Case Nos. 12-1404(L) and 12-1772 (CON)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH of MASSACHUSETTS
Petitioner,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,

ENTERGY NUCLEAR OPERATIONS, INC.;
ENTERGY NUCLEAR GENERATION COMPANY,
Intervenors.

On Petitions for Review of Orders by the
United States Nuclear Regulatory Commission

BRIEF FOR FEDERAL RESPONDENTS

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GLOSSARY OF ACRONYMS

EIS:	Environmental Impact Statement
GEIS:	Generic Environmental Impact Statement
NEPA:	National Environmental Policy Act
NRC:	Nuclear Regulatory Commission
SAMA:	Severe Accident Mitigation Analysis
SEIS:	Supplemental Environmental Impact Statement

JURISDICTIONAL STATEMENT

The Commonwealth of Massachusetts filed a timely petition for judicial review on June 19, 2012, challenging a final order of the Nuclear Regulatory Commission (NRC) issued on May 29, 2012. The challenged NRC final order renews the operating license for the Pilgrim Nuclear Power Station (Pilgrim). Under the Administrative Orders Review Act, commonly known as the Hobbs Act, this Court has jurisdiction to review NRC final orders in licensing cases. See 28 U.S.C. § 2341 *et seq.*

STATEMENT OF ISSUES

1. Does the National Environmental Policy Act (NEPA) or the Atomic Energy Act excuse Massachusetts's failure to comply with NRC's well-established standards for filing adjudicatory contentions and reopening a closed record in NRC licensing proceedings?

2. Does an NRC staff report on the Fukushima Dai-ichi accident and ensuing NRC orders concerning nuclear safety demonstrate that NRC's existing NEPA cost-benefit analysis and accident-probability estimates are invalid, even though the Fukushima-related report and orders did not address cost-benefit analysis or accident probability?

STATEMENT OF THE CASE

This case addresses NEPA[1] claims first raised by Massachusetts five years after NRC began a license renewal proceeding for Pilgrim. The Commission denied these various claims and associated procedural requests in CLI-12-6, the decision Massachusetts challenges here.[2] By the time Massachusetts tried to present these claims to NRC, evidentiary hearings had already been held on another party's claims, the evidentiary record was closed, and NRC had resolved an associated Massachusetts rulemaking petition on the merits after providing an opportunity for public comment. *See* JA2-5. According to Massachusetts, its newly-filed NEPA claims were supported by information related to the Fukushima Dai-ichi nuclear power plant accident, which followed the massive March 11, 2011, earthquake and tsunami in Japan. *See generally* JA1667-1779, 1807-1822, 2535-2560.

Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.

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[1] 42 U.S.C. §§ 4321-4347.

[2] Before this Court, Massachusetts has not specifically challenged any other Commission adjudicatory decisions, which include the Commission's CLI-11-5 decision (JA2671-2736) denying various petitions to suspend ongoing NRC licensing proceedings in light of the Fukushima accident. *See generally* Massachusetts Br.

(collectively, Entergy) applied to NRC in January of 2006 to renew Pilgrim's operating license, which was set to expire on June 8, 2012. JA65. *See generally Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008). NRC docketed the application and issued a notice of opportunity for hearing. JA2 n.3. Massachusetts and a local interested group named Pilgrim Watch each filed petitions to intervene, requesting hearings on proposed claims (known in NRC practice as "contentions"). JA2-3. An NRC hearing tribunal, the Atomic Safety and Licensing Board (Board), granted Pilgrim Watch's intervention petition, admitting two Pilgrim Watch contentions for evidentiary hearing. JA3. The Board denied Massachusetts's intervention petition, but Massachusetts subsequently noticed its intention to participate in the Pilgrim renewal proceeding as an Interested State under 10 C.F.R. § 2.315(c). JA1139.[3] Next, the Board held an evidentiary hearing on Pilgrim Watch's two contentions, ruled on those contentions, and closed the evidentiary record on June 8, 2008. JA4-5; JA67; JA1185. Once the record closed, anyone seeking an additional hearing on other, new

[3] Although the Board denied Massachusetts's contention, Massachusetts placed the same issue before the NRC in a separate petition for rulemaking. NRC denied Massachusetts's petition for rulemaking, and the Second Circuit subsequently upheld NRC's decision. *See New York v. NRC*, 589 F.3d 551 (2d Cir. 2009).

contentions would need to satisfy NRC's standards for reopening closed evidentiary records, codified at 10 C.F.R. § 2.326.

When the Fukushima accident occurred (in March 2011), NRC had yet to issue a renewal decision for Pilgrim. Massachusetts filed a series of motions and petitions to delay the Pilgrim renewal proceeding, citing the Fukushima accident. Those filings included:

- A motion to admit a new contention and ("if necessary") reopen the record in the Pilgrim proceeding based on "new and significant information" derived from the Fukushima accident. JA1667-1726; 1759-68; 1779-84.
- A petition to waive an NRC regulation establishing that the environmental impact of spent nuclear fuel storage at nuclear plants operating under renewed licenses is likely to be small. JA1727-58.
- In the event that the waiver petition proved unsuccessful, a petition for rulemaking seeking rescission of the same regulation and a "conditional motion to suspend" the Pilgrim proceeding while NRC considered this petition. This rulemaking petition was similar to an earlier Massachusetts rulemaking petition that NRC had recently denied, in a decision upheld

by the Second Circuit. *See* p. 3 n.3, *supra*; JA1727-58, 1769-78.

- A later motion to supplement its new contention based on a recently-released NRC staff Task Force Report suggesting possible accident-mitigating measures that NRC might impose at U.S. plants in the wake of the Fukushima accident, which Massachusetts considered "new and significant information." JA2535-60.

Massachusetts's new contention requests were evaluated according to NRC regulations. The Board considered those requests first, and in 2011, it issued a decision (LBP-11-35) denying Massachusetts's new motions, including its request for a hearing on its proposed new Fukushima-related contention. JA65-141. Massachusetts appealed the Board's rulings to the Commission. In the Commission adjudicatory decision under review here, CLI-12-6, the Commission upheld the Board's ruling. The Commission noted that NRC standards for reopening a closed adjudicatory record require a contention to show a "significant . . . environmental issue" that likely would yield a "materially different result." The Commission found that nothing in Massachusetts's Fukushima contention would undermine NRC's prior review of severe accidents, and that it therefore was not a valid contention that would justify reopening. JA1-38.

The Commission also referred Massachusetts's rulemaking petition to NRC staff for appropriate resolution but denied Massachusetts's associated request to suspend the proceeding. JA27-32. In doing so, the Commission explained that "[a]lthough our Fukushima lessons-learned review continues, we do not have sufficient information at this time to make a significant difference in the *Pilgrim* environmental review. NEPA requires that we conduct our environmental review with the best information available now. It does not require that we wait until inchoate information matures into something that later might affect our review." JA32.

Massachusetts petitioned this Court for review of CLI-12-6 on April 5, 2012 (No. 12-1404). But NRC did not issue its final order renewing Pilgrim's operating license until May 29. JA47-62. Massachusetts then filed a second petition for judicial review (No. 12-1772) challenging that order.[4]

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[4] In our view, Massachusetts's first petition for review was filed prematurely, but this Court need not consider that question, as Massachusetts's second petition unquestionably was timely. In that petition, in addition to NRC's final licensing order, Massachusetts also listed a Commission Voting Record as an "order" being challenged. This voting record, however, merely documents the Commission's authorization to NRC staff to issue a licensing order "upon [the staff] making the appropriate findings on safety and environmental matters." *See* JA43, 46, 3229. Thus,
(continued. . .)

