

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY LICENSING BOARD**

In the Matter of )  
ALL OPERATING BOILING WATER )  
REACTOR LICENSEES WITH MARK I )  
AND MARK II CONTAINMENTS )  
  
AND ) Docket Nos. EA-12-050 and EA-12-051  
ALL POWER REACTOR LICENSEES )  
AND HOLDERS OF CONSTRUCTION )  
PERMITS IN ACTIVE OR DEFERRED )  
STATUS )  
  
(Fukushima-Related Orders Modifying )  
Licenses) ) July 3, 2012

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**PILGRIM WATCH COMMENTS ON SIGNIFICANCE OF STAFF DISCLOSURES**

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## PILGRIM WATCH COMMENTS ON SIGNIFICANCE OF STAFF DISCLOSURES

Pursuant to the Board's Order of June 16, 2012, Pilgrim Watch ("PW") here "provide[s] comments on the significance ... of the disclosures in the Staff response upon one or more of the issues that have been presented to the Board."<sup>1</sup>

### Introduction

The Board Order of May 17, 2012 noted that the *Bellotti* decision on which Entergy and the Staff rely "called specific attention to the availability to Attorney General Bellotti of the provisions of 10 C.F.R. § 2.206", and directed the NRC Staff "to provide the Board ... with a list of those occasions since January 1975 ... on which the substantive relief sought in the petition was granted."

The Staff filed two responses. Those responses show, at most, (and the Board should take as admitted for the purposes of this proceeding) that in the more than 27 years since 1975 the NRC provided petitioners the relief requested in a 2.206 petition only 2 times out of 387 Director's Decisions. The Staff responses are significant to at least three of the issues now before the Board:

1. Section 2.206 does not provide an alternative viable or appropriate path for PW.
2. The Staff response shows that the only path available to PW is to ask this Board to have a hearing and not to sustain the Orders.
3. The Staff's response is additional evidence that the reach of *Bellotti* should not be extended to deny a hearing in the very different case here.

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<sup>1</sup>The Board's Order of June 19, 2012 extended the time for filing comments to "no later than noon (EDT) on July 3, 2012."

The Staff Response makes abundantly clear that PW's only viable route to requiring the NRC to meet its statutory obligation of providing adequate protection of the public health and safety is to have this Board not sustain the Orders here. The plain fact is that these Orders do not provide that protection. That is what PW's request for hearing is all about. It is why PW is adversely affected, and the adverse effects on it would be multiplied if a hearing was denied here and PW was relegated to some hopeless other path. The Orders should not be sustained.

If the Board finds that the present Orders should not be sustained because they do not protect public health and safety (in the two areas, DTV and spent fuel, which they address), the NRC will have only two options: under the law it must either shut the reactors down or go back to the drawing board and order "fixes" that will meet its statutory obligations. (Roisman Tr., 102). PW would be better off in either event. The Orders invited PW to appear before this Board and under the terms of the Orders PW has the right to be heard. (*See*, Roisman, Tr. 103, and Webster, Tr., 70)

### **10 C.F.R. § 2.206 Is Not a Viable or Appropriate Avenue for Relief**

At the June 5 hearing, Judge Hawkens asked whether 10 C.F.R. § 2.206 was the appropriate avenue for PW to find relief in this proceeding. The Staff's and Entergy's answer that it was (Tr., Staff at 36; Stenger at 98) is simply wrong.

The evidence before the Board shows that, for all practical purposes, NRC only granted a petitioner the relief it sought in no more than two instances in 27 years. NRC's near 100% rejection rate is exacerbated by the facts that the Commission will not entertain requests for review of a Director's Decision (NUREG/BR-0200, Rev. 5), and that judicial review of Director's decisions is effectively impossible.

1. The NRC's Track Record: The Staff's first response to the Board's Order of May 17 admitted that the requested relief was not granted in 385 of the 387 Director decisions that the Staff reviewed beginning in 1975. The Staff said that 142 of those Decisions were granted either in part or if denied, some action was taken. The Board's June 19 Order found that the "most cursory examination of the Staff response reveals that in many, if not the majority, of the instances that action was patently not substantive in nature." (Order, 2) As an example, the Board pointed to relief granted in Pacific Gas and Electric Company that, "On examination of the relief provided in that instance, it is obvious the relief could not possibly be characterized as substantive in nature."<sup>2</sup>

