), NRC Staff Testimony of Nathan E. Bixler (undated), ML110330544. As experts upon whom Staff relies for their positions on issues in the proceeding and who may be testifying experts, the work they have done, the documents they have produced and the opinions they hold are required to be promptly disclosed. 10 C.F.R. § 2.336(a)(1). All the other parties are required to disclose the documents generated by their experts, other than draft reports, and the documents upon which experts rely for their opinions and are doing so. There is no reason why Staff experts are entitled to special treatment and every reason why, as servants of the public interest who are supported by public funds, the documents and reports they create using public money and the documents upon which they rely should be freely available to the general public.

C. Staff's Failure To Produce The Documents Frustrates Public Participation

Public participation is one of NEPA's cornerstones. As the Commission has observed, public participation "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted" to the Commission. *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 N.R.C. 1, 2 (1975). Numerous court decisions have

Re: Telecon Summaries for November 3rd and 9th (Nov. 18, 2009), ML093220329 and attachments ML093170171 and ML093170168; *see also* Summary of Telephone Call Held on November 9, 2009, Between the U.S. Nuclear Regulatory Commission and Entergy Nuclear Operations, Inc., Concerning Meteorological Data Used for the Severe Accident Mitigation Alternative Analysis (Nov. 19, 2009), ML093170171 (enclosure). NRC also has relied upon Nathan Bixler and Joe Jones as expert declarants in opposing the State's Summary Disposition Motion related to Contention 16. NRC Staff's Response in Opposition to State of New York's Motion for Partial Summary Disposition of NYS Contention 16/16A, Exhibit 3 (Affidavit Of Joseph A. Jones And Dr. Nathan E. Bixler concerning The State Of New York's Motion For Partial Summary Disposition Of NYS Contention 16/16A (October 12, 2009). The State should not be prejudiced by NRC Staff's failure to timely designate its experts or to make disclosures of documents relied upon and/or generated by those experts.

emphasized the importance of facilitating public participation in NEPA to assist the agency in reaching its final decision:

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. See *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; *it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)(emphasis added and internal citations omitted); see also *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 725 (9th Cir. 2009)("An adequate EIS is essential to informed agency decision-making and informed public participation, without which the environmental objectives of NEPA cannot be achieved"); *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)(emphasizing NEPA's obligation to "foster . . . informed public participation").

In its regulations, the President's Council on Environmental Quality ("CEQ") requires that all federal agencies, to "the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d). The Supreme Court has recognized that CEQ regulations are entitled to substantial deference in evaluating agency compliance with NEPA. "In *Andrus v. Sierra Club*, 442 U.S., at 358, we held that CEQ regulations are entitled to substantial deference." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 355 (internal citation omitted). NRC's regulations reflect the agency's obligation to take account of CEQ regulations. See 10 C.F.R. § 51.10(a). NRC case law also acknowledges the importance of compliance with CEQ requirements. *In re Detroit*

Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 N.R.C. 227, 264 (July 31, 2009)(“We may therefore rely upon NEPA Section 102(2)(C)(i)-(v), as interpreted in NEPA case law and CEQ regulations, for assistance in resolving questions concerning the content of the [environmental report] that are not unambiguously resolved by 10 C.F.R. § 51.45(b)(1)-(5)”).

Staff, by refusing to provide the State with the documents generated by the consultants who participated in reviewing Entergy’s SAMA analysis, as well as the review of the State’s criticism with regard to the DSEIS, seriously impedes effective participation by the State of New York, leaving it without access to the underlying data and analysis that form the bases for FSEIS statements regarding Entergy’s SAMA analysis and the State’s critique of the DSEIS.

V. Conclusion

For the reasons stated above, the State of New York respectfully requests that the Board order NRC Staff to immediately produce all the documents the State requested in its January 31, 2011 letter to Staff, and alternatively, if the documents are not required to be produced, to require Staff to immediately produce a new privilege log listing all the documents the State seeks for which the Staff claims a privilege that identifies each document with sufficient specificity to permit an evaluation to be made of the basis for the claim, including both the author and all recipients by name and affiliation, and providing the State with 14 days to file a new Motion to Compel to the extent the asserted bases for the privilege are inadequate.

Respectfully submitted,

 /s
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
120 Broadway

 /s
John Sipos
Assistant Attorney General
Office of the Attorney General
State Capitol

New York, New York 10271
(212) 416-8459
janice.dean@ag.ny.gov

Albany, New York 12224
(518) 402-2251
john.sipos@ag.ny.gov

April 22, 2011

Certification pursuant to 10 C.F.R. § 2.323 and ASLB Scheduling Order

Pursuant to 10 C.F.R. § 2.323(b) and this Atomic Safety and Licensing Board's July 1, 2010 Scheduling Order ¶ G.6, I certify that I have made a sincere effort to contact NRC Staff in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

_____/s_____
Janice Dean

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

-----X	
In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 April 22, 2011
-----X	

**DECLARATION OF JANICE A. DEAN IN SUPPORT OF
THE STATE OF NEW YORK'S MOTION TO COMPEL NRC STAFF
TO PRODUCE DOCUMENTS RELIED UPON IN STAFF'S FINAL
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

JANICE A. DEAN, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the Office of the New York State Attorney General and I make this Affirmation in support of the State of New York's motion to compel NRC Staff to produce documents relied upon in Staff's Final Supplemental Environmental Impact Statement ("FSEIS").

2. On January 31, 2011, I sent a letter to Sherwin Turk, Esq., counsel for NRC Staff, seeking documentation from Sandia National Laboratories ("Sandia") and Information Systems Laboratories, Inc. ("ISLI") which appeared to exist based on statements in Staff's FSEIS (*see* FSEIS, Section 5.2.1; G.2.3) and which Staff had not logged or produced. This letter, which is attached as Attachment 1, indicates that it was the second request made for these documents, as the first was made in a telephone conversation between Mr. Turk and Assistant Attorney General Susan Taylor on January 28, 2011.

3. I received no response to my letter of January 31, 2011.

4. On March 7, 2011, after reviewing Staff's Hearing Docket update for February and seeing none of the documents I requested listed either as a disclosure or as a privileged document, I sent a follow-up email to Mr. Turk. This email is attached as Attachment 2.

5. Shortly thereafter on the same day, Mr. Turk responded that Staff was reviewing their disclosure logs to determine if any additional documents should have been, but were not, disclosed; that the State would see a reference to this in Staff's response to NYS Contention 12-C to be filed that day, and that a final answer would need to await the return of the attorney who has been handling Staff's document disclosures who was scheduled in hearings in another proceeding that week. Mr. Turk anticipated responding to me within a week. Mr. Turk's March 7, 2011 email is attached at Attachment 3.

