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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.	)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3)	)	July 29, 2011

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**APPLICANT'S PETITION FOR REVIEW OF LBP-11-17 GRANTING  
SUMMARY DISPOSITION OF CONSOLIDATED CONTENTION NYS-35/36**

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	)	July 29, 2011

**APPLICANT'S PETITION FOR REVIEW OF LBP-11-17 GRANTING  
SUMMARY DISPOSITION OF CONSOLIDATED CONTENTION NYS-35/36**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.341, Entergy Nuclear Operations, Inc. ("Entergy") petitions the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") for expedited review of the Atomic Safety and Licensing Board's ("Board") July 14, 2011 Memorandum and Order ("Order").<sup>1</sup> In the Order, the Board granted New York State's ("New York") Motion for Summary Disposition ("Motion"). It concluded that Entergy's operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3") "cannot be renewed" because the NRC Staff supposedly failed to review Entergy's "completed" severe accident mitigation alternatives ("SAMA") analysis, and supposedly failed either to justify deferring completion of the review or to better justify not ordering Entergy to implement cost beneficial SAMAs identified in the Staff's Final Supplemental Environmental Impact Statement ("FSEIS"),<sup>2</sup> even though *none* of the identified SAMAs concerned the aging-related issues that are the subject of

<sup>1</sup> Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-11-17, 74 NRC \_\_\_, slip op. (July 14, 2011) ("Order" or "LBP-11-17").

<sup>2</sup> NUREG-1437, Supp. 38, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report* (Dec. 2010) ("FSEIS").

the license renewal decision.<sup>3</sup> As set forth herein, the Board's decision was wrong both as a matter of law and fact. As a matter of law, there is no requirement that non-aging related SAMAs be further analyzed or implemented as a condition for a renewed license pursuant to 10 C.F.R. Parts 51 or 54. And as a matter of fact, the NRC Staff fulfilled their obligations under the National Environmental Policy Act ("NEPA") and 10 C.F.R. Part 51. For the reasons given herein, the Commission should grant review and reverse the Board's decision.<sup>4</sup>

## II. BACKGROUND

### A. THE INDIAN POINT LICENSE RENEWAL PROCEEDINGS

Entergy's IP2 and IP3 reactors presently are operating under licenses which expire on September 28, 2013, and December 12, 2015, respectively. On April 23, 2007, Entergy filed an application to renew the operating licenses for the IP2 and IP3 reactors.

In connection with these applications and as required under 10 C.F.R. Part 51, the NRC Staff prepared, and in December 2010 issued, an FSEIS. Under NEPA, an Environmental Impact Statement ("EIS") must contain a reasonably complete discussion of possible measures to mitigate environmental impacts, including SAMAs.<sup>5</sup> Therefore, in accordance with 10 C.F.R. §

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<sup>3</sup> LBP-11-17, slip op. at 17.

<sup>4</sup> This Petition is brought to the Commission not without prior history. Namely, in July 2010, Entergy and NRC Staff filed petitions for interlocutory review of the Board's decision to admit NYS-35/36, contending, in part, that the Board's decision improperly imported Part 50 operating reactor oversight issues into a NEPA analysis and a Part 54 license renewal proceeding. See Applicant's Petition for Interlocutory Review of LBP-10-13 (July 15, 2010) ("Entergy July 2010 Appeal"); NRC Staff's Petition for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13) (July 15, 2010). While the Commission did not accept the petitions, it clearly stated that "[t]hese arguments are not without force," and cautioned that "[p]ortions of the Board's decision appear problematic, and may warrant our review later in the proceeding." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-30, 72 NRC \_\_\_, slip op. at 6 (Nov. 30, 2010). The time for doing so is now.

<sup>5</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352, 353 n.16 (1989) (ruling that NEPA requires a "reasonably complete discussion of possible mitigation measures," but "imposes no substantive requirement that mitigation measures actually be taken"); see also *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994) ("NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." (citations omitted)); *Nat'l Parks & Conservation*

51.53(c)(3)(ii)(L), and in advance of the FSEIS, Entergy prepared a detailed site-specific evaluation of possible SAMAs for Indian Point and submitted it to the Staff.

The NRC Staff reviewed Entergy's assessment of SAMAs and, in the FSEIS, offered its own independent and detailed technical review of Entergy's SAMA analyses. Among other conclusions, the NRC Staff explained that NRC lacks the authority, in connection with a Part 54 renewal proceeding, to require implementation of cost-beneficial SAMAs if they are unrelated to aging management.<sup>6</sup> In this regard, the FSEIS was fully consistent with Commission precedent establishing that conditions of a renewed license must be aging related.<sup>7</sup> The NRC Staff also concluded in the FSEIS that the methods used by Entergy in conducting its SAMA analysis, and the implementation of those methods, were sound, and that Entergy's SAMA evaluations were "reasonable and sufficient for the license renewal submittal."<sup>8</sup>

New York submitted two contentions relating to the SAMA issue. The first, Contention 35, alleged that Entergy's SAMA analysis was "incomplete." The second, Contention 36, alleged that the NRC Staff had failed, as supposedly required, either to demand that Entergy

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*Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000) ("Contrary to National Parks' assertion, a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."); *Cnty. of Rockland v. FAA*, 335 Fed.Appx. 52, 55 (D.C. Cir. 2009) (quoting *Methow Valley*, 490 U.S. at 352) ("NEPA does not impose 'substantive requirement that a complete mitigation plan be actually formulated and adopted' before agency can act.").

<sup>6</sup> FSEIS, Vol. 1, at 5-11 (explaining that "none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation" and "[t]herefore, they need not be implemented as part of IP2 and IP3 license renewal pursuant to 10 CFR Part 54").

<sup>7</sup> See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC \_\_\_, slip op. at 7 n.26 (Mar. 26, 2010) (noting that because none of the SAMAs identified by Entergy as potentially cost-effective for the Pilgrim plant "bear on adequately managing the effects of aging, none need be implemented as part of the license renewal safety review, pursuant to 10 C.F.R. Part 54"); see also *Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2)*, CLI-02-28, 56 NRC 373, 388 n.77 (2002). In CLI-02-28, the Commission specifically cited the Draft SEIS's conclusion that "this SAMA does not relate to adequately managing the effects of aging during the period of extended operation" and "[t]herefore, it need not be implemented as part of license renewal pursuant to 10 CFR Part 54." *Id.* The Commission further stated that "NEPA 'does not mandate the particular decisions an agency must reach,' only the 'process the agency must follow while reaching its decisions.'" *Id.* (quoting *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir. 1996)).

<sup>8</sup> FSEIS, Vol. 1, at 5-11.

implement any cost-beneficial SAMAs as a condition of license renewal, or to provide more fulsome justification *in the FSEIS* for its decision not to require implementation of the cost-beneficial SAMAs. Subsequently, New York moved for summary disposition. New York asked that Entergy's application be denied due to the Staff's supposedly-inadequate analysis of the SAMA issue in the FSEIS. Alternatively, New York asked the Board to require the Staff to revise the FSEIS with the information alleged to be lacking by Contention 36.

#### **B. THE BOARD'S DECISION**

On July 14, 2011, the Board granted New York's motion and denied the cross-motions filed by the NRC Staff and Entergy. The Board did not deny Entergy's application for a renewed license, as requested by New York, but instead granted the relief that New York had requested in the alternative: a remand for the NRC Staff either to require Entergy to implement the non-aging related, cost-beneficial SAMAs, or to better explain why they are not requiring Entergy to do so.<sup>9</sup> In the meantime, the Board held that the licenses for Indian Point "cannot be renewed" absent the satisfaction of one of those two Board requirements.<sup>10</sup>

In reaching this decision the Board fundamentally misstated the legal framework surrounding license renewal applications. The Board began by explaining that "the NEPA review in license renewal proceedings, which is conducted pursuant to Part 51, is not limited to aging management-related issues."<sup>11</sup> The Board went on to state that Part 51 and NEPA require the NRC Staff, before it may issue a renewed license, to take a "hard look . . . at all SAMAs (both aging related and non-aging related) before deciding whether to grant a license renewal

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<sup>9</sup> See LBP-11-17, slip op. at 17.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 9 (citing *Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, LBP-10-15, 72 NRC \_\_\_, slip op. at 20 (Aug. 4, 2010)).

application.”<sup>12</sup> According to the Board, however, the Staff “has the authority to require implementation of non-aging management SAMAs through its CLB backfit review under Part 50 or through setting conditions of the license renewal,”<sup>13</sup> and therefore must, under 10 C.F.R. § 51.103(a)(4), in “its record of decision . . . [s]tate whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted.”<sup>14</sup> The Board, in other words, concluded that before the renewed licenses may be issued, the Staff must either require implementation of all cost-beneficial SAMAs or better explain why particular non-aging related SAMAs were not required as a condition of license renewal.

Notably, in reaching this conclusion, the Board acknowledged that SAMAs unrelated to aging management need not be implemented pursuant to the NRC’s license renewal safety review under Part 54.<sup>15</sup> In doing so, however, it erroneously attached significance to the nexus between SAMAs and Part 51.<sup>16</sup> The Commission, consistent with its holding in *Pilgrim*, has held that the ultimate decision on whether to require a facility to modify its current licensing basis to implement any particular SAMA will fall under a Part 50 review—not a Part 51 or Part 54 license renewal review.<sup>17</sup> Therefore, any argument that Part 51 authorizes or compels implementation of SAMAs—or any other mitigation alternatives—runs directly counter to judicial and Commission precedent.

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<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 14 (citing *Pilgrim*, CLI-10-11, slip op. at 7 n.26).

<sup>16</sup> *Id.* at 14 (stating that “SAMAs identified in the FSEIS as potentially cost-beneficial have not been analyzed under the NRC’s Part 54 license renewal safety review, having instead been analyzed under its Part 51 environmental review.”)

<sup>17</sup> See *McGuire/Catawba*, CLI-02-28, 56 NRC at 388 n.77 (“Thus, the ultimate agency decision on whether to require facilities with ice condenser containments to implement any particular SAMA will fall under a Part 50 current licensing basis review.”).

The Board also concluded that the NRC Staff had failed to satisfy its requirement that the identified cost-beneficial SAMAs and the need for their implementation be fully analyzed and justified as a condition for license renewal. The Board faulted the NRC Staff for supposedly deferring certain actions with respect to cost-beneficial, non-aging management SAMAs identified in Entergy's review. Accordingly, the Board granted New York's motion, ordering that no renewed licenses may be issued until the Staff either orders Entergy to implement all cost-beneficial SAMAs, whether or not aging related, or provides some additional justification—besides the limited scope of the Part 54 renewal process—for not requiring implementation of the non-aging management SAMAs.

### **III. ARGUMENT**

#### **A. REVIEW AT THIS STAGE IS WARRANTED UNDER COMMISSION REGULATIONS**

Review by the Commission of a Board order is proper in any of three (3) circumstances:

- First, NRC regulations at 10 C.F.R. § 2.341(b)(1) authorize a party to petition for Commission review of any full or partial initial decision by a presiding officer and any other decision or action by a presiding officer with respect to which a petition for review is authorized. Generally, a Board order is reviewable if it disposes of a major segment of the case or terminates a party's right to participate.<sup>18</sup> Pursuant to 10 C.F.R. § 2.341(b)(1), such a petition may be granted "in the discretion of the Commission . . . with respect to the following considerations: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration which the Commission may deem to be in the public interest."
- Second, pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, at its discretion, grant a party's request for interlocutory review of an issue that: (i) threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the

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<sup>18</sup> *Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-731, 17 NRC 1073, 1074-75 (1983).*

presiding officer's final decision; or (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.

- Finally, the Commission may take review of an issue on its own motion, or *sua sponte*, pursuant to its inherent supervisory authority over NRC adjudications. For example, the Commission has taken *sua sponte* review to address issues that “are ‘significant,’ have ‘potentially broad impact,’ and ‘may well recur in the likely license renewal proceedings for other plants.’”<sup>19</sup>

Here, review by the Commission would be justified for reasons fitting within each of these categories.

First, in granting New York summary disposition, the Board made clear that it had rendered a final decision on Contention NYS-35/36, and that Entergy's operating licenses cannot be renewed regardless of the outcome of the forthcoming hearing on the remaining admitted contentions without taking the actions directed by the Board.<sup>20</sup> While the Board has carefully stated that it is “not directing the implementation of any SAMA,”<sup>21</sup> its ruling has terminated further litigation on the merits of Contention NYS-35/36, forcing the Staff to take actions which are contrary to law. In this respect, the Board's ruling has placed Entergy and the Staff in an untenable position from which flows serious and irreparable harm.

Moreover, the Board's ruling in LBP-11-17 fundamentally distorts the very fabric of the NRC's license renewal regulatory framework – a framework that draws a clear line between the agency's safety review under the Atomic Energy Act (“AEA”) and Part 54 and its environmental review under NEPA and Part 51. By disregarding settled precedent, the Board has imposed new and unique substantive obligations on Entergy and the Staff that have no legal basis.

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<sup>19</sup> *N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC \_\_\_, slip op. at 8-9 (Sep. 30, 2010).*

<sup>20</sup> LBP-11-17, slip op. at 17.

<sup>21</sup> *Id.* at 18.

The appeal also brings directly to the Commission an important legal question that directly affects the manner in which the NRC Staff must proceed to discharge its obligations under NEPA, the AEA, and NRC regulations governing applications for renewed licenses. The clear intent and effect of the Board's Order is to compel further NRC Staff analysis and implementation (or some new justification for not doing so) of cost-beneficial SAMAs in license renewal proceedings.<sup>22</sup> Such a profound reversal of NRC policy and law should not be left to the discretion of a single Board, but rather is more appropriately addressed by the Commission.<sup>23</sup>

Accordingly, and as explained more fully below, the Commission has the authority to, and should, accept this petition to address the legal and factual errors committed by the Board below.

**B. THE BOARD'S LEGAL CONCLUSION THAT RENEWED LICENSES MAY NOT BE ISSUED ABSENT FURTHER ANALYSIS AND JUSTIFICATION IS ERRONEOUS**

In reaching its decision below, the Board acknowledged that "SAMAs unrelated to aging management need not be implemented pursuant to the NRC's license renewal *safety* view under Part 54," as set forth in *Pilgrim*.<sup>24</sup> Nonetheless, the Board effectively held that cost-beneficial SAMAs unrelated to aging management *must* be implemented—or else the Staff *must* explain why they are not being implemented—*before* a renewed license may be issued. This decision reflects a fundamental misunderstanding of the NRC's regulations in both Part 51, which

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<sup>22</sup> Although the order is not binding on other Boards, recent experience plainly teaches that the instant decision is likely to trigger further contentions and similar rulings in other proceedings. As such, this appeal presents important issues of generic application that justify expeditious review and resolution by the Commission.

<sup>23</sup> Further, the Board's ruling comes in the midst of Commission consideration of potential changes to the regulatory framework governing the analysis and implementation of severe accident mitigation as a result of the recent events in Japan. Accordingly, one of the core issues presented in this appeal—the process by which the NRC Staff must analyze and implement specific measures for mitigating severe accidents—is directly related to ongoing deliberations of the Commission.

<sup>24</sup> LBP-11-17, slip op. at 14 (*citing Pilgrim*, CLI-10-11, slip op. at 7 n.26).

implements NEPA, and Part 54, which alone sets forth the requirements for issuance of a renewed license.

In reaching its conclusion, the Board principally relied on the backfit regulations found in 10 C.F.R. § 50.109(a)(3) and the environmental conditions referenced in § 54.33(c). The Board, quoting § 50.109(a)(3), stated that:

[T]he Staff has the option and the duty . . . to pursue modifications to Entergy's CLB at all periods during normal and extended operations through the backfit procedure if "there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection."<sup>25</sup>

According to the Board, the Staff provided "no explanation at all for why it has decided not to require implementation of these [non-aging related] cost-beneficial SAMAs by setting conditions for the license renewal" under 10 C.F.R. § 54.33(c) or requiring a backfit.<sup>26</sup> These regulatory provisions, however, cannot bear the weight placed on them by the Board. As explained in the following sections, neither § 50.109 nor § 54.33(c) require the analysis and level of justification of non-aging related, cost-beneficial SAMAs called for by the Board prior to issuance of renewed licenses.

#### **1. The Commission's Backfit Regulations Do Not Establish License Renewal Requirements**

The backfit regulation in § 50.109 itself does not require backfitting as a condition of license renewal. To the contrary, § 50.109(c) expressly gives the Commission discretion in scheduling backfits to take account of numerous factors. *See* 10 C.F.R. § 50.109(c) ("In reaching

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<sup>25</sup> *Id.* at 16 (quoting 10 C.F.R. § 50.109(a)(3)). Significantly, the Board does not suggest that the implementation of any SAMA will achieve a "substantial increase" in the overall protection of public health and safety—a *sine qua non* for any cost-justified backfit under § 50.109. Further, for the purposes of license renewal, the Commission has already determined that the probability-weighted consequences of a severe accident are "SMALL" for all plants.

<sup>26</sup> *Id.*

the determination required by paragraph (a)(3) of this section, the Commission will consider how the backfit should be scheduled in light of other ongoing regulatory activities at the facility and, in addition, will consider information available concerning any of the following factors . . .”).

The Board’s decision is also contradicted by Commission precedent.<sup>27</sup> In the *Pilgrim* and *Vermont Yankee* license renewal proceedings, the Massachusetts Attorney General (“AG”) filed hearing requests that each included a “Petition for Backfit Order.”<sup>28</sup> The AG sought to initiate action in those proceedings to change the storage configuration of the Pilgrim and Vermont Yankee spent fuel pools for asserted environmental and safety reasons.<sup>29</sup> The Commission denied the petitions, noting that they amounted to a request for agency enforcement action, a request “not suitable for a license renewal adjudication.”<sup>30</sup>

The Board’s novel view of § 50.109 is also inconsistent with the regulatory history of Part 54, which clarifies the relationship between Part 54 and Part 50’s backfit rule. For example, the Statements of Consideration (“SOC”) for the NRC’s July 1990 proposed Part 54 rulemaking clearly states:

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<sup>27</sup> See *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-06-26, 64 NRC 225, 226-27 (2006) (holding that backfit requests are “not suitable for a license renewal adjudication”).

<sup>28</sup> See *id.* at 226 & n.3.

<sup>29</sup> *Id.* at 226. Specifically, the petitions requested that the Commission require each of the spent fuel pools to return “to its original low-density storage configuration and [to] us[e] dry storage for any excess fuel.” *Id.*

<sup>30</sup> *Id.* at 226-27; see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 96-97 (2007) (denying the petitioners’ request for fire barrier system backfits in light of their proffered contentions, which included SAMA issues, under the authority of CLI-06-26, and noting that a petition for backfits is essentially a request for enforcement action under 10 C.F.R. § 2.206 and is “not cognizable in a license renewal adjudication”); *Dominion Nuclear N. Anna, LLC* (Early Site Permit for N. Anna ESP Site), CLI-07-27, 66 NRC 215, 233 (2007) (noting the limiting applicability of the backfit rule). In *North Anna*, the Commission rejected the notion that the board overseeing the mandatory hearing on an early site permit application could impose a permit condition requiring that the design of North Anna’s two existing reactors be modified to provide for water-saving measures to offset environmental impacts of the new reactors. The Commission noted that its Notice of Hearing did not permit the Board to attach conditions to the operating licenses for the existing reactor units. *Id.* at 233-34. It also concluded that “such a result would run afoul of our Backfit Rule, which permits the Staff to impose new conditions on existing licenses only under very limited circumstances, none of which the dissent suggests apply here.” *Id.* at 234 n.103.

If the staff or the licensee seeks to make changes in a plant's licensing basis *for reasons other than age-related degradation*, they should be pursued either in the existing operating license or the renewed license, *once issued*. Staff-initiated changes would be evaluated in accordance with the backfit rule, 10 CFR 50.109.<sup>31</sup>

In the May 1995 SOC for its final revisions to Part 54, the Commission reaffirmed that it “does not intend to impose requirements on a licensee that go beyond what is necessary to adequately manage aging effects.”<sup>32</sup> The Board's current ruling that the backfit rule authorizes the Staff to require implementation of mitigation measures unrelated to aging management as part of license renewal cannot be reconciled with these settled and Commission-endorsed principles.<sup>33</sup>

## 2. Section 54.33(c) Does Not Support The Board's Decision

The second avenue identified by the Board for requiring implementation of non-aging management SAMAs is § 54.33(c). That section, however, contains no such requirement. As an initial matter, while the Board relied on § 50.109(c)'s standard for requiring backfits as the substantive reason why cost-beneficial SAMAs must be addressed as described above, § 54.33(c) does not mention backfits or refer to § 50.109 at all. Instead, the only “conditions for the license renewal”<sup>34</sup> mentioned in § 54.33(c) are “those conditions to protect the environment that were

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<sup>31</sup> Proposed Rule: Nuclear Power Plant License Renewal, 55 Fed. Reg. 29,043, 29,047 (July 17, 1990) (emphasis added).

<sup>32</sup> Final Rule: Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,490 (May 8, 1995).

<sup>33</sup> These same principles are reflected in NRC guidance documents. See, e.g., NRR Office Instruction LIC-202, Rev. 2, *Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests* at 1 (May 17, 2010), available at ADAMS Accession No. ML092010045 (stating that “if the NRC proposes to address safety issues outside the [aging management] scope of Part 54 ... then any actions necessary to address such out-of-scope safety issues are subject to the Backfit Rule”); NUREG-1850, *Frequently Asked Questions on License Renewal of Nuclear Power Reactors* at 4-34 (Mar. 2006), available at [http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1850/sr1850\\_fa\\_q\\_lr.pdf](http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1850/sr1850_fa_q_lr.pdf) (stating that plant enhancements that appear to be cost-beneficial but are unrelated to aging management during the period of extended operation “are considered as current operating issues and are further evaluated as changes that might appropriately be made under the current operating license rather than as a license renewal issue”); NUREG-1800, Rev. 2, *Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants*, at 4.1-1, 4.7-1 (Dec. 2010), available at ADAMS Accession No. ML103490036 (“Any question regarding the adequacy of the CLB must be addressed under the backfit rule (10 CFR 50.109) and is separate from the license renewal process.”).

<sup>34</sup> LBP-11-17, at 16.

imposed pursuant to 10 C.F.R. § 50.36b and that are part of the CLB for the facility at the time of issuance of the renewed license.”<sup>35</sup>

In citing 10 C.F.R. § 54.33(c), the Board invokes a provision contained in the NRC’s Part 54 aging management regulations that the Board views as compelling implementation of environmental mitigation measures identified through the Part 51 NEPA process.<sup>36</sup> That conclusion is erroneous. As its title indicates, “Continuation of CLB and conditions of renewed license,” 10 C.F.R. § 54.33 addresses the continuation of a plant’s CLB during the period of extended operation. Subsection 54.33(c), in particular, requires each application for license renewal to identify those license conditions which protect the environment—via environmental monitoring, reporting, and recordkeeping requirements—that previously were imposed *pursuant to 10 C.F.R. § 50.36(b)* and that are part of the CLB for the facility at the time of issuance of the renewed license.<sup>37</sup> Thus, insofar as Section 54.33(c) references environmental matters, the

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<sup>35</sup> 10 C.F.R. § 54.33(c).

<sup>36</sup> See LBP-11-17, at 16 & n.72 (*citing* 10 C.F.R. § 54.33(c) in suggesting that the Staff can require implementation of cost-beneficial SAMAs “by setting conditions for the license renewal”).

<sup>37</sup> Notably, in quoting 10 C.F.R. § 54.33(c), the Board omits the first and third sentences of that regulation, which are critical to understanding the scope of this provision. Section 54.33(c) states in full:

Each renewed license will include *those conditions to protect the environment that were imposed pursuant to 10 CFR 50.36b* and that are part of the CLB for the facility at the time of issuance of the renewed license. *These conditions* may be supplemented or amended as necessary to protect the environment during the term of the renewed license and will be derived from information contained in the supplement to the environmental report submitted pursuant to 10 CFR Part 51, as analyzed and evaluated in the NRC record of decision. The conditions will identify the obligations of the licensee in the environmental area, including, as appropriate, requirements for reporting and recordkeeping of environmental data and any conditions and monitoring requirements for the protection of the nonaquatic environment.

10 C.F.R. § 54.33(c) (emphasis added).

Board relies on circular, unsupported logic that impermissibly stretches the language of that regulation beyond its plain meaning.<sup>38</sup>

### 3. Part 51 Itself Contains No Authority For Conditioning Renewed Licenses to Require Implementation of Non-Aging Related SAMAs

The Board sought to distinguish *Pilgrim* by noting that the issue at hand concerns items identified under a Part 51 analysis, not Part 54 requirements, but that explanation does not withstand scrutiny. Part 51 contains no action-forcing mechanism. That is not surprising, given that the statute Part 51 implements, *i.e.*, NEPA, is not an action-forcing statute.

In suggesting broader authority under Part 51, the Board ignores the U.S. Supreme Court's unequivocal holding in *Methow Valley*, in which the Court ruled that NEPA requires a "reasonably complete discussion of possible mitigation measures," but "imposes no substantive requirement that mitigation measures actually be undertaken."<sup>39</sup> The Court further noted that there is a fundamental distinction between a procedural requirement that an agency discuss possible mitigation measures in sufficient detail, and a substantive requirement that the agency implement those measures.<sup>40</sup> Since NEPA is only procedural and not substantive in nature, that

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<sup>38</sup> See *La. Energy Servs., L.P. (Claiborne Enrichment Ctr.)*, CLI-97-15, 46 NRC 294, 299 (1997) ("The starting point in construing an NRC regulation is, of course, its 'language and structure.'") (quoting *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-900, 28 NRC 275, 288, review declined, CLI-88-11, 28 NRC 603 (1988); *Entergy Nuclear Vt. Yankee, L.L.C. (Vt. Yankee Nuclear Power Station)*, LBP-04-31, 60 NRC 686, 705 (2004) (quoting *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-95-17, 42 NRC 137, 145 (1995) (internal quotation marks omitted) ("When the meaning of the regulation is clear and obvious, the regulatory language is conclusive and a Board is not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history.")).

<sup>39</sup> *Methow Valley*, 490 U.S. at 352, 353 n.16; see also, *Laguna Greenbelt*, 42 F.3d at 528 ("NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." (citations omitted)); *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4 ("Contrary to National Parks' assertion, a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."); *Cnty. of Rockland*, 335 Fed.Appx. at 53 ("NEPA does not impose 'substantive requirement that a complete mitigation plan be actually formulated and adopted' before agency can act") (quoting *Methow Valley*, 490 U.S. at 352).

<sup>40</sup> *Methow Valley*, 490 U.S. at 352-53

statute does not require agencies to implement any of the mitigation measures discussed in the FSEIS.<sup>41</sup>

**C. THE BOARD'S FACTUAL CONCLUSION THAT ENERGY HAD NOT COMPLETED ITS SAMA ANALYSIS IS ERRONEOUS**

The Board's conclusion that Entergy's SAMA cost-benefit analyses, and the Staff's response to it, are incomplete is wrong as a matter of fact and law.

**1. The Board Plainly Erred in Ruling that the FSEIS Lacks An Adequately-Stated and Rational Basis for Not Requiring Implementation of Cost-Beneficial SAMAs**

The foregoing Board errors underlie the Board's incorrect conclusion that the FSEIS fails "to articulate a rational basis for not requiring Entergy to complete its SAMA review and for not requiring the implementation of cost-beneficial SAMAs prior to the license renewal of Indian Point Units 2 and 3."<sup>42</sup> Contrary to the Board's decision, and as evidenced by the detailed technical evaluation documented in Appendix G of the FSEIS, the Staff has taken the requisite "hard look" at potential SAMAs as required by NEPA.

As an initial matter, the Staff fully analyzed the submissions that Entergy made to it. The Staff reviewed the bases for Entergy's cost estimates and compared the cost estimates to others developed previously for similar mitigation measures, including estimates developed as part of other licensees' SAMA analyses. Where Entergy's original implementation cost estimates appeared high, or revised cost estimates contained its revised SAMA analysis resulted in certain SAMAs becoming non-cost-beneficial, the Staff requested and obtained from Entergy additional

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<sup>41</sup> *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F.Supp.2d 582, 603 (E.D. Va. 1999) (citing *Methow Valley*, 490 U.S. at 353).

<sup>42</sup> LBP-11-17, slip op. at 16.

information and justification for the values.<sup>43</sup> Based on its review, the Staff found that the cost estimates provided by Entergy were reasonable and sufficient to support the SAMA evaluation.<sup>44</sup>

The Commission has long held that “NRC adjudicatory hearings are not EIS editing sessions,” and that its boards “do not sit to parse and fine-tune EISs.”<sup>45</sup> The ultimate concern here is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details of the SAMA analysis.<sup>46</sup> The Board does not suggest that additional SAMAs should have been identified or that any of Entergy’s SAMA implementation cost estimates contain errors, much less material errors. In summary, the Staff’s detailed and reasoned evaluation of Entergy’s SAMA analysis cannot fairly be labeled “uninformed.”<sup>47</sup>

Moreover, and contrary to the Board’s finding, the Staff adequately explained in Section 5.2.6 of the FSEIS why it was not ordering Entergy to implement the non-aging related SAMAs. In particular, the Staff logically concluded that implementation would not be required as a condition of license renewal given the absence of a regulatory basis for such action:

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<sup>43</sup> See FSEIS, Vol. 3, App. G at G-39. For example, the Staff questioned a seemingly high cost estimate (\$800,000) for changing the pressurizer PORV block valves from normally closed to normally open in conjunction with IP2 SAMA 53. Entergy provided justification for the cost estimate in a February 2008 RAI response. As noted above, the Staff also requested that Entergy provide the bases for certain revised cost estimates (including an explicit breakdown of the cost estimate in terms of the major cost factors). Entergy provided this additional information by letter dated January 14, 2010. See NL-10-013, Letter from Fred Dacimo, Entergy, to NRC, “License Renewal Application - Supplement to SAMA Reanalysis Using Alternate Meteorological Tower Data” (Jan. 14, 2010), available at ADAMS Accession No. ML100260750.

<sup>44</sup> See FSEIS, Vol. 3, App. G at G-40.

<sup>45</sup> Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2) CLI-03-17, 58 NRC 419, at 431 (2003).

<sup>46</sup> See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-09-11, 69 NRC 529, 533 (2009); see also *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-11-18, 74 NRC \_\_\_, slip op. at 10 (July 19, 2011) (stating that “the relevant issue is not whether . . . the SAMA analysis can be refined further, but whether it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated”) (quoting *Pilgrim*, CLI-10-11, slip op. at 37, 39) (internal quotation marks omitted).

<sup>47</sup> LBP-11-17, slip op. at 17.

Based on its review of the SAMA analysis, as revised, the staff concurs with Entergy's identification of areas in which risk can be further reduced in a cost-beneficial manner through the implementation of all or a subset of potentially cost-beneficial SAMAs. Given the potential for cost-beneficial risk reduction, the staff considers that further evaluation of these SAMAs by Entergy is appropriate. However, none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation. Therefore, they need not be implemented as part of IP2 and IP3 license renewal pursuant to 10 CFR Part 54.<sup>48</sup>

The Staff's conclusion is rational because, as explained above, it complies with governing law and long-standing NRC precedent on this matter. No further explanation is needed to satisfy NEPA or the Administrative Procedure Act ("APA"), or to support issuance of the renewed operating licenses under the relevant decision standards in 10 C.F.R. Parts 51 and 54.<sup>49</sup>

## **2. Entergy's Analysis Satisfies Part 51 and Part 54**

The Board's conclusion that the Staff lacked the "requisite information" to take the "hard look" at Entergy's SAMA analysis under NEPA<sup>50</sup> rests solely on the erroneous factual supposition that Entergy has deferred completion of the necessary analysis until after license renewal. Entergy's SAMA analyses, including its cost estimates are not incomplete for purposes of Part 51. To the contrary, in opposing NYS-35/36 and the Motion, Entergy amply and repeatedly demonstrated that the Board's characterization of Entergy's SAMA analysis as incomplete is factually unfounded.

As a threshold matter, Part 51 requires applicants like Entergy to perform site-specific SAMA analyses.<sup>51</sup> The NRC's NEPA requirements in Part 51, however, are "tempered by a

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<sup>48</sup> FSEIS, Vol. 1, at 5-11.

<sup>49</sup> See 10 C.F.R. §§ 54.29(a), 51.95(c).

<sup>50</sup> LBP-11-17, slip op. at 15-16.

<sup>51</sup> 10 C.F.R. § 51.53(c)(3)(ii)(L).

practical rule of reason.”<sup>52</sup> In this regard, “NEPA requires [applicants and] the NRC to provide a ‘reasonable’ mitigation alternatives analysis, containing ‘reasonable’ estimates.”<sup>53</sup> Here, Entergy has done precisely so by following the guidance provided in NEI 05-01, which the NRC Staff has endorsed and which is consistent with NEPA’s “rule of reason” standard.<sup>54</sup> Entergy has supplied “sufficient facts” to allow the Staff to explain its conclusions and to fully satisfy its “hard look” obligations under NEPA.<sup>55</sup>

ER Section 4.21.5.4 and Attachment E to the ER (Sections E.2.3 and E.4.3) describe the manner in which Entergy prepared its original SAMA implementation cost estimates. As explained therein, Entergy developed cost estimates for implementing each SAMA candidate to the extent necessary to allow it to make an informed judgment about the economic viability of the proposed improvement.<sup>56</sup> Entergy followed this same cost-estimating process in its Revised SAMA Analysis.<sup>57</sup> In some cases, it was necessary to perform more detailed, plant-specific cost estimates to confirm whether certain SAMAs were, in fact, potentially cost-beneficial.<sup>58</sup> Tables 4 through 7 of the revised SAMA analysis reflect the results of Entergy’s updated cost-benefit analyses.<sup>59</sup> As Entergy made clear, it provided “final” cost estimates for each SAMA to the

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<sup>52</sup> *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-22, 72 NRC \_\_\_, slip op. at 9 (Aug. 27, 2010) (quoting *Cmtys., Inc. v. Busey*, 956 F.2d 619, 626 (6th Cir. 1992)).

<sup>53</sup> *Id.*

<sup>54</sup> See *Pilgrim*, CLI-10-11, slip op. at 4 n.11 (citing NEI 05-01, Rev. A, *Severe Accident Mitigation Alternatives (SAMA) Analysis, Guidance Document* (Nov. 2005) (“NEI 05-01”) (NEI 05-01 as NRC-endorsed guidance for performing SAMA analyses)).

<sup>55</sup> *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3)*, LBP-10-13, 71 NRC \_\_\_, slip op. at 29 (June 30, 2010).

<sup>56</sup> See Applicant’s Environmental Report, Att. E at E.2-3 to E.2-4, E.4-3 to E.4-4.

<sup>57</sup> See NL-09-165, Letter from Fred Dacimo, Entergy, to NRC, “License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Data” at 8-9 (Dec. 11, 2009) (“Revised SAMA Analysis”), available at ADAMS Accession No. ML093580089.

<sup>58</sup> See *id.* at 7-8.

<sup>59</sup> See *id.* at 10-28, 30-31.

Staff. The Board is thus incorrect in stating that Entergy has failed to complete the cost estimates required for its SAMA analysis.<sup>60</sup>

In short, in finding Entergy's current cost estimates to be incomplete and inadequate, the Board misinterprets both the facts of record and controlling legal precedent. Entergy's statements that it intends to perform additional, more refined engineering project cost evaluations of the cost-beneficial SAMAs for possible future implementation in accordance with existing plant procedures does not negate Entergy's and the Staff's demonstrated *current* compliance with NEPA for purposes of license renewal. Furthermore, any refinement of the cost estimates would serve no necessary purpose under NEPA, because "regardless of how [any further] cost-benefit calculations come out[,] . . . NEPA imposes no substantive requirement that mitigation measures actually be taken."<sup>61</sup>

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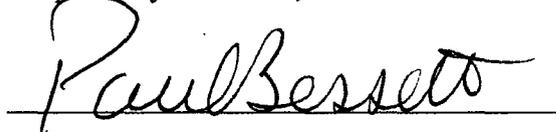
<sup>60</sup> See LBP-11-17, slip op. at 15.

<sup>61</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 10 (2002).

IV. CONCLUSION

For the foregoing reasons, the Commission should take immediate review of LBP-11-17 and grant the relief requested above, as the Commission deems appropriate.

Respectfully submitted,



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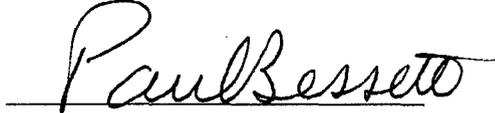
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