The Board's Order of June 19 directed Staff to go back to the drawing board and identify those of the 142 Director's Decisions listed in the June 15, 2012 response that, in fact, provided substantive relief. The Staff's second response did not do what the Board ordered. More important the Staff has provided, at most, only one example of alleged "substantive relief," essentially showing that the Staff concedes that virtually none of the 2.206 Orders provided substantive relief. Staff was given a chance to defend its position and it refused, choosing instead to quarrel with the Board's order rather than to obey it. The only interpretation of this action by Staff is that it has, at most, two examples where substantive relief was granted in whole, or in part, in response to a 2.206 Petition filed since 1975. This is not a surprising outcome since the essence of virtually every 2.206 Petition is a request for the *Staff* to find that the *Staff* has failed to meet its statutory and regulatory obligations.

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<sup>2</sup> The Staff also said that the petition in Battelle Memorial Institute Columbus Operations (Columbus Ohio); Docket No. 70-08; DD-94-11, 40 NRC 359 (1994), was granted. The petition was not available either on Adams or online so an evaluation was not possible.

Although PW did not try to do the Staff's job; we looked at many of the Director's Decisions and, like the Board, found that the relief granted, to the extent any relief requested was granted, was not substantive and at best procedural. Three examples (DD-06-03, DD-04-03, and DD-01-05) are described in Attachment 1. Further, and most relevant here, none of the 2.206 decisions cited by the Staff appeared to involve a case like PW's Requests for Hearing under consideration by the Board where a finding of "no adequate protection" had been made by the NRC and applicable regulations needed to be altered to provide the required protection. Neither did any involve the Board asking the Staff to show how it had acted to adequately protect the public health and safety. Staff's response showed that 2.206 is a hollow shell and that the likelihood of the NRC granting substantive relief requested in a 2.206 petition is effectively zero. There is no basis for Entergy's assertion that,

[T]here is no reason to assume that a properly supported 2.206 petition would not be taken seriously by the NRC Staff. It will be. (Stenger, Trans., 98).

The best example of the futility of the action that Entergy asserts will be "taken seriously" is the fact that the concerns that underlie PW's contention, i.e. inadequacies in the action Staff has ordered be taken, have been well-known to Staff and Entergy for many months. Staff has not taken any steps to address these concerns and has vigorously defended the adequacy of the Orders in this proceeding. It is, at best, disingenuous for Staff and Entergy to suggest that PW has an adequate remedy by filing a 2.206 Petition or that it will be taken seriously. Obviously, it will be rejected and thus there will be no effective review of the adequacy of these Orders if the Board does not admit PW's contentions and hold the hearing requested.

2. If a Petitioner is not Granted Relief, both Commission and Judicial Review are highly unlikely, if not impossible: The futility of a Section 2.206 petition is exacerbated by the fact that the Commission will not entertain requests for review of a Director's Decision, (NUREG/BR-0200, Rev. 5) and there is close to zero chance that the NRC's refusal to grant a petition will be overturned on appeal.<sup>3</sup> (Judge Hawkens, Tr., 66) The NRC Staff tried to justify the lack of reviewability on the need to avoid "virtually interminable, free-ranging investigations." (Stafford, Tr. 37) However, that supposed justification has no applicability here. How many times has the NRC issued an Order that admits that the status quo does not protect the public health and safety? A hearing on an Order that makes that admission, and asks that the Order not be sustained because it does not do so, is unique; it does not open the process to "free-ranging" challenges to all Orders issued by Staff. Requiring that the NRC do what it legally must do will hardly require a misallocation of NRC resources.

3. 2.206 Petitions Are Limited to Enforcing Existing Regulations: A 2.206 petition is concerned with ensuring licensee compliance with existing regulations; Judge Hawkens agreed. (Judge Hawkens and Webster, Tr., 68)

4. Commission Procedures Would Not Permit Accepting a 2.206 At This Time: The NRC Staff provided another reason that a 2.206 petition is not an option for PW:

One of the impediments here and by virtue of the regulation we are in a current adjudicatory proceeding on this matter. So a 2.206 petition could either be held in abeyance or rejected on the grounds that it is currently being adjudicated in another forum...for example, the issue of the filters on the vents. (Safford, Tr., 93-94)

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<sup>3</sup> *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L.Ed.2d 714 (1985)

5. Rule Making: A request for rule-making is not a realistic option either. As Entergy said "we all know how long the NRC ... can take with rule-making." (Stenger, Tr. 56)

### **Conclusion**

The foregoing demonstrates clearly that the Staff Responses show that 10 C.F.R. § 2.206 is not an option for redress of PW's concerns, and that, given that PW has met the prerequisites established by these Orders for the grant of a hearing and has demonstrated why this proceeding is not like the proceeding addressed in the *Bellotti* case, provide additional reasons that this Board should not deny PW its right to a hearing here. In *Bellotti*, one of Judge Bork's bases for his decision was his view that Sec. 2.206 provided a viable alternative. History and the Staff response have proved him to be wrong.