6. I received no further follow-up to Mr. Turk's email of March 7, 2011, but Staff did state in a pleading filed with the Board that day that "[t]he Staff is reviewing its document disclosures to date, and will determine whether the analyses in question were, or should be, disclosed; the Staff will notify the State of that determination promptly." NRC Staff's Answer to State of New York Contention 12-C Concerning the Final SEIS Evaluation of Decontamination and Clean up Costs in a Severe Accident (Mar. 7, 2011), ML110670302 at 18, n. 39.

7. I received no communication from Staff regarding my January 31 letter after the Staff filed its Answer to Contention 12-C.

8. On Friday, April 15, 2011, I left Mr. Turk a voice mail message asking for follow-up on the State's request, indicating that the State would contemplate a motion to compel if the Staff did not produce the document or otherwise produce the State's request, but that I preferred to avoid motion practice if possible.

9. On Monday, April 18, 2011, Mr. Turk returned my phone call and indicated that the Sandia document (referencing only one document, when the State asked for many) was logged on Staff's disclosure logs, perhaps more than once, as a privileged document, and that the Staff may take the position that the document is attorney work product, prepared for litigation as it relates to one of the State's contentions. I explained the State's position that these documents were not privileged and are required to be disclosed. I indicated that I would review Staff's logs again, and Mr. Turk indicated that Brian Harris, additional counsel for NRC Staff, was preparing a letter in response to my letter. Mr. Turk indicated that he would be out of the office on Tuesday and Wednesday, April 19 and 20, but that he would have Mr. Harris contact me.

10. Later that day, I sent Brian Harris an email inquiring as to the dates of the privilege logs upon which the responsive documents apparently could be found. This email is attached as Attachment 4.

11. Mr. Harris did not respond to my email, but Mr. Turk did, in the email attached at Attachment 5. His email lists a number of documents which he indicates relate to Sandia or ISLI.

12. A review of these documents indicates that they are not responsive to the State's request. An analysis of each allegedly relevant disclosure is attached as Attachment 6.

13. In response to Mr. Turk's email, after three months of unsuccessfully requesting these documents, I sent a letter to Mr. Turk explaining that the documents he referenced were nonresponsive to the State's requests, why the documents the State seeks could not be privileged pursuant to the deliberative process privilege or as material prepared for litigation, and that due to the limited time remaining before the State's testimony was due, the State intended to file a motion to compel by the end of the week. This letter is attached as Attachment 7.

14. Attached as Attachment 8 is an Email from Kimberly Green to Michael D. Stroud, Re: Telecon Summaries for November 3rd and 9th (Nov. 18, 2009), ML093220329 and attachments ML093170171 and ML093170168.

Dated: April 22, 2011
New York, New York

/s
Janice A. Dean

Attachment 1



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

January 31, 2011

Sherwin Turk
Office of the General Counsel
Mail Stop O-15-D-21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Via electronic and U.S. Mail

Re: License Renewal Application submitted by Entergy Indian Point Unit 2, LLC, Entergy Indian Point Unit 3, LLC, and Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Mr. Turk:

This letter follows up on your conversation with Assistant Attorney General Susan Taylor on Friday, January 28, 2011, regarding documentation from Sandia National Laboratories ("Sandia") referenced in Staff's Final Supplemental Environmental Impact Statement ("FSEIS") which Staff has not, to date, logged or produced. *See* FSEIS, Section 5.2.1; G.2.3. Thank you for inquiring into these documents.

As you know, 10 C.F.R. § 2.336(b)(3) requires the NRC staff to disclose all documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding. *See* 10 C.F.R. § 2.336(b)(3); *see also* 10 C.F.R. § 2.1202(b)(3) (which obligates the Staff to fulfill all the "responsibilities of a party with respect to the admitted contention/matter" and thus supersedes the limitations in 10 C.F.R. § 2.336(a) and makes those responsibilities applicable to Staff regarding New York State Contentions 12 and 16).

As Staff has indicated reliance upon certain Sandia documents in its FSEIS, the State requests all documents prepared by Sandia, including but not limited to computer input/output files, sensitivity studies of any computer models or the input assumptions that were used, validation of any computer models or the input assumptions that were used, correspondence between NRC Staff and Sandia regarding the consultation, a copy of any contract or task assignment between NRC and Sandia or any such document prepared in consultation with Sandia, during the Staff's review of Entergy's Indian Point relicensing application conducted

pursuant to the National Environmental Policy Act ("NEPA"). This request includes but is not limited to any document prepared by or in consultation with Joseph Jones, Nathan Bixler, or Fotini Watson, who are identified in the FSEIS, Appendix B, as Sandia employees having expertise in Severe Accident Mitigation Alternatives at Sandia and are identified as authors of the FSEIS (*see* NRC Bibliographic Data Sheet).

These documents are directly relevant to admitted contentions in the proceeding; while it is not a precondition for the Staff to produce the material under § 2.336(b), this underscores the importance of prompt production of all the documents in Sandia's possession that were generated as part of Sandia's analysis. In addition, as a party, subject to all the responsibilities of a party, NRC Staff must disclose all information within the scope of 10 C.F.R. § 2.336(a) responsibilities which clearly include the kind of documents it has yet to disclose regarding Sandia's work on admitted Contentions 12/12A/12B and 16/16A/16B.

In addition to these Sandia documents, Staff also states in its FSEIS at 5-4 that Information Systems Laboratories, Inc. provided consulting services. The State notes that NRC Staff has not logged or produced any documents originating with Information Systems Laboratories, Inc. and requests that Staff produce all documents prepared by Information Systems Laboratories, Inc., or prepared in consultation with Information Systems Laboratories, Inc., during the Staff's review of Entergy's Indian Point relicensing application conducted pursuant to the NEPA.

Sincerely,

/s

Janice A. Dean
Assistant Attorney General

Attachment 2

From: Janice Dean
To: Turk, Sherwin
CC: Sipos, John; Taylor, Susan
Date: 3/7/2011 10:18 AM
Subject: Re: Indian Point, letter regarding disclosures
Attachments: 2011 01 31 ltr to Staff.pdf

Sherwin, I am following up on the below email and letter I sent on January 31 regarding Sandia documents. I see that no Sandia documents referenced in the Staff's FSEIS were logged on Staff's most recent hearing file update; the State requests that you provide the referenced documents at your earliest convenience.

Thank you,
Janice

>>> Janice Dean 1/31/2011 4:41 PM >>>

Sherwin, following up on your conversation with Susan Taylor on Friday concerning Sandia documents, please see the attached letter clarifying our request.

Thank you,
Janice

Janice A. Dean
Section Chief
Toxics and Cost Recovery Section
Environmental Protection Bureau
Office of the New York State Attorney General
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-8459 (voice)
(212) 416-6007 (fax)
janice.dean@ag.ny.gov

Attachment 3

From: "Turk, Sherwin" <Sherwin.Turk@nrc.gov>
To: Janice Dean <Janice.Dean@ag.ny.gov>
CC: John Sipos <John.Sipos@ag.ny.gov>, Susan Taylor <Susan.Taylor@ag.ny.gov>
Date: 3/7/2011 10:36 AM
Subject: RE: Indian Point, letter regarding disclosures

Janice -

We are reviewing the Staff's disclosure logs to determine if any additional documents should have been, but were not, disclosed. You will see a reference to this in our response to NYS Contention 12-C, going out today. The attorney who has been handling our document disclosures will be in hearings in another proceeding this week, and is expected to return to the office on Thursday. We will be continuing our review of the logs in the meantime, but will need to await his return before we can reach a final resolution. I hope to respond to you within the next week or so.

Sincerely,

Sherwin E. Turk
Special Counsel for Litigation
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Mail Stop O15-D21
Rockville, MD 20852
(301) 415-1533

-----Original Message-----

From: Janice Dean [mailto:Janice.Dean@ag.ny.gov]
Sent: Monday, March 07, 2011 10:19 AM
To: Turk, Sherwin
Cc: John Sipos; Susan Taylor
Subject: Re: Indian Point, letter regarding disclosures

Sherwin, I am following up on the below email and letter I sent on January 31 regarding Sandia documents. I see that no Sandia documents referenced in the Staff's FSEIS were logged on Staff's most recent hearing file update; the State requests that you provide the referenced documents at your earliest convenience.

Thank you,
Janice

>>> Janice Dean 1/31/2011 4:41 PM >>>

Sherwin, following up on your conversation with Susan Taylor on Friday concerning Sandia documents, please see the attached letter clarifying our request.

Thank you,
Janice

Janice A. Dean
Section Chief
Toxics and Cost Recovery Section
Environmental Protection Bureau
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(212) 416-8459 (voice)

(212) 416-6007 (fax)
janice.dean@ag.ny.gov

Attachment 4

From: Janice Dean
To: Harris, Brian
CC: Sipos, John; Turk, Sherwin
Date: 4/18/2011 11:03 AM
Subject: Followup on the State's letter of January 31

Brian,

I spoke with Sherwin Turk a few minutes ago and he indicated that you would be sending a letter and/ or calling in response to my letter of January 31, to indicate that the documents the State requested have already been logged. A quick review of the last five hearing docket updates don't reveal a document which is readily identified as a Sandia/ISLI document - would you be able to quickly refer me to the date(s) of the hearing docket update on which these documents appeared? Sherwin indicated they appear on the privilege log, perhaps more than once. If I can review the log before we speak I'll be better prepared to discuss.

Thank you very much,
Janice

Janice A. Dean
Section Chief
Toxics and Cost Recovery Section
Environmental Protection Bureau
Office of the New York State Attorney General
120 Broadway, 26th Floor
New York, NY 10271
(212) 416-8459 (voice)
(212) 416-6007 (fax)
janice.dean@ag.ny.gov

Attachment 5

From: "Turk, Sherwin" <Sherwin.Turk@nrc.gov>
To: Janice Dean <Janice.Dean@ag.ny.gov>
CC: John Sipos <John.Sipos@ag.ny.gov>, "Harris, Brian" <Brian.Harris@nrc.gov>
Date: 4/18/2011 12:36 PM
Subject: RE: Followup on the State's letter of January 31

Janice --

As I indicated in our telephone conversation this morning with regard to your letter of January 31, 2011, the Staff has previously identified numerous ISL and Sandia documents in the Indian Point license renewal proceeding, including the specific document mentioned in your letter (Sandia's evaluation of New York's SAMA contentions, discussed in the FSEIS). In addition, the Staff had previously identified these documents in Mr. Harris' October 12, 2010 letter in response to Mr. Sipos' earlier request. At that time, Mr. Harris pointed New York to the Staff's 11th and 12th disclosure supplements dated December 30, 2009, and January 29, 2010, respectively.

To address your letter of January 31, we have again undertaken a time-consuming review of the Staff's disclosure logs, and found numerous ISL and Sandia documents among the documents listed. These include the Staff's Initial Disclosure and Supplements 9, 10, 12, and 18, dated January 30, 2009; October 30, 2009; November 30, 2009; January 29, 2010; and July 30, 2010, respectively.

For example, a cursory review of the logs shows that numerous documents "from" or "to" ISL were listed in the disclosure logs at DPP-00-37, DPP-00-39, DPP-00-53, DPP-00-54, DPP-00-57, DPP-00-65, DPP-00-66, DPP-00-67, DPP-00-82, DPP-00-98, DPP-00-147, DPP-00-155, DPP-00-161, DPP-00-164, DPP-00-165, DPP-00-168, DPP-00-191, DPP-00-209, and DPP-00-243. Similarly, numerous Sandia documents were listed in the disclosure logs at DPP-18-005, DPP-18-006, DPP-14-003, DPP-12-004, DPP-12-005, DPP-12-006, DPP-10-001, DPP-10-002, DPP-10-004, DPP-10-005, DPP-10-006, DPP-10-007, DPP-10-011, DPP-10-012, DPP-09-002, DPP-09-004, DPP-09-005, DPP-09-008, and DPP-09-013, as some examples. There may be other instances of such disclosures, which might be found in a more thorough review of the disclosure logs.

Moreover, as I mentioned in our conversation, and is evident from a reading of the FSEIS, the Sandia document which was specifically mentioned in your letter of January 31 was referenced in the FSEIS as a report prepared in preparation for litigation in response to the State's SAMA contentions, rather than as part of the Staff's review of the Applicant's SAMA analyses. That document was identified in the Staff's disclosure logs at DPP-18-005; in addition, the document was discussed in substantial detail in the FSEIS, allowing the State to understand the Staff's views of the State's SAMA contentions.

As additional documents become available, the Staff will continue to identify the documents as appropriate, consistent with the Staff's obligations under 10 C.F.R. 2.336(b) and 2.1203(b).

With best wishes,

Sincerely,
Sherwin

Sherwin E. Turk
Special Counsel for Litigation
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Mail Stop O15-D21
Rockville, MD 20852
(301) 415-1533

-----Original Message-----

From: Janice Dean [mailto:Janice.Dean@ag.ny.gov]
Sent: Monday, April 18, 2011 11:04 AM
To: Harris, Brian
Cc: John Sipos; Turk, Sherwin
Subject: Followup on the State's letter of January 31

Brian,

I spoke with Sherwin Turk a few minutes ago and he indicated that you would be sending a letter and/ or calling in response to my letter of January 31, to indicate that the documents the State requested have already been logged. A quick review of the last five hearing docket updates don't reveal a document which is readily identified as a Sandia/ISLI document - would you be able to quickly refer me to the date(s) of the hearing docket update on which these documents appeared? Sherwin indicated they appear on the privilege log, perhaps more than once. If I can review the log before we speak I'll be better prepared to discuss.

Thank you very much,
Janice

Janice A. Dean
Section Chief
Toxics and Cost Recovery Section
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Office of the New York State Attorney General
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New York, NY 10271
(212) 416-8459 (voice)
(212) 416-6007 (fax)
janice.dean@ag.ny.gov

Attachment 6

**DOCUMENTS LISTED BY NRC STAFF AS RESPONSIVE TO THE STATE OF NEW YORK'S
REQUEST, BUT WHICH ARE NOT**

(with annotation of reasons for nonresponsiveness)

ID #	Accession Number	Author Name/Affiliation	Title/Description	Document Date	Document Type	Addressee/ Addressee Affiliation	Comment	Key
DPP-00-037	ML073510192	Bruce Mrowca/ ISL, Inc.	EMAIL - IP2 Draft RAIs	9/12/2007	E-Mail	Ali Azarna/ ISL, Inc.	Internal transmission of draft RAIs regarding SAMAs	1,2
DPP-00-039	ML073510199	Robert Palla/ NRC/NRR	EMAIL - IP2/3 SAMA Draft RAIs	9/17/2007	E-Mail	Robert Palla/ NRC/NRR	Internal transmission of draft RAIs regarding SAMAs	1,2
DPP-00-053	ML073511773	Clifford Marks/ Information Systems Laboratories	EMAIL - IP2 and 3 SAMA RAIs	10/4/2007	E-Mail	Bruce Mrowca/ ISL, Inc.	Internal transmission of draft SAMA RAIs with comments	1,2
DPP-00-054	ML083090968	Bruce Mrowca/ ISL, Inc.	EMAIL - Indian Point Audit Plan for Subtask 4 TO 360	10/4/2007	E-Mail	Stanley Gardocki/ NRC/NRR/DL R; J. Woodfield, S. Pope/ ISL	Internal transmission of audit plan	1,3
DPP-00-057	ML073511764	Clifford Marks/ ISL	EMAIL - Re: IP2 and 3 SAMA RAIs	10/9/2007	E-Mail	Robert Palla/ NRC/NRR	Internal transmission draft SAMA RAIs with comments	1,2
DPP-00-065	ML083090964	Clifford Marks/ ISL	EMAIL - Indian Point LRA Delivery of Subtask 4 J- 4072 TAC 5407, 5408	10/23/2007	E-Mail	Stanley Gardocki, Rachel Gardocki/ NRC/NRR/DL R; Gloria Miket, B. Mrwoca, J. Woodfield, M. Kennedy, S. Pope/ ISL	Internal transmission of memo discussing results of site audit (Oct. 2007)	1,3
DPP-00-066	ML083090963	Clifford Marks/ ISL	EMAIL - Indian Point LRA a2 Drawing review	10/24/2007	E-Mail	Stanley Gardocki/ NRC/NRR/DL R	Internal discussion of draft RAIs – non-safety related components	1,2
DPP-00-067	ML083090962	Clifford Marks/ ISL	EMAIL - Indian Point (a)(2) RAIs	10/25/2007	E-Mail	Stanley Gardocki/ NRC/NRR/DL R	Internal transmission/ discussion of draft RAIs	1,2
DPP-00-082	ML083090958	Clifford Marks/ ISL	EMAIL - Indian Point LRA Teleconference RAI withdrawal	11/14/2007	E-Mail	Stanley Gardocki/ NRC/NRR/DL R; S. Pope/ ISL	Internal discussion of draft RAIs	1,2

DPP-00-098	ML083090956	Clifford Marks/ ISL	EMAIL - Indian Point LRA SER	12/21/2007	E-Mail	Kimberly Green, Stanley	Internal transmission/	1,3
DPP-00-147	ML083090954	Clifford Marks/ ISL	EMAIL - Indian Point RAI Response Evaluations	2/27/2008	E-Mail	Stanley Gardocki/ NRC/NRR/DL R; S. Pope, J. Woodfield/ ISL	Internal discussion of staff review of RAI responses	1,2
DPP-00-155	ML080770254	Robert Palla/ NRC/NRR	EMAIL - EPRI Documents related to TI-SGTR	3/4/2008	E-Mail	Bruce Mrowca, Ali Azarn (ISL, Inc.)	Email contains internal discussion of IP SAMA review; attachment contains proprietary information being withheld from public disclosure under 10 CFR 2.390(a)(4) -	1,4
DPP-00-161	ML080770251	Bruce Mrowca/ ISL, Inc.	EMAIL - Indian Point Follow-up RAIs	3/5/2008	E-Mail	Robert Palla/ NRC/NRR	Internal transmission of draft RAIs	1,2
DPP-00-164	ML083090994	Clifford Marks/ISL, Inc.	EMAIL - RE: additional concern	3/7/2008	E-Mail	Stanley Gardocki/ NRC/NRR/DL R	Internal discussion of staff review - feedwater valves	1,3
DPP-00-165	ML083090997	Robert Palla/ NRC/NRR	EMAIL - RE: cont.	3/7/2008	E-Mail	Stanley Gardocki/ NRC/NRR/DL R	Internal discussion of RAI response	1,2
DPP-00-168	ML080770222	Robert Palla/ NRC/NRR	EMAIL - Follow-up RAIs Rev 1	3/13/2008	E-Mail	Andrew Stuyvenberg(NRC/NRR)/ Bruce Mrowca (ISL, Inc.)	Internal transmission of draft RAIs	1,2
DPP-00-191	ML081000275	Clifford Marks/ ISL	EMAIL - RE: Comments on the BVPS RAI Responses	4/1/2008	E-Mail	Ali Azarn/ ISL, Inc.	Internal discussion regarding economic impacts	
DPP-00-209	ML083090953	Clifford Marks/ISL, Inc.	EMAIL - Indian Point RAI Review - AFW Room	4/7/2008	E-Mail	Stanley Gardocki/ NRC/NRR/DL R	Internal discussion of staff review of RAI responses	1,2
DPP-00-243	ML083090951	Clifford Marks/ISL, Inc.	EMAIL - Indian Point LRA SER 4511-380	4/22/2008	E-Mail	Stanley Gardocki/ NRC/NRR/DL R; Steve Pope, J. Woodfield, Tammy Pfister/ ISL	Internal transmission of draft SER input for RAIs sections 2.2 and 2.3	1,3

DPP-18-005	ML101800548	J.Jones SNL	02/08/2010 Indian Point LR Hearing - Indian Point Task I Report - Deliverable	2/18/2010	E-Mail	[None provided]	Discussion of Draft Responses to DSEIS Comments	2,6
DPP-18-006	ML101800550	J.Jones SNL	2010/02/08 Indian Point LR Hearing - Task I	12/18/2009	E-Mail	[None provided]	Discussion of Draft Responses to DSEIS Comments	2,6
DPP-14-003	ML100770511	R. Palla/ NRC/NRR	EMAIL 2010/03/18 Indian Point LR Hearing - Indian Point MACCS2 Calculation Matrix	3/18/2010	E-Mail	[None provided]	Transmission of Internal Discussion Regarding SEIS	5,6
DPP-12-004	ML100141724	R. Palla/ NRC/NRR	2010/01/14 Indian Point LR Hearing - Draft FSEIS Insert Discussing Impact of IP Contentions on SAMA	1/14/2010	E-Mail	[None provided]	Internal Transmission of draft FSEIS	4
DPP-12-005	ML100190008	R. Palla/ NRC/NRR	2010/01/19 Indian Point LR Hearing - FW: Draft FSEIS Insert Discussing Impact of IP Contentions on SAMA	1/19/2010	E-Mail	[None provided]	Internal Transmission of draft FSEIS	4
DPP-12-006	ML100190227	R. Palla/ NRC/NRR	2010/01/19 Indian Point LR Hearing - FW: Letter of Technical Direction RE IP Site Visit	1/19/2010	E-Mail	[None provided]	Internal discussion regarding SAMA	4
DPP-10-001	ML093160012	J. Jones, NRC contractor/(Sandia)	2009/10/27 Indian Point LR - Indian Point Weather	10/27/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4,5,6
DPP-10-002	ML093000388	R. Palla/ NRC/NRR	2009/10/27 Indian Point LR Hearing - Tables	10/27/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4
DPP-10-003	ML093010020	R. Palla/ NRC/NRR	2009/10/28 Indian Point LR Hearing - FW: Indian Point Weather	10/28/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	5,6
DPP-10-004	ML093160015	J. Jones, NRC contractor/(Sandia)	2009/10/28 Indian Point LR Hearing - RE: Table Comparing Population in ER vs SECPop	10/28/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4,5,6

DPP-10-005	ML093010132	R. Palla/ NRC/NRR	2009/10/28 Indian Point LR Hearing - RE: Table Comparing Population in ER vs SECPop	10/28/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4,5,6
DPP-10-006	ML093160014	J.Jones, NRC contractor/ (Sandia)	2009/10/28 Indian Point LR Hearing - Wind Discussion	10/28/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4
DPP-10-007	ML093160018	J.Jones, NRC contractor/ (Sandia)	2009/10/28 Indian Point LR Hearing - Indian Point Weather	10/29/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4,5,6
DPP-10-011	ML093160020	J.Jones, NRC contractor/ (Sandia)	2009/11/02 Indian Point LR Hearing - Indian Point	11/2/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4
DPP-10-012	ML093160021	J.Jones, NRC contractor/ (Sandia)	2009/11/02 Indian Point LR Hearing - 2009/11/02 Indian Point LR Hearing -	11/2/2009	E-Mail	[None provided]	Transmission of Internal Discussion Regarding EIS	4
DPP-09-002	ML092720329	R. Palla, NRC, NRR	2009/03/02 Indian Point LR Hearing - FW: State of New York dSEIS Contentions and Supporting Documents	3/2/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	4
DPP-09-004	ML092720634	R. Palla, NRC, NRR	2009/08/31 Indian Point LR Hearing NYS Documents Table	8/31/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	4
DPP-09-005	ML092660503	R. Palla, NRC, NRR	2009/09/23 Indian Point LR Hearing - General Discussion Regarding SAMA Analysis *** Attorney Client Privilege	9/23/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	4
DPP-09-008	ML092720210	R. Palla, NRC, NRR	2009109129 Indian Point LR Hearing - FW:	9/29/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	4
DPP-09-013	ML092870018	R. Palla, NRC, NRR	2009110114 Indian Point LR Hearing - Annual Effluent Reports	10/14/2009	E-Mail	[None provided]	Internal Transmission of Comments Regarding the EIS	4

DPP-25-045	ML110310331	J. Jones, Sandia	2009/12/16 Indian Point LR Hearing - RE: IPEC Letter NL-09-165 - SAMA Reanalysis Using Alternate Meteorological Tower Data	12/16/2009	E-Mail	[None provided]	Internal discussion of Met data	6
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Key

- 1 Document created before any contentions admitted and before New York State Comments on the DSEIS: DPP-00-37, DPP-00-39, DPP-00-53, DPP-00-57, DPP-00-66, DPP-00-67, DPP-00-82, DPP-00-147, DPP-00-161, DPP-00-165, DPP-00-168, DPP-00-209, DPP-00-54, DPP-00-65, DPP-00-98, DPP-00-164, DPP-00-243, DPP-00-155
- 2 Documents related to comments on RAI or FSEIS draft: DPP-00-37, DPP-00-39, DPP-00-53, DPP-00-57, DPP-00-66, DPP-00-67, DPP-00-82, DPP-00-147, DPP-00-161, DPP-00-165, DPP-00-168, DPP-00-209, DPP-18-005, DPP-18-006
- 3 Documents with subject unrelated to SAMA analysis: DPP-00-54, DPP-00-65, DPP-00-98, DPP-00-164, DPP-00-243
Documents authored by NRC and by either IFSI or Sandia and recipient not disclosed: DPP-00-155, DPP-12-004, DPP-12-005, DPP-10-001, DPP-10-002, DPP-10-004, DPP-10-005, DPP-10-006, DPP-10-007, DPP-10-011, DPP-10-012, DPP-09-02, DPP-09-04, DPP-09-05, DPP-09-08, DPP-09-013, DPP-12-004, DPP-12-005, DPP-12-006
- 5 Documents that appear to contain facts which are not subject to withholding: DPP-10-001, DPP-10-003, DPP-10-007, DPP-10-004, DPP-10-005, DPP-14-003
- 6 Documents with information too cryptic to evaluate privilege claim: DPP-25-045, DPP-18-005, DPP-18-006, DPP-10-001, DPP-10-003, DPP-10-007, DPP-10-004, DPP-10-005, DPP-14-003

Attachment 7



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

April 20, 2011

Sherwin Turk, Esq.
Office of the General Counsel
Mail Stop O-15-D-21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Via electronic mail

Re: License Renewal Application submitted by Entergy Indian Point Unit 2, LLC, Entergy Indian Point Unit 3, LLC, and Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Mr. Turk:

This letter responds to your email of April 18, 2011 which responded to my letter of January 31, 2011 seeking documents Staff referenced in the FSEIS. The FSEIS says: "The NRC staff performed its review with contract assistance from Information Systems Laboratories, Inc. and Sandia National Laboratory." FSEIS at 5-4. I therefore requested that NRC Staff identify and produce the documents that Information Systems Laboratories, Inc. ("ISLI") and/or Sandia National Laboratory ("Sandia") prepared for NRC Staff, as Staff itself references in the FSEIS, Vol.1 at 5-4 and Vol. 3, Appendix G at G-22 to G-29. Your email is almost entirely unresponsive to the State's request and raises alleged privilege claims that are inapplicable to the documents the State seeks and to which it is entitled pursuant to 10 C.F.R. §§ 2.336(a)(1)(i) and 2.336(b)(3).

In your email, you indicate that Staff previously identified the documents the State seeks in Staff's Deliberative Process Privilege ("DPP") logs on numerous occasions, and you include references to a number of the logs as well as a previous letter from Brian Harris to John Sipos regarding Contentions 35 and 36 on October 12, 2010. None of these references, with minor exceptions, reflect disclosure of the documents the State is seeking, and your reliance on those disclosures indicates a fundamental misunderstanding of the State's request. To reiterate, on January 31 the State requested:

all documents prepared by Sandia, including but not limited to computer

input/output files, sensitivity studies of any computer models or the input assumptions that were used, validation of any computer models or the input assumptions that were used, correspondence between NRC Staff and Sandia regarding the consultation, a copy of any contract or task assignment between NRC and Sandia or any such document prepared in consultation with Sandia, during the Staff's review of Entergy's Indian Point relicensing application conducted pursuant to the National Environmental Policy Act ("NEPA"). This request includes but is not limited to any document prepared by or in consultation with Joseph Jones, Nathan Bixler, or Fotini Watson, who are identified in the FSEIS, Appendix B, as Sandia employees having expertise in Severe Accident Mitigation Alternatives at Sandia and are identified as authors of the FSEIS (see NRC Bibliographic Data Sheet).

Staff produce all documents prepared by Information Systems Laboratories, Inc., or prepared in consultation with Information Systems Laboratories, Inc., during the Staff's review of Entergy's Indian Point relicensing application conducted pursuant to the NEPA.

January 31, 2011 Letter from Janice Dean to Sherwin Turk at 1-2. Thus, the essence of the State's request is for documents ISLI and/or Sandia generated or reviewed and which allegedly provided support for Staff's positions in the FSEIS. The State did not ask for drafts of the FSEIS language, but rather the documents that ISLI and Sandia generated or reviewed as part of their consultation with NRC and that provide "support for or opposition to" the FSEIS conclusions. See 10 C.F.R. § 2.336(b)(3).

Your April 18 email refers to "the Sandia document which was specifically mentioned in your letter of January 31" when in fact the State did not seek any particular single document. Rather, the State requested "all the documents in Sandia's possession that were generated as part of Sandia's analysis." You assert that DPP-18-005, identified on Staff's log as a "discussion" of draft responses to the DSEIS, is responsive to the State's request. This designation is, at best, ambiguous, and implies that draft responses have been prepared by an entity or person other than Sandia and that in DPP-18-005 Sandia is providing comments on those draft responses. This document would not be responsive to the State's request. The State seeks documents Sandia generated, prepared and reviewed in analyzing the State's DSEIS comments and contentions, including any computer analyses, provided to NRC.

The State also seeks the documents Staff references and discusses in the FSEIS. For example, the FSEIS asserts that "Sandia performed a comparison of the decontamination cost factors derived from the Site Restoration study to those used in the SAMA analysis." FSEIS Vol. 3 at G-23. Yet Staff has not identified any document in which Sandia's comparison and supporting documentation can be found. The FSEIS is full of similar indications of considerable work done by Sandia to form the basis for statements made in the FSEIS. The State seeks, and Staff is obligated to provide, access to documents generated by Sandia and documents it reviewed in doing its work for NRC. The Staff is also obligated to provide the documents that NRC's designated experts (including those who work at Sandia (such as Nathan Bixler, et al.)) reviewed and relied on.

Your email identified 19 ISLI-authored documents¹ that Staff initially disclosed on January 30, 2009; of these, none are dated after April 22, 2008 (DPP-00-243). It therefore appears highly unlikely that these documents could be responding to the State's comments or contentions based on the DSEIS, since the ISLI-authored documents you list pre-date the DSEIS by many months, and pre-date the State's contentions and DSEIS comments by almost a year. The only one conceivably relevant to the State's request is DPP-00-191. However, that document is authored by NRC and sent to ISLI; the State asked for documents *generated* by ISLI. Also, its topic is apparently the economic impacts analysis in the Beaver Valley proceeding and not the Indian Point proceeding and it was authored on April 1, 2008, four months before any contentions were admitted in this proceeding and thus cannot possibly contain ISLI's analysis of a New York contention or comment.

In addition, the subject matter of the documents you listed, to the extent they were revealed in the DPP log, were irrelevant to what the State seeks. According to the description provided by NRC Staff in the privilege log DPP-00-37, DPP-00-39, DPP-00-53, DPP-00-57, DPP-00-66, DPP-00-67, DPP-00-82, DPP-00-147, DPP-00-161, DPP-00-165, DPP-00-168, DPP-00-209 are all related to RAI drafts. The State did not ask for draft RAIs in its January 31 letter. Other documents you identified are similarly nonresponsive to the State's request: DPP-00-54 describes a planned audit, DPP-00-65 is apparently the results of the audit, DPP-00-98, DPP-00-164 and DPP-00-243 are related to safety issues (not the FSEIS), and DPP-00-155 does not appear to have been authored by ISLI. None of these are responsive to the State's request for all documentation that relates to the FSEIS and in particular the FSEIS's statement that "[t]his section presents a summary of the SAMA evaluation for IP2 and IP3, conducted by Entergy, and the NRC staff's review of that evaluation. The NRC staff performed its review with contract assistance from Information Systems Laboratories, Inc. and Sandia National Laboratory." FSEIS at 5-4.

The allegedly relevant and disclosed Sandia documents you listed are also, for the most part, irrelevant. First, none of the NRC Staff's log descriptions list recipients, so unless Sandia was the author of a document, no one reviewing Staff's logs would be able to determine whether Sandia was involved. Second, most of the documents are authored by NRC and are thus clearly not responsive to the State's request for documents generated by Sandia. DPP-18-005 and 006 appear to be the same 22 page document and, as noted above, appear to be comments on the draft proposed FSEIS language. DPP-12-004 and 005 are authored by NRC and appear to also be comments on draft FSEIS language. The State did not request NRC drafts of FSEIS language or documents NRC authored. Several documents in disclosure supplement 10 are Sandia-authored but, contrary to the assertion in your letter, either do not contain deliberative process discussions or reveal the existence of documents that do not contain deliberative process discussions. DPP-10-001, 003 and 007 appear to include facts about Indian Point weather and, as you know, facts are not privileged under the deliberative process privilege. Similarly, DPP-10-004 and 005

¹ Your email referenced documents using numbers DPP-00-39, etc. The actual DPP used numbers DPP-00-039 (emphasis added). I have assumed the designation you used reflects an inadvertent mistake, and not a different list of documents.

relate to specific tables comparing population estimates. DPP-14-003, an NRC authored document with no disclosed recipient, identifies a MACCS2 Calculation Matrix, that has not been produced and is not subject to the deliberative process privilege since it is a calculation, not an opinion.

Finally, the documents identified by Brian Harris in his October 12, 2010 letter to John Sipos are also irrelevant to the State's request because they are not documents authored by either ISLI or Sandia.

Your letter also suggests that the documents are being withheld for reasons not provided in the disclosure logs and that they are being withheld because they were prepared in anticipation of litigation. That assertion is baseless, since all the documents the State seeks relate to Sandia and ISLI's work done in response to the State's comments on the DSEIS. Staff is obligated under NRC regulations and the National Environmental Policy Act ("NEPA") to disclose all the documents reviewed and/or relied upon by it in developing its FSEIS position, including responses to comments of the public. That fact that some public comments are also the basis for contentions in a licensing proceeding does not authorize NRC Staff to fail to meet its disclosure obligations under NRC regulations and NEPA. In addition, once Staff chose to rely upon the information provided to it by Sandia and ISLI in formulating its FSEIS conclusions, it waived any possible privilege related to such documents. There is no legal basis for Staff to rely upon documents in formulating its FSEIS conclusions and then to refuse to disclose those documents under a claim of privilege.

It is now apparent that the documents the State sought via letter dated January 31, 2011 have never been disclosed, even on privilege logs, and that Staff does not intend to disclose the documents on a privilege log or provide the documents. Given that it has been three months since the State's original request for these documents, and that the State's testimony on FSEIS-related issues is due in eight weeks, it is essential that the State file a motion to compel production of the withheld documents by the end of this week.

Sincerely,

/s

Janice A. Dean
Assistant Attorney General

cc: Brian Harris, Esq.
Counsel for NRC Staff
Via electronic mail

Attachment 8

IPRenewal NPEmails

From: Green, Kimberly
Sent: Wednesday, November 18, 2009 11:13 AM
To: STROUD, MICHAEL D
Cc: IPRenewal NPEmails
Subject: Telecon Summaries for November 3rd and 9th
Attachments: ML093170171.pdf; ML093170168.pdf

Mike,

Attached are the telecon summaries for the calls that took place on November 3 and 9, 2009. They will be publicly available in ADAMS on 11/25/09.

Kimberly Green
Safety PM
(301) 415-1627
kimberly.green@nrc.gov

Hearing Identifier: IndianPointUnits2and3NonPublic_EX
Email Number: 1864

Mail Envelope Properties (F5A4366DF596BF458646C9D433EA37D71D5EE87223)

Subject: Telecon Summaries for November 3rd and 9th
Sent Date: 11/18/2009 11:12:55 AM
Received Date: 11/18/2009 11:13:00 AM
From: Green, Kimberly

Created By: Kimberly.Green@nrc.gov

Recipients:
"IPRenewal NPEmails" <IPRenewal.NPEmails@nrc.gov>
Tracking Status: None
"STROUD, MICHAEL D" <MSTROUD@entergy.com>
Tracking Status: None

Post Office: HQCLSTR01.nrc.gov

Files	Size	Date & Time
MESSAGE	287	11/18/2009 11:13:00 AM
ML093170171.pdf	97094	
ML093170168.pdf	96597	

Options
Priority: Standard
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:
Recipients Received:

November 17, 2009

LICENSEE: Entergy Nuclear Operations, Inc.
FACILITY: Indian Point Nuclear Generating Unit Nos. 2 and 3
SUBJECT: SUMMARY OF TELEPHONE CALL HELD ON NOVEMBER 9, 2009, BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION AND ENTERGY NUCLEAR OPERATIONS, INC., CONCERNING METEOROLOGICAL DATA USED FOR THE SEVERE ACCIDENT MITIGATION ALTERNATIVE ANALYSIS

Representatives of the U.S. Nuclear Regulatory Commission (NRC or the staff) and Entergy Nuclear Operations, Inc., (Entergy or the applicant) held a telephone call on November 9, 2009, to clarify how the meteorological data that were used in the severe accident mitigation alternatives (SAMA) analysis were averaged. This call was a follow-up call to the call held on November 3, 2009.

During the call, Entergy informed the staff that, based on a review of the meteorological data used for the SAMA analysis, it discovered an error in how the wind direction data were averaged. Entergy stated that it has issued a condition report. It further stated that it will document the discovery of the error and that corrective action is being taken in a letter to the NRC.

Entergy plans to submit the results of a reanalysis of the MELCOR Accident Consequence Code System, Version 2 (MACCS2) calculations using corrected data. The staff asked Entergy to also include the following information in its submittal:

- identification of the wind data used and its justification (e.g., if a single year is used or an average of several years),
- revised estimates of the offsite population dose and offsite economic costs,
- identification of which meteorological tower heights were used for wind data and why they were selected,
- an assessment of the impact on the SAMA analysis results, specifically for the analysis case discussed in response to RAI 4e, dated February 5, 2008, and
- the complete MACCS2 input file used for the reanalysis (in electronic format).

Entergy Nuclear Operations, Inc. - 2 -

The enclosure provides a listing of the participants.

The applicant had an opportunity to comment on this summary.

/RA/

Kimberly J. Green, Project Manager
Projects Branch 2
Division of License Renewal
Office of Nuclear Reactor Regulation

Docket Nos. 50-247 and 50-286

Enclosure:
As stated

cc w/encl: See next page

The enclosure provides a listing of the participants.

The applicant had an opportunity to comment on this summary.

/RA/
Kimberly J. Green, Project Manager
Projects Branch 2
Division of License Renewal
Office of Nuclear Reactor Regulation

Docket Nos. 50-247 and 50-286

Enclosure:
As stated

cc w/encl: See next page

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- RidsNrrDirRpob Resource
- RidsNrrDciCvib Resource
- RidsNrrDciCpnb Resource
- RidsNrrDraAfpb Resource
- RidsNrrDeEmcb Resource
- RidsNrrDeEeeb Resource
- RidsNrrDssSrxb Resource
- RidsNrrDssSbpb Resource
- RidsNrrDssScvb Resource
- RidsOgcMailCenter Resource

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| DWrona | EDacus, OCA |
| BPham | GMeyer, RI |
| KGreen | RConte, RI |
| AStuyvenberg | JBoska |
| RAuluck | DScrenci, RI OPA |
| JDozier | NSheehan, RI OPA |
| MKowal | PCataldo, RI |
| STurk, OGC | CHott, RI |
| DJackson, RI | NMcNamara, RI |
| BMizuno, OGC | BWelling, RI |
| SBurnell, OPA | ECobey, RI |
| DMcIntyre, OPA | TKoonce, RI |
| TMensah, OEDO | GMalone, RI |

ADAMS Accession Number: **ML093170171**

OFFICE	PM:RPB2:DLR	LA:RPOB:DLR	BC:RPB2:DLR	PM:RPB2:DLR
NAME	KGreen	SFiguroa	DWrona	KGreen (Signature)
DATE	11/16/09	11/13/09	11/17/09	11/17/09

OFFICIAL RECORD COPY

**TELEPHONE CONFERENCE CALL
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 AND 3
LICENSE RENEWAL APPLICATION**

**LIST OF PARTICIPANTS
NOVEMBER 9, 2009**

PARTICIPANTS

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Nate Bixler

Joe Jones

Garry Young

Alan Cox

Mike Stroud

Lori Potts

Clem Yeh

Kou John Hong

Doug Gaynor

Jim Thomas

John Corn

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NRC

Sandia National Laboratory (SNL)

SNL

Entergy Nuclear Operations, Inc. (Entergy)

Entergy

Entergy

Entergy

Entergy

Entergy

Entergy

Enercon

Enercon

ENCLOSURE

Indian Point Nuclear Generating
Unit Nos. 2 and 3

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Indian Point Nuclear Generating
Unit Nos. 2 and 3

- 2 -

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Indian Point Nuclear Generating
Unit Nos. 2 and 3

- 3 -

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November 17, 2009

LICENSEE: Entergy Nuclear Operations, Inc.
FACILITY: Indian Point Nuclear Generating Unit Nos. 2 and 3
SUBJECT: SUMMARY OF TELEPHONE CALL HELD ON NOVEMBER 3, 2009, BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION AND ENTERGY NUCLEAR OPERATIONS, INC., CONCERNING METEOROLOGICAL DATA USED FOR THE SEVERE ACCIDENT MITIGATION ALTERNATIVE ANALYSIS

Representatives of the U.S. Nuclear Regulatory Commission (the staff) and Entergy Nuclear Operations, Inc., (Entergy or the applicant) held a telephone call on November 3, 2009, to obtain clarification on how the meteorological data that were used in the severe accident mitigation alternatives (SAMA) analysis were averaged. As stated in the Environmental Report, five recent years of data were averaged and used as input for the MELCOR Accident Consequence Code System, Version 2 analysis; however, the applicant did not describe how the averaging of the data was conducted.

During the call, the staff asked Entergy to describe how it averaged the data and to verify the data for wind direction. Entergy stated that it averaged five years worth of meteorological data. For each year, there are 8,760 data points. The applicant stated that it averaged each corresponding data point (i.e., same data point for each year) for all five years. It clarified that it averaged each parameter separately, i.e., wind speed, direction, precipitation and humidity.

The applicant stated that it will confirm with its contractor how the data were averaged, and indicated that another phone call might be needed.

The enclosure provides a listing of the participants.

The applicant had an opportunity to comment on this summary.

/RA/

Kimberly J. Green, Project Manager
Projects Branch 2
Division of License Renewal
Office of Nuclear Reactor Regulation

Docket Nos. 50-247 and 50-286

Enclosure:
As stated

cc w/encl: See next page

November 17, 2009

LICENSEE: Entergy Nuclear Operations, Inc.
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Docket Nos. 50-247 and 50-286

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DATE	11/16/09	11/13/09	11/17/09	11/17/09

OFFICIAL RECORD COPY

Memorandum to Entergy Nuclear Operations, Inc. from Kimberly J. Green dated November 17, 2009

SUBJECT: SUMMARY OF TELEPHONE CALL HELD ON NOVEMBER 3, 2009, BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION AND ENTERGY NUCLEAR OPERATIONS, INC., CONCERNING METEOROLOGICAL DATA USED FOR THE SEVERE ACCIDENT MITIGATION ALTERNATIVE ANALYSIS

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**TELEPHONE CONFERENCE CALL
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 AND 3
LICENSE RENEWAL APPLICATION**

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

-----x
In re: Docket Nos. 50-247-LR and 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. April 22, 2011
-----x

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2011, copies of the State of New York's Motion to Compel NRC Staff To Produce Documents Relied Upon In Staff's Final Supplemental Environmental Impact Statement, along with Declaration of Janice A Dean and attachments, were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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