STATUTORY AND REGULATORY BACKGROUND

I. License Renewal for Nuclear Power Plants

The Atomic Energy Act authorizes NRC to issue initial licenses to commercial nuclear power reactors to operate for up to 40 years. 42 U.S.C. § 2133(c). Operating licenses then "may be renewed upon the expiration of such period." *Id.* The Act provides no further direction to NRC regarding license renewal. *See Massachusetts*, 122 F.3d at 119. In general, in renewal proceedings, NRC focuses on plant-aging issues not specifically addressed by other NRC regulatory processes. 10 C.F.R. § 54.21(a). *See generally New Jersey Envtl. Fed. v. NRC,* 645 F.3d 220, 224 (3d Cir. 2011).

II. NEPA Review for License Renewal

A. *Environmental Impact Statements (GEIS & SEIS)*

NEPA requires Federal agencies to prepare environmental impact statements (EISs) regarding major federal actions that would significantly affect the quality of the human environment. 42 U.S.C. § 4332. By rule, all reactor license renewals constitute

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(. . .continued)

the voting record represents a step on the way to NRC issuance of an order, not a reviewable order in and of itself. *See Blue Ridge Environmental Defense League v. NRC,* 668 F.3d 747, 754-56 (D.C. Cir. 2012).

"major federal actions." 10 C.F.R. § 51.95(c). An NRC EIS for license renewal consists of two parts: (1) a generic EIS (GEIS) specifying expected environmental impacts NRC has found to be generally applicable to license renewal at any plant; and (2) a plant-specific supplemental EIS (SEIS) addressing environmental impacts not amenable to generic analysis. *See Massachusetts*, 522 F.3d at 119-21 (summarizing NRC's approach to NEPA for license renewals).

NRC's generic findings about environmental impacts (the GEIS) are codified in NRC's NEPA regulations. 10 C.F.R. Part 51, Subpart A, App. B. A generic finding may be challenged in individual license renewal proceedings only if a party demonstrates that a waiver is necessary based upon unique, site-specific characteristics that would make the generic finding inapplicable to the plant in question. 10 C.F.R. § 2.335; *Massachusetts*, 522 F.3d at 127.

B. *NEPA analysis of the environmental impacts of potential nuclear plant accidents.*

As part of its license renewal process, NRC has long analyzed under NEPA the environmental impacts of potential nuclear plant accidents, including severe accidents. GEIS chapter 5, entitled "Environmental Impacts of Postulated Accidents," provides

extensive, detailed analysis of the environmental impacts of a full range of potential reactor accidents at nuclear plants operating under renewed licenses. JA381-496.[5] This environmental-impacts analysis addresses both "design basis" accidents (i.e., accidents a plant "is designed specifically to accommodate") and "severe" accidents (i.e., accidents a plant was not specifically designed to accommodate, which have lower probability but potentially higher consequences than design-basis accidents). JA381. The analysis examines both the likelihood and potential consequences of such events. *See generally* JA381-496.

The purpose of the GEIS's generic analysis is to "conservatively[6] predict the environmental impacts of severe accidents for each plant during the renewal period." JA1091. In the site-specific SEIS for Pilgrim, NRC found that no new information

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[5] Additional statistical analysis regarding postulated plant accidents also is provided in Appendix G to the GEIS. *See* Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Appendices (NUREG-1437, Volume 2), Appendix G, *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/v2/index.html#_1_165.

[6] "Conservative" in this context means utilizing analytical methods that would tend to err on the side of depicting environmental impacts as being more significant than they likely would be, which increases confidence that potential impacts are not being underestimated.

had arisen placing the potential environmental impacts of a severe accident at Pilgrim outside the bounds of the conservative generic predictions of potential impacts set forth in the GEIS. JA1092. As a result, the Pilgrim SEIS generally relies upon the generic severe accident environmental impact findings in the GEIS.

NRC regulations do require, however, that a NEPA analysis considering potential additional "severe accident mitigation alternatives" (SAMAs) be conducted on a site-by-site basis. *See* JA1092-93 (citing 10 C.F.R. § 51.53(c)(3)(ii)(L)). Accordingly, the Pilgrim license renewal SEIS discusses detailed, site-specific SAMA analyses. JA1093-1137.

NRC uses the SAMA process to address the requirement to consider reasonable mitigation alternatives under NEPA. *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 736-39 (3d Cir. 1989). Under NRC's regulations, mitigation measures may be reasonable under NEPA even if they are not required for safety and adequate protection under the Atomic Energy Act. *See id.* at 729-31. NRC used its typical SAMA process for Pilgrim, comparing the projected benefits of potential mitigation measures to their anticipated implementation costs to assess, for NEPA purposes, the overall reasonableness of each measure. These measures are considered on a site-specific basis, to account for particular risks at a plant, such as Pilgrim.

JA1094; *see also* JA1789-90; JA1990; *Limerick*, 869 F.2d at 738 (discussing the site-dependent impacts of mitigation measures).

To predict the "benefits" of a prospective mitigation measure in a meaningful way, NRC's SAMA analysis uses advanced probabilistic modeling techniques. Using these techniques, NRC assesses plant-specific probabilities of various accident sequences that could lead to core damage[7], the potential progression of such core damage (including the potential for containment failure and release of radiation to the environment), and the potential consequences in the event of a release. JA1215-16. The various accident scenarios that NRC uses in its SAMA analysis can be aggregated to identify the overall probability that core damage will occur at the plant. *See* JA1094 (noting the aggregate baseline core-damage frequency for Pilgrim, and breaking it down by each initiating event). But different scenarios resulting in core damage can present different risks, and any individual mitigation measure only mitigates a subset of potential accident scenarios.[8]

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[7] The term "core damage" refers to damage to the portion of a nuclear reactor containing the nuclear fuel the plant uses to create heat for electricity generation.

[8] For more detail on how SAMA analyses account for variation among core-damage scenarios, see JA1105; JA1217-18; JA2025-26; JA115 n.203.

Therefore, this NEPA analysis of individual mitigation measures depends upon individual potential accident sequences, rather than any aggregate estimate of the probability that core damage will occur at the plant. NRC's analysis assumes that the plant will include all mitigation measures that NRC requires under the Atomic Energy Act. To evaluate the benefits of any particular *additional* potential mitigation measure under NEPA, NRC compares (1) the outcomes of accident scenarios with that mitigation measure in place and (2) the outcomes without the measure in place. JA1216-17; *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 N.R.C. 287, 291 (2010) (a SAMA "analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility"). Ultimately, this assessment allows NRC to determine, for purposes of NEPA, whether a given mitigation alternative would be reasonable in terms of costs versus benefits.

The Pilgrim SAMA analysis began with 281 potential SAMAs, performed an initial screening that found 59 SAMAs suitable for further analysis, and identified seven of these remaining measures as being potentially cost-beneficial. JA1093, 1097-98.

C. Consideration of New and Significant Information under NEPA in NRC License Renewal Proceedings.

NEPA requires agencies to supplement EISs when new information emerges that "provides a *seriously* different picture of the environmental landscape" from that depicted in an existing EIS for a proposed action. *Nat'l Comm. for the River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original); *see also Town of Winthrop v. FAA*, 535 F.3d 1, 12 (1st Cir. 2008). NRC accordingly utilizes this standard when assessing claims of new and significant information. *See, e.g., Hydro Resources, Inc.*, CLI-06-29, 64 N.R.C. 417, 419 (2006).

NRC regulations govern the process by which persons may bring claims of "new and significant" information to challenge already-completed NEPA reviews. If the new information pertains to site-specific NEPA reviews, parties must file contentions through NRC's adjudicatory hearing process, and if the information pertains to generic NEPA findings codified in NRC regulations, parties must either file a rulemaking petition or petition to waive the generic findings based on site-specific special circumstances (which would permit the challenge to be brought through the adjudicatory hearing process). *See Massachusetts*, 522 F.3d at 120-21; 10 C.F.R. §§ 2.309(f), 2.335, 2.802; *see also* 10 C.F.R. § 51.92(a) (codifying requirement that final NRC environmental impact statements be supplemented as appropriate with

"new and significant" information).

III. NRC Regulations and Standards Applicable to Massachusetts's Claims

A. Obtaining a New Evidentiary Hearing after the Record is Closed

When the evidentiary record in an NRC licensing proceeding has closed, anyone seeking to litigate a new contention must satisfy NRC's record-reopening standards. Under those standards, it is not enough simply to give notice that new information has arisen. Rather, to reopen the record, a movant must show that the new contention (1) is timely (unless the issue addressed is exceptionally grave); (2) that it addresses a "significant" safety or environmental issue; and (3) that "a materially different result would be or would have been likely" if the new information had been available while the record was open. NRC's reliance on these reopening standards in managing its hearing process has been upheld against various court challenges. *See New Jersey Envtl. Fed.*, 645 F.3d at 233; *Ohio v. NRC*, 814 F.2d 258, 262-63 (6th Cir. 1987); *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207-08 (D.C. Cir. 1986).

Even if a petitioner meets these requirements, any new contention must also satisfy the general contention-admissibility standards set forth at 10 C.F.R. § 2.309(f)(1). Among the various requirements of § 2.309(f)(1), a contention proponent must:

- "Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding," § 2.309(f)(1)(iv); and

- "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute…." § 2.309(f)(1)(vi).

B. Criteria for Suspending Ongoing Licensing Proceedings

The Administrative Procedure Act requires agencies, giving "due regard to the rights and privileges" of interested parties and affected persons, to complete licensing proceedings "within a reasonable time." 5 U.S.C. § 558(c). NRC's "longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication." *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-01-26, 54 N.R.C. 376, 381 (2001).

Through agency case law, NRC has established a set of criteria to evaluate requests to suspend ongoing license proceedings. Specifically, NRC assesses "whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from [an]

ongoing evaluation." *Id.*; *see also* JA28.

IV. NRC's Japan Task Force Report and Resulting Safety Orders

On March 11, 2011, a magnitude 9.0 earthquake centered off the coast of Japan triggered a massive tsunami, causing tremendous devastation and loss of life across northeastern Japan. *See* JA2449. This seismic event also led to reactor-core melting at the Fukushima Dai-ichi nuclear power facility and substantial releases of radiation from the plant, prompting evacuations from surrounding areas.

Following the Fukushima accident, the Commission established a Task Force to determine what initial lessons could be learned from the accident and propose appropriate recommendations for changes to NRC safety requirements. Though recognizing the still-developing nature of the information, the Task Force did recommend certain measures to bolster NRC safety requirements.

The Task Force did not assess the probability of accidents at U.S. plants. *See generally* JA2431-2526; *see also* JA2554 (observing that the Task Force Report "entirely bypasses the question of probability"). Instead, it followed NRC's "defense-in-depth" regulatory philosophy— the concept that plants should employ multiple independent layers of protection, even if the likelihood of needing all of them may appear very low. Based on that philosophy, the Task Force recommended various generic

improvements to the overlapping mitigation practices in place at American nuclear plants based on the events at Fukushima. JA2445-47, 2474-92.

The Task Force viewed its recommendations as redefining the level of protection that constitutes "adequate protection of public health and safety" under the Atomic Energy Act. JA2446-47. Because factoring cost considerations into Atomic Energy Act "adequate protection" determinations is unlawful, *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114-18 (D.C. Cir. 1987), the Task Force did not assess the costs of implementing any of its recommendations. The Task Force therefore did *not* address whether any new mitigation measures should be considered reasonable for purposes of NEPA.

After the Task Force completed its report, but before granting the Pilgrim license renewals, NRC issued safety orders implementing a few of the Task Force recommendations. One order required plants to employ a "three-phase approach for mitigating beyond-design-basis external events," which would begin with using "installed equipment or resources," progress to using "portable, onsite equipment and consumables," and finally move on to using "offsite resources to sustain [the mitigation] functions indefinitely." JA3131. Another order, recognizing that "wide variance exists with regard to the reliability" of existing hardened vents, required

"Mark I" and "Mark II" boiling water reactor plants to utilize hardened vents meeting more stringent standards. JA3209-10. NRC issued these two orders as "adequate protection" requirements under the Atomic Energy Act, and they were not based on implementation-cost considerations or determinations of accident probability. JA3133-34, 3211-12. The mitigating-measures order applied to all operating plants, including Pilgrim; the "hardened vents" order also applies to Pilgrim, which is a Mark I boiling water reactor. JA3206, 3223.

The third order required all operating plants (including Pilgrim) to meet higher reliability standards for instrumentation measuring spent-fuel-pool water level. The order pointed out that concerns early on in the Fukushima accident about damage to fuel in the Fukushima Dai-ichi Unit 4 spent fuel pool appear now to have been overstated, as "[s]ubsequent analysis determined that the water level…did not drop below the top of the stored fuel and no significant fuel damage occurred." JA3167-68. But the lack of reliable means for measuring pool water level may have resulted in emergency responders devoting more resources to the Unit 4 spent fuel pool than they should have, instead of attending to more pressing issues. JA3168, 3171. NRC did not deem the new pool instrumentation necessary for ensuring adequate

protection.[9] *See* JA3171-72.

None of the orders relied upon cost-benefit analysis of the recommended measures or assessed accident probability.

STATEMENT OF THE FACTS

I. Massachusetts's Post-Fukushima Filings

Massachusetts filed the contention at issue here on June 2, 2011, over five years into the Pilgrim renewal proceeding. JA1667-78. By that point, evidentiary hearings had been held and the evidentiary record had formally been closed. JA4-5. In addition, Massachusetts's separate rulemaking petition challenging NRC's generic NEPA finding on spent fuel pool environmental impacts had already been denied by NRC, after a notice-and-comment process, and NRC's decision had been upheld by the Second Circuit. *See* JA1027-1048, 1099-1208; *New York,* 589 F.3d 551.

Massachusetts explained its new, 2011 Pilgrim contention as follows:

The Commonwealth contends that the environmental impact analysis

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[9] Ordinarily, before issuing a beyond-adequate-protection order, NRC would first perform a cost-benefit analysis under 10 C.F.R. § 50.109 (also known as the "backfit" rule). But the Commission administratively exempted the order from the backfit rule because, in the press of its other Fukushima activities, it did not have sufficient information or time to complete a full backfit analysis. JA3172.

> and the SAMA analysis in [Pilgrim's SEIS] are inadequate to satisfy NEPA because they fail to address new and significant information revealed by the Fukushima accident that is likely to affect the outcome of those analyses. The new and significant information shows that both core-melt accidents and spent fuel pool accidents are significantly more likely than estimated or assumed in [the Pilgrim SEIS] or the SAMA analysis for [Pilgrim]. As a result, the environmental impacts of re-licensing [Pilgrim] have been underestimated. In addition, the SAMA analysis is deficient because it ignores or rejects mitigative measures that may now prove to be cost-effective in light of this new understanding of the risks of re-licensing Pilgrim.

JA1763-64.

Most importantly to their claims, Massachusetts claimed that Fukushima demonstrated that NRC's analysis of severe accidents and mitigation measures was inadequate. Massachusetts deemed "NRC's assumptions about operators' capability to mitigate an accident at" Pilgrim to be "unrealistically optimistic," with mitigation potential "severely degraded in the accident environment." *Id.* Massachusetts listed various types of mitigation measures it believed, based on the Fukushima accident, should have been considered in the SAMA analysis for Pilgrim. JA1765-66.

The stated basis underlying Massachusetts's contention was a report by Dr. Gordon Thompson (Thompson Report). JA1679-1726. This report categorizes its various findings "as either Conclusive or Provisional." JA1679. According to Massachusetts, "[t]he Conclusive findings are fully supported by information that is

available to date. The Provisional findings are generally supported by available information, but await final confirmation from information that is likely to become available during coming months." JA1766. Massachusetts claimed that Dr. Thompson's report, including its provisional findings, satisfied NRC's standards for reopening the record and admitting its contentions. JA1669-78. Massachusetts also argued, though, that record reopening was unnecessary because the Commission on appeal had remanded one Pilgrim Watch contention back to the Board for further proceedings. JA1675.

Massachusetts also sought a waiver of NRC's generic NEPA finding that spent fuel pool storage is not expected to have significant environmental impacts during a renewed license period. JA1727. As an alternative to waiver, Massachusetts asked that its petition be deemed a renewal of the petition for rulemaking that NRC had previously denied, seeking to rescind the generic no-significant-impact finding from NRC regulations. JA1727, 1756.

Later, Massachusetts supplemented its contention based on an additional declaration from Dr. Gordon Thompson, JA2551-60, which relied on NRC's Fukushima Task Force Report containing safety recommendations. *Id.* Dr. Thompson admitted that the Task Force Report did not contain any "SAMA-type analysis" or

accident-probability analysis, that "[t]he Task Force report acknowledges limitations in currently-available information about the Fukushima accident," and that "detailed information in each of the issue areas investigated by the Task Force 'was, in many cases, unavailable, unreliable, or ambiguous.'" JA2552, 2554. Nonetheless, according to Dr. Thompson, the Task Force Report provided "indirect" support for his own 2011 findings. JA2557.

II. Licensing Board Decision

The first forum for Massachusetts's contentions was the Licensing Board, which ruled against Massachusetts on all issues. The Board found that the available evidence did not support Massachusetts's contention:

> [T]here is presently absolutely no information presented from the Fukushima accidents that has been indicated to have any impact on the Pilgrim plant or its environmental impact….It is pure speculation to aver that there is, or that there will be, at some unknown and unknowable time in the future, new significant information arising from those accidents relevant to Pilgrim running so afoul of the requirements of NEPA and our regulations today so as to require delay of this license renewal decision.

JA133-34.

The Board addressed all of Massachusetts's various filings to delay the Pilgrim renewal proceedings in turn. First, the Board denied Massachusetts's request to suspend the Pilgrim renewal proceeding, reasoning that the Commission had already

rejected this request in its earlier CLI-11-5 decision (involving multiple requests for suspending proceedings). JA70-73.

Second, the Board rejected Massachusetts's request to waive the generic NEPA finding for spent-fuel-pool impacts at Pilgrim. The Board held that Massachusetts had not explained how its pool-fire concerns applied uniquely to Pilgrim so as to justify a site-specific waiver. JA73-80. The Board pointed out that "there are more than 20 [Boiling Water Reactor (BWR)] Mark I plants which share the characteristics of Pilgrim, not to mention the fact that each and every nuclear power plant in this country has a spent fuel pool." JA80.

Third, the Board held that Massachusetts's Fukushima-NEPA contention did not meet any of the standards for reopening a closed record set out in 10 C.F.R. § 2.326(a): timeliness, significance, or likelihood of a materially changed result. JA113-23. The Board also found that Massachusetts's expert failed to support the required showings via affidavit with the specificity called for by § 2.326(b). JA123-28.[10]

Finally, although each of the Board holdings on reopening would alone require

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[10] Challenges had also been raised in the proceeding regarding Dr. Thompson's expert qualifications, but the Board saw no need resolve that dispute in light of its other findings. *See* JA124 n.224.

dismissal of Massachusetts's contention, 10 C.F.R. § 2.326; *see also* JA119, 121, 123 (separately finding Massachusetts's contention "inadmissible" under §§ 2.326(a)(1), (a)(2), and (a)(3), respectively), the Board addressed general contention-admissibility requirements as well. Among other things, the Board found that a central component of Massachusetts's contention—the "direct-experience" approach to calculating aggregate probability of core damage—was not timely raised. *See* 10 C.F.R. § 2.309(c); JA128-33.[11]

III. Commission Decision

Massachusetts petitioned for Commission appellate review of the Board decision. JA2893. In CLI-12-6, the Commission, agreeing with the Board, denied the petition for review. JA1-33.

Initially, though unsure whether Massachusetts was even challenging the Board's ruling on the waiver request, the Commission found the Board's denial of the request "sound." JA13-16. The Commission agreed with the Board that

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[11] One of the three Board judges, Judge Young, concurred only in the result. Even Judge Young agreed that Massachusetts's "new and significant information" claims were premature but she indicated that she "would permit [Massachusetts] to file new Fukushima-related contentions at such time as relevant information may be ripe for consideration." JA140.

Massachusetts's spent fuel pool concerns "apply generically to '*all* spent fuel pools at all reactors,'" making them "more appropriately addressed via rulemaking or other appropriate generic activity." JA15-16. Because Massachusetts had asked the Commission to treat the waiver petition as a rulemaking petition if it did not meet the waiver criteria, the Commission referred the waiver petition to NRC's staff as a rulemaking petition. JA16.

The Commission next examined Massachusetts's contention. First, the Commission found the 10 C.F.R. § 2.326 record-reopening standards applicable. After noting that the Board had "closed the evidentiary record in June 2008," the Commission explained that, although it had remanded a portion of one of Pilgrim Watch's contentions to the Board for further consideration, that remand had not reopened the record generally: rather, "the record remained closed on all issues except that single, remanded issue." JA17. "After a record has closed," the Commission explained, "finality attaches to the hearing process, and after that point, only timely, significant issues will be considered." JA19.

The Commission began its reopening analysis with Massachusetts's reliance on Dr. Thompson's "direct experience" methodology. His methodology rested not on a probabilistic analysis like NRC's but on the five severe accidents that had occurred

around the world. Dr. Thompson simply divided the approximate number of total years of worldwide reactor operation since the beginning of commercial nuclear power generation (14,500) by the number of worldwide severe reactor accidents (5), and deemed that to be the annual probability of a severe accident. This analysis did not take into account safety improvements over time, the U.S. system of nuclear safety, or the specific characteristics of the Pilgrim plant. Even Dr. Thompson characterized this method as only a "reality check."[12] Massachusetts, however, argued that Dr. Thompson had shown that Pilgrim's SAMA analysis should use a higher core-damage frequency.

The Commission upheld the Board's conclusion that Dr. Thompson's

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[12] Dr. Thompson initially characterized his methodology as providing merely a "reality check" because of the "comparatively sparse" nature of the underlying data set, JA1694, stating only that "[o]ne can reasonably find" this alternative method to show that NRC "under-estimated the baseline [core-damage frequency] of the Pilgrim plant by an order of magnitude." JA1695. When summarized later, this initially tentative assessment transformed into a definitive conclusion that Dr. Thompson's method was correct and NRC's was incorrect. JA1764 ("The experience of the Fukushima accident, taken together with the history of other [nuclear power plant] accidents in the world, shows that the estimate of core damage frequency relied on in [Pilgrim's SEIS] and the related SAMA analysis is unrealistically low by an order of magnitude.").

methodology was an inadequate basis for a hearing contention, because it did not call into question NRC's probabilistic-risk approach. JA20. The Commission found "no error" in the Board's ruling—specifically, that Massachusetts: (1) had not challenged the scenario-specific core-damage frequency values actually used in NRC's existing Pilgrim SAMA analyses; (2) had not shown how one would develop an alternative spectrum of core damage frequencies for a SAMA analysis using Dr. Thompson's approach, and (3) had not explained how one would evaluate the consequences of core damage—which can vary substantially from scenario to scenario—if using Dr. Thompson's aggregate core-damage-frequency value as the starting point. *Id. See also* JA115 n.203 and accompanying text.

The Commission commented that "our adjudicatory proceedings are not 'EIS editing sessions,'" and that it was Massachusetts's burden "to show that the [NRC] Staff's analysis or methodology is unreasonable or insufficient." JA21 (citing prior Commission precedent). Merely presenting a different methodology for calculating an aggregate core-damage frequency value and then making a "sweeping assertion that [this] methodology provides a 'reality check' for the Pilgrim SAMA analysis" did not, in the Commission's view, accomplish that. *Id.* The Commission concluded that Massachusetts's claim that a "direct experience" methodology should be used as a

"reality check" had not "demonstrated the existence of a 'significant environmental issue'" under 10 C.F.R. § 2.326(a)(2). *Id.*

The Commission also found no error in the Board 's finding that Massachusetts's direct-experience claim was late. Although framed as "new information" arising from the Fukushima accident, the Commission agreed that Massachusetts could have raised the same "direct experience" claim with similar force at the outset of the proceeding in 2006. JA21 n.99; see also JA116; JA1930-31.

Next, the Commission agreed with the Board on Massachusetts's claims about non-spent-fuel-pool-related operator actions and mitigation procedures. The Commission found "no error in the Board's analysis," which rested on Massachusetts's "failure to address the 'actual consideration of those matters in the [license renewal application], and failure to indicate how [they] would be affected by consideration of the proposed new information." JA22 (internal quotation marks omitted). Such failure prevented a showing "that a materially different result would have been likely had this information been considered initially." JA22-23. And in line with its holding on the waiver petition, the Commission agreed with the Board that Massachusetts's spent-fuel-pool-related claims, were "outside the proceeding's scope." JA23, 25-26.

In considering Massachusetts's other non-spent-fuel-pool-related arguments, the Commission generally noted that Massachusetts had generally not even attempted to explain how or why the information it was presenting showed that the extensive discussions of potential severe accidents already contained in the Pilgrim EIS needed updating. For example, Massachusetts claimed that "hydrogen explosions…could occur at Pilgrim," but the Commission pointed to "the Pilgrim SAMA analysis's extensive consideration of hydrogen explosions," and found that Massachusetts had simply ignored that existing analysis. JA24-25; *see also* JA2025-2031 (describing how hydrogen explosions were considered). The Commission also pointed out that Massachusetts had not discussed the relevant costs and benefits, the central focus of any SAMA analysis. JA26. Adding these problems together, the Commission found that Massachusetts could not meet one of the key criteria for reopening the record: that the information supporting the contention establishes the "likelihood of a materially different result." JA24.

Lastly, the Commission considered whether it should suspend the Pilgrim renewal proceeding while it considered (once again) Massachusetts's request to eliminate the GEIS finding that environmental impacts from spent-fuel-pool storage during the license renewal period are expected to be small. Applying its established

standards for considering suspension petitions, the Commission concluded that moving forward with the license renewal proceeding would not jeopardize public health and safety, would not prove an obstacle to fair and efficient decision-making, and would not prevent the implementation of any pertinent changes that might emerge from the rulemaking petition. JA28. Moreover, the Commission found, any "unfairness" to Massachusetts in not awaiting the outcome of its rulemaking petition is counterbalanced by the license applicant's interest in receiving a prompt decision on its renewal application. JA30.

With analysis of the Fukushima events still ongoing and likely to remain so for a while, the Commission also stressed that "NEPA requires that we conduct our environmental review with the best information available now. It does not…require that we wait until inchoate information matures into something that later might affect our review." JA32 (citing cases). In the Commission's view, there was simply not "sufficient information at this time to make a significant difference in the *Pilgrim* environmental review." JA32.

SUMMARY OF ARGUMENT

NRC must comply with NEPA before taking licensing actions. But far from avoiding that burden here, NRC has already conducted full-scale NEPA reviews for

Pilgrim. In demanding that NRC reopen the Pilgrim renewal proceeding to consider its Fukushima-related claims, Massachusetts needed to show why NRC's already-completed NEPA reviews are insufficient in light of purportedly "new and significant information." Moreover, NEPA does not alter generally applicable NRC procedural requirements for hearings, and Massachusetts's filings needed to comply with NRC threshold standards and regulations, including those applicable to motions to reopen closed records and requests to suspend proceedings.

The Commission reasonably found, through application of well-established threshold standards governing NRC proceedings, that Massachusetts's weakly-supported filings were insufficient to justify further NEPA reviews and hearings. Although the occurrence of the Fukushima accident was "new," the Commission did not find any new information presented by Massachusetts to be "significant": it did not establish any flaw in NRC's existing severe-accidents analysis for Pilgrim. Thus, the Commission reasonably denied Massachusetts's various requests.

Now, before this Court, Massachusetts abandons any attempt to show that it did, in fact, meet the applicable NRC threshold standards. Massachusetts makes no effort to demonstrate any error in the specific reasons given by the Commission for finding the threshold standards unsatisfied. Instead, Massachusetts's brief attempts to

create the impression that, somehow, NEPA and the Atomic Energy Act's "hearing" requirement render longstanding NRC procedural requirements irrelevant or inapplicable.

Yet NRC hearing procedures, including its record-reopening requirements, have consistently been upheld by courts, and are reasonable in their own right. NRC's reopening standards merely reflect the common-sense notion, often reiterated by the judiciary, that agencies (or courts) need not and ought not restart already-completed, resource-intensive hearings absent a strong showing that proffered new information is significant and likely to yield a different result. Nothing in NEPA alters an agency's general procedures regarding public participation in its proceedings. Massachusetts's disregard for NRC procedural standards renders its claims meritless.

Assuming for the sake of argument that this Court were free to overlook Massachusetts's procedural default, Massachusetts's logic for redoing NRC's NEPA analysis is deeply flawed. Massachusetts claims that an NRC staff Task Force Report on Fukushima and follow-on orders, both addressing safety regulation under the Atomic Energy Act, show that the specific NEPA analyses Massachusetts challenged are insufficient. But this conclusory assertion ignores the vast material differences between the Task Force Report (and subsequent orders) and the NEPA analyses in

question.

The NEPA analyses Massachusetts challenges seek to make predictions about environmental impacts from low-probability accidents, and so determining accident probability is crucial to the analysis. In addition, some of these NEPA analyses are cost-benefit analyses of severe accident mitigation alternatives (SAMAs) under NRC regulations that implement NEPA. The SAMA analyses assess both implementation costs and accident probability (which helps determine a mitigation measure's benefits). The Task Force Report and the follow-on orders, however, have nothing to do with accident probability, and include *no analysis whatsoever* of either accident probability or costs.

Simply put, the Task Force Report and orders do not demonstrate any flaws in the Pilgrim NEPA analysis, let alone flaws so fundamental and obvious that they conceivably justify overlooking Massachusetts's failure to satisfy applicable NRC threshold standards. The Commission therefore reasonably declined Massachusetts's requests for another Pilgrim hearing and to suspend the Pilgrim proceeding.

STANDARD OF REVIEW

The Atomic Energy Act gives broad discretion to NRC to set its own procedures and apply its expertise about information relevant to the licensing of

nuclear power. Hence, this Court, like the Supreme Court and other courts of appeals, reviews NRC decisions under a highly deferential standard:

> The Administrative Procedure Act authorizes this court to displace the Commission's decisions only to the extent that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Massachusetts v. [NRC]*, 878 F.2d 1516, 1522 (1st Cir.1989). This general posture of deference toward agency decision-making is particularly marked with regards to NRC actions because "[t]he [AEA] is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends." *Massachusetts*, 878 F.2d at 1523 (*quoting Pub. Serv. Co. of N.H. v. [NRC]*, 582 F.2d 77, 82 (1st Cir.1978)). This principle is applicable in the context of licensing decisions, where statutory directives are scant and the AEA explicitly delegates broad authority to the agency to promulgate rules and regulations. See, e.g., 42 U.S.C. §§ 2133, 2134(b).

Massachusetts, 522 F.3d at 126-27. For the same reason, "*increased* deference" has long been applied to NRC's promulgation and application of its procedural rules. *Union of Concerned Scientists*, 920 F.2d at 54.

With respect to agency denials of motions to reopen the record, a reviewing court may not overturn the agency's decision absent "a showing of the clearest abuse of discretion." *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987) (citing *United States v. Pierce Auto Freight Lines, Inc.* 327 U.S. 515, 534-35 (1946). And, of course, when as here an NRC decision rests in part on scientific or technical judgments within the agency's area of expertise, courts are particularly loath to

second-guess agency determinations. *See, e.g., New Jersey Envtl. Fed.,* 645 F.3d at 230; *New York,* 589 F.3d at 555. *See generally Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1985).

Further, "determining what constitutes *significant* new information" in NEPA cases "is a factual question requiring technical expertise," and "[t]he agency's resolution of this question is thus one to which a reviewing court owes considerable deference." *Town of Winthrop*, 535 F.3d at 8. "Considerable deference is also owed to [the agency's] determination of whether an [already-completed EIS] remains accurate, adequate, and current, as that determination is but a variation on the same question." *Id.*

ARGUMENT

I. Parties seeking to challenge NRC's NEPA reviews are not excused from satisfying generally applicable NRC procedural requirements.

A. The general rule is that NEPA claimants *do* need to satisfy NRC threshold procedural requirements before obtaining merits review of their claims in court.

Massachusetts argues that its adherence to NRC procedural standards is irrelevant to litigating NEPA claims in this Court. Its argument relies on the proposition that "the burden is on the NRC – not the Commonwealth – to comply with NEPA." Massachusetts Br. at 39. While this proposition is certainly true,

Massachusetts overreaches when it claims that "NRC does not have the discretion to rely upon heightened admissibility standards under its regulations." *Id.* at 40. NRC's standards for raising claims in administrative proceedings are well established. Massachusetts's petition here does not directly raise the question whether NRC complied with NEPA, but rather whether NRC correctly dismissed Massachusetts's requests for failing to meet the prevailing standards by which litigants exhaust their claims before the agency.

In its 2008 *Massachusetts v. NRC* decision, this Court stated: "The Commonwealth's claim that the agency committed statutory violations by rejecting its hearing request fails because it does not meet the basic prerequisite that a petitioner for judicial review of an agency action first exhaust administrative remedies." 522 F.3d at 132. The Court continued: "The administrative exhaustion requirement gives agencies a fair and full opportunity to adjudicate claims presented to them by requiring that litigants use all steps that the agency holds out, *and do[ ] so properly (so that the agency addresses the issues on the merits).*" *Id.*(*citing Woodford v. Ngo,* 548 U.S. 81, 90 (2006)) (emphasis added and internal quotation marks omitted). This Court's 2008 decision, of course, addressed a NEPA-based Massachusetts challenge to an NRC decision.

The D.C. Circuit has explained that "[w]hile NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues. . . . As a result, NEPA does not alter the procedures agencies may employ in conducting public hearings." *Union of Concerned Scientists v. NRC*, 920 F.2d at 56. The D.C. Circuit therefore held that "as [NRC's] procedural rules do not facially violate the Atomic Energy Act or the [Administrative Procedure Act], they are also consistent with NEPA." *Id.* at 56-57.

In contrast, the scheme Massachusetts is proposing—under which compliance with applicable agency procedures in NEPA cases is irrelevant once judicial review is sought—makes no sense. It would render the administrative exhaustion requirement a sham in NEPA cases. It would allow claimants to bring to the agency vague, unstructured, unsupported, or incomprehensible challenges, filed in whatever form they see fit, secure in the knowledge that they can more properly focus their challenge later, once the case is in court.

Indeed, decades ago, in the landmark *Vermont Yankee* case. the Supreme Court made precisely the same point:

> [W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is

> meaningful, so that it alerts the agency to the intervenors' position and contentions.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978). Drawing a parallel between the threshold issue in the hearing context and the requirements applicable to public commenters, the Court noted: "'[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results." *Id.* at 553.

Here, the "threshold requirement of materiality" to which the Supreme Court alluded is defined by NRC regulations. The Commission (and Board) applied those regulations to find that Massachusetts had failed to show why the information it was offering had a sound basis and would make a material difference to NRC's already-completed NEPA analyses for Pilgrim. In its brief before this Court, Massachusetts *never challenges* the Commission's findings that it failed to meet applicable record-reopening standards, including the heightened materiality standard applicable to

reopening motions.[13]

The closest Massachusetts comes to any kind of argument along this line is to claim, in a footnote, that Dr. Thompson's report raised a "genuine dispute that could materially affect" the SAMA analysis. *See* Massachusetts's Br. at 39-40 n.29. But that standard is set forth under NRC's *general contention-admissibility standards* at 10 C.F.R. § 2.309(f)(1)(vi). NRC's reopening rule (10 C.F.R. § 2.326(a)(3)), in contrast, requires parties seeking reopening to make a heightened materiality showing, namely that a "materially different result *would be or would have been likely* had the newly proffered evidence been considered initially," (emphasis added)). Thus, even if Massachusetts were right about the general materiality of its Fukushima-NEPA contention (and it is not, *see* discussion in Section II of this Argument, *infra*), Massachusetts's failure even to address NRC's reopening standards—the prime reason why its contention was rejected—is fatal to its NEPA claim in this Court.

In sum, those who challenge NRC actions in court must first satisfy the agency

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[13] The Board also found that the "direct experience" aspect of Massachusetts's claim failed to satisfy applicable timeliness requirements, because a "direct experience" argument was available from the start of the Pilgrim proceeding, and the Commission found no error in this Board finding. *See* p. 28, *supra*. Massachusetts's Brief never challenges this finding.

procedures necessary to pursue a merits claim at NRC before obtaining merits review in court. The Commission and the Board found that Massachusetts failed to meet applicable threshold requirements, including the record-reopening standards, and explained their reasoning in detail. JA49-64; JA17-32. Massachusetts was free, of course, to argue in this Court that the Commission and Board decided the threshold issue incorrectly, but its opening brief raises no challenge to the Commission's reopening findings. The Commission's decision not to allow reopening under its established standards thus stands unchallenged.[14]

B. It is well established that agencies may require heightened showings when claimants seek to reopen closed evidentiary records.

Even if Massachusetts were correct that NEPA would have required NRC to consider Fukushima-related information *during* the Pilgrim hearings, it takes another unjustified leap to argue that NEPA requires NRC to *reopen* a closed record and hold

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[14] Massachusetts, of course, may not use its reply brief to argue for the first time that the Commission applied its reopening standards incorrectly. This Court has "held, with a regularity bordering on the monotonous, that issues raised for the first time in an appellant's reply brief are deemed waived." *Waste Management Holding, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000). In any event, the grounds the Commission (and the Board) gave for denying reopening reflect a reasoned exercise of agency judgment based in part on the agency's technical expertise. *See* pp. 24-30, *supra.*

new hearings whenever "new and significant information" is alleged. In making its argument that NRC threshold standards are irrelevant to this case, Massachusetts seems to take specific issue with the "heavy burden" set by NRC's reopening standards. *See* Massachusetts Br. at 39. But those standards have consistently been upheld by courts. *See New Jersey Envtl. Fed.*, 645 F.3d at 233 ("We have upheld the motion to reopen standard and deferred to the NRC's application of its rules, so long as it is reasonable."); *Ohio*, 814 F.2d at 262-63 (upholding Commission's denial of reopening motion even though Board had ordered an "exploratory hearing" to permit movant to flesh out its otherwise insufficient reopening motion); *Oystershell Alliance*, 800 F.2d at 1207-08 ("In examining petitioners' plea to reopen the record, we rely on the same court-sanctioned test applied by the Commission in reaching its decision.").

Such holdings derive from the Supreme Court's longstanding view that reopening of a closed record in a complex administrative proceeding is not sought as a matter of right, but as a plea to the agency's discretion. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 295 (1975) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944)). "If litigants might demand rehearings as a matter of law because some new circumstances have arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative

process could ever be consummated in an order that would not be subject to reopening." *Vermont Yankee,* 435 U.S. at 554-55 (internal citations and quotation marks omitted). *See also Seacoast Anti-Pollution League v. NRC,* 598 F.2d 1221, 1230 (1st Cir. 1979). Accordingly, courts may not order agencies to reopen a closed administrative record "except in the most extraordinary circumstances." *Bowman*, 419 U.S. at 296.

Both the Board initially and the Commission on review found that Massachusetts's submissions failed to meet these well-established, court-approved reopening standards. JA17-27; JA49-64. And, as noted above, Massachusetts's brief does not argue that it met *any* of these standards, thus waiving any such arguments. *See* p.40 n.14, *supra.* Accordingly, Massachusetts has provided this Court no basis to question NRC's application of its own procedural regulations, and so has fallen far short of establishing "the clearest abuse of discretion."

C. NRC reasonably found that Massachusetts's new rulemaking petition did not justify suspending the Pilgrim proceeding.

Massachusetts's disregard for any threshold standard, and its failure to challenge NRC's application of such standards (thereby waiving any such challenges), do not end with its silence on NRC's reopening standards. Massachusetts's brief seemingly challenges (though only implicitly) NRC's decision in CLI-12-6 not to

suspend the Pilgrim proceeding until Massachusetts's latest rulemaking petition challenging the spent-fuel-pool GEIS finding is resolved. *See* Massachusetts' Br. at 30. But Massachusetts makes no attempt to address the Commission's standards concerning suspension of the proceeding and indeed does not directly challenge the suspension at all. Instead, Massachusetts merely implies that NRC was barred as a matter of law from renewing Pilgrim's license while Massachusetts's rulemaking petition was still pending. *See* Massachusetts Br. at 30, 43. A vague implication does not suffice to preserve an argument for this Court's review. Massachusetts's implied argument, in any event, is unpersuasive.

Massachusetts concedes that NRC may use generic findings concerning environmental impacts in individual proceedings where those findings are common to more than one plant. Massachusetts Br. at 7, n.1. Using generic determinations in license renewal proceedings "is reasonable and consistent with the purpose of promoting efficiency in handling licensing decisions." *Massachusetts,* 522 F.3d at 120. If a proceeding must be put on hold whenever a petitioner challenges a generic determination, no matter the context, NRC could never rely on generic findings. However, NRC properly anticipates that its generic findings "might become obsolete," either generally or for a particular project, and "[i]n such a situation, the

regulations provide channels" through which the agency staff or outside petitioners may raise information bearing on the particular project that would change the findings on environmental impacts. *Id.* at 120-121, 127. For example, NRC regulations allow petitioners to "influence the order and timing of the agency's final decisions in the rulemaking and licensing proceedings," *id.* at 128, by moving for suspension of a proceeding. *See* 10 C.F.R. § 2.802(d). Here, Massachusetts attempted to use this process, and the Commission found that suspension of the Pilgrim proceeding was not warranted.

Consistent with NRC case law, the Commission considered several factors in making this decision: public health and safety, obstacles to fair decision-making, and ultimate implementation of any "lessons learned" from the petition for rulemaking. JA28. Balancing these factors, which the Commission examined at some length, the Commission found that suspending proceedings was not justified.

The Commission held that there was no public-health-and-safety threat, that Pilgrim's owner (Entergy) had as much interest in a prompt decision as Massachusetts had in a postponed one, that NRC had ample regulatory tools to implement new requirements and enhancements in the future, and that the agency did not have "sufficient information at this time" to believe that the Fukushima events would

trigger significant changes in NRC's existing environmental analysis. JA28-32. The Commission decision emphasized that NEPA does not require agencies to delay actions based on speculation that additional material information might arise in the future; rather, it requires agencies to assess environmental impacts based on the best information currently available. *See* JA32 (citing *Village of Bensenville v. FAA*, 457 F.3d 52, 71-72 (D.C. Cir. 2006); *Town of Winthrop*, 535 F.3d at 13; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989) ("To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.")).

NRC's determination that NEPA does not mandate awaiting inchoate future developments is reasonable on its face. More importantly, Massachusetts does not directly argue that it was unreasonable: its opening brief nowhere addresses the Commission's application of the relevant suspension standards. Nor does Massachusetts allege that NRC's suspension standards are an invalid means of determining how NRC considers environmental impacts under NEPA.

Massachusetts also suggests the Commission may be using its generic findings to avoid the need to consider "new and significant" information. *See* Massachusetts Br. at 40 n.30. To the contrary, the Commission acknowledged that at some point,

Fukushima-related information could conceivably alter NEPA findings, *see* JA32, which could include revisions to the GEIS. When and if such "new and significant information" eventually comes to light, it would trigger NEPA obligations for licensing proceedings that are pending at that time. But for a current agency decision – such as the Pilgrim decision, which had already been pending for five years – what matters in the NEPA review is the information currently available and sufficiently developed to form present conclusions.

Therefore, Massachusetts has not given this Court any basis to question the Commission's determination that the information Massachusetts presented did not warrant suspending the proceeding under the applicable standards.

D. The general hearing right conferred by the Atomic Energy Act does not render longstanding, court-approved NRC hearing procedures inapplicable.

Having failed to contest NRC's application of its own reopening standards, contention-admissibility standards, or suspension standards, Massachusetts instead claims that NRC's use of those standards somehow equates to NRC denying basic Atomic Energy Act hearing rights. Massachusetts's brief at 42-44, citing 42 U.S.C. § 2239(a). This argument lacks merit.

First, hearings *have already been held* in the Pilgrim renewal proceeding. While

Massachusetts's initial contention filing was found not to merit an evidentiary hearing, NRC *did* hold an evidentiary hearing in the Pilgrim proceeding on issues raised by intervenor group Pilgrim Watch. *See* JA4-5. In addition, when Massachusetts filed its first rulemaking petition on spent fuel pool environmental impacts in connection with the Pilgrim proceeding, NRC solicited public comments on the petition and resolved the petition on its merits. *See* JA1199-1208; *see also* Massachusetts Br. at 43 (recognizing that NRC can satisfy Atomic Energy Act "hearing" requirement through the generic notice-and-comment rulemaking process). And NRC did so well before reaching a final decision in the Pilgrim renewal proceeding. *Compare id.* (rulemaking petition denial decision, issued on August 8, 2008), *with* JA47 (issuance of Pilgrim renewed license on May 29, 2012).

Thus, Massachusetts's claim is not truly that NRC has not provided a hearing for Pilgrim; rather, it is that NRC, having already held hearings for Pilgrim, is refusing its request to hold *more* hearings.

Second, Massachusetts's argument, at its essence, is a claim that NRC may never use *any* threshold standards to determine whether to hold hearings. The flaws in Massachusetts's position and the bevy of precedents rejecting it were addressed above, in the previous sections of this Argument. There simply is no serious question

concerning NRC's right to prescribe reasonable screening criteria governing agency hearings under section 189.a of the Atomic Energy Act, 42 U.S.C. § 2239(a).

Massachusetts's reference (Br. at 42-43) to the D.C. Circuit's decision in *Union of Concerned Scientists v. NRC,* 735 F.2d 1437 (D.C. Cir. 1984), does not demonstrate otherwise. That case did *not* address whether using reopening standards (or other threshold standards) violates the Atomic Energy Act's hearing provision. It addressed a different question: whether NRC could single out a particular site-specific issue and, categorically by rule, exclude it from the scope of the normal Atomic Energy Act hearing process for reactor operating license proceedings.[15]

Subsequent D.C. Circuit decisions confirm that *Union of Concerned Scientists* did not reject NRC's use of threshold standards to determine whether to hold hearings under the Atomic Energy Act § 189.a hearing requirement. First was *Oystershell Alliance v. NRC*, which upheld NRC's use of its record-reopening standards to deny an

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[15] This is distinct from the NRC's exclusion of certain NEPA issues from the hearing process where it has made generic NEPA findings on the issue in question, a practice endorsed by both this court and the Supreme Court. *Massachusetts*, 521 F.3d at 127 (citing *Baltimore Gas & Electric Co.,* 463 U.S. at 101). In the *Union of Concerned Scientists* case, NRC was not relying upon anything comparable to a generic NEPA finding.

Atomic Energy Act hearing request. 800 F.2d at 1207-08. Subsequently, in another *Union of Concerned Scientists v. NRC* decision (issued in 1990), the D.C. Circuit upheld NRC's baseline contention-admissibility standards, including heightened pleading specificity requirements. In so ruling, the D.C. Circuit explained: "As the [Atomic Energy] Act nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run, [the Union of Concerned Scientists'] challenge to the NRC's procedural rules faces a steep uphill climb." 920 F.2d at 53-54. The court also referred to "the *increased* deference due NRC procedural rules" given the broad discretion the Act grants NRC on how to "proceed in achieving the statutory objectives." *Id.* at 54 (emphasis in original).

Thus, to the extent Massachusetts is arguing that NRC's reliance on well-established threshold standards to deny an evidentiary hearing violates the Atomic Energy Act, the argument is plainly meritless. NRC was required to apply its own regulations to the Pilgrim proceeding, and Massachusetts does not even *attempt* to argue that it did so erroneously.

II. The existence of the Task Force Report and subsequent NRC safety orders does not reveal some self-evident shortcoming in the Pilgrim NEPA analyses.

Massachusetts's failure to argue that its contention met NRC threshold standards is fatal to its petition for judicial review. There may be extraordinary cases

where a reviewing court might consider a NEPA issue *de novo* to correct *obvious* or *wholesale* NEPA violations, notwithstanding a failure to satisfy applicable NRC threshold standards. *See DOT v. Public Citizen*, 541 U.S. 752, 765 (2004); *United States v. Coalition for Buzzards Bay*, 644 F.3d 26, 35 (1st Cir. 2011). But Massachusetts does not attempt to show why this case is one of them.

Instead, without significant analysis, Massachusetts's brief refers repeatedly to the Task Force Report and subsequent orders as if they self-evidently show a breach of NRC's NEPA obligations. In fact, the Task Force Report does reflect that Fukushima was a serious accident that may present lessons for nuclear safety regulation in the United States, and NRC's orders reflect this by implementing some of the Task Force's recommendations. But that is the purview of the Atomic Energy Act; Massachusetts never shows why the Task Force report and orders present "a seriously different picture" of the environmental impact of the proposed project from what was previously envisioned. *See Nat'l Comm. for the New River*, 373 F.3d at 1330; *see also Town of Winthrop*, 535 F.3d at 12; *Hydro Resources, Inc.*, CLI-06-29, 64 N.R.C. at 419.

Massachusetts essentially ignores all potential differences between safety reviews and environmental-impact reviews, offering instead a sweeping claim (made in a footnote) that the two areas "substantially overlap." Massachusetts Br. at 34 n.26.

Massachusetts makes no effort to explain how, precisely, this "substantial overlap" implicates the particular, Fukushima-based NEPA challenges at issue here.

Indeed, examination of the Task Force Report, the orders, and the relevant NEPA analyses reveals fundamental differences in both purpose and methodology that Massachusetts, to sustain its litigating position, needs to reconcile but does not. The Task Force Report used—indeed, was primarily based upon—NRC's "defense-in-depth" philosophy of safety regulation. *See, e.g.*, JA2439-40, 2462, 2467-2504 (setting forth the Task Force's various recommendations in a chapter entitled "Safety Through Defense-in-Depth"). As the Task Force explained, "The key to a defense-in-depth approach is creating multiple independent and redundant layers of defense to compensate for potential failures and external hazards so that no single layer is exclusively relied on to protect the public and the environment." JA2467. "[M]itigation of the consequences of accidents should they occur" is just one of these independent and redundant layers. JA2445. The Task Force further explained that key to the "logic" behind its various recommendations is that "these recommendations are intended to make *each level* of defense-in-depth *complete and effective*." JA2447 (emphasis added).

Given its Atomic Energy Act purpose and defense-in-depth philosophy, the

Task Force Report made no attempt to make environmental-impact predictions or estimates. It also did not assess the implementation costs of its recommendations, nor did it assess probability of accidents. Massachusetts's own expert admitted as much, stating that "the Task Force report does not justify its recommendations by any SAMA-type analysis or any resort to [probabilistic risk assessment] estimates," and then observing that the Task Force Report "entirely bypasses the question of probability." JA2554. Likewise, the orders were not based on assessments of either implementation cost or accident probability. *See* pp. 16-19, *supra*; *see also* Massachusetts Br. at 18.

This contrasts with the NEPA analyses being challenged. For instance, the Pilgrim SAMA analyses are cost-benefit analyses, which assess the reasonableness of potential mitigation alternatives (beyond what NRC would require for accident mitigation under the Atomic Energy Act). *See* pp. 10-12, *supra.* Implementation costs are assessed and compared to a mitigation measure's predicted benefits to determine the measure's reasonableness in terms of costs and benefits. And the "benefits" side of the equation is driven heavily by accident probability determinations. *See id.* Specifically, the SAMA process analyzes in detail the potential types of severe accident scenarios that could occur at the plant, assesses the probability of each scenario

actually occurring, predicts the consequences of each scenario, and compares such assessments with and without a particular mitigation measure in place to gauge the benefits of adding the mitigation measure. *See id.*

These SAMA analyses are conducted under NEPA—not the Atomic Energy Act—in order to explore potential mitigation alternatives *over and above* what NRC is already requiring for safety reasons pursuant to the Atomic Energy Act. The purpose of these analyses is to *predict* the value of these prospective mitigation measures to assess whether they would be reasonable to consider as mitigation alternatives under NEPA