Respectfully submitted,

(Electronically signed)

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July 3, 2012

**ATTACHMENT**

<b>DD</b>	<b>Petitioner/Case</b>	<b>Petitioner Request</b>	<b>DD Relief granted</b>
DD-06-03	David Lochbaum (Union Concerned Scientists), other organizations & individuals, including Mary Lampert- all reactors concerns reactors releasing radioactively contaminated water offsite, unmonitored and above allowable levels	<p>NRC Issue Demand for Information and docket responses to questionnaire that includes:</p> <ul style="list-style-type: none"> <li>• Systems that contain radioactive liquids and methods to monitor leakage</li> <li>• The largest leak rate that can remain undetected by monitors</li> <li>• Methods to monitor grounds around facility.</li> <li>• Indicate level of assurance that facility’s leak can go offsite in quantities exceeding federal regulations</li> </ul>	<p align="center"><u>PROCEDURAL</u></p> <p>Granted in part- DFI denied, instead:</p> <ul style="list-style-type: none"> <li>• DD provided <i>verbal assurance</i> leakages to date resulted no harm to public health</li> <li>• Listed other means issue addressed: <ul style="list-style-type: none"> <li>- NRC <i>established</i> Lessons Learned Task Force</li> <li>- NRC <i>interacted</i> with NEI</li> <li>- DD reported that a <i>voluntary industry initiative</i> was established and includes NEI’s questionnaire</li> </ul> </li> </ul>
DD-04-03	Richard Blumenthal (AG for State of Connecticut)	<p>NRC requested to take the following actions in response to terrorist threats</p> <ul style="list-style-type: none"> <li>• Order IP take full review security measures and evacuation plans</li> <li>• Until above requested review completed shut down IP</li> <li>• Require IP document security measures</li> <li>• Modify license to mandate a defense security system sufficient to protect IP from an attack by water and land</li> <li>• Order revision IPs emergency plans and procedures to account terrorist attacks</li> <li>• Take prompt action &amp; retire IP if after conducting assessment vulnerabilities cannot assure public safety.</li> </ul>	<p align="center"><u>PROCEDURAL</u></p> <p>Granted in part</p> <ul style="list-style-type: none"> <li>• Director <i>referenced</i> previous NRC security measures to licensees</li> <li>• Director <i>referenced</i> FEMA’s latest determination of the sufficiency IPs emergency plans and procedures, despite fact that only a few months previous to that assessment, James Lee Witt’s (prior FEMA Director) report to Governor Pataki showed IP’s emergency plans insufficient to protect public</li> </ul>

<b>DD</b>	<b>Petitioner/Case</b>	<b>Petitioner Request</b>	<b>DD Relief Granted</b>
DD-01-05	Union Concerned Scientists	<p>UCS requested that NRC issue a Demand for Information (DFI) to licensees that use Wackenhut security personnel requiring that:</p> <ul style="list-style-type: none"> <li>• Licensees provide a docketed response explaining how they comply with 10 CFR 26.10 to provide reasonable measures for early detection if workers are not fit duty; and how they comply with requirement of 10 CFR 26.20 that address other factors affecting fitness duty such as stress, fatigue and illness.</li> <li>• Require licensees to describe their policy for above and describe policy for these factors as applied specifically to Wackenhut security personnel.</li> </ul>	<p style="text-align: center;"><u>PROCEDURAL</u></p> <p>Granted in part- DFI denied</p> <p>Director reported that:</p> <ul style="list-style-type: none"> <li>• NRC staff are <i>developing a generic communication</i> to all licensees subject to requirements part 26</li> <li>• As staff <i>proceeds in future</i> with proposals to revise Part 26 and address worker fatigue <i>through rulemaking, it will consider</i> need to clarify NRC's expectations concerning worker declarations of FFD and work scheduling</li> </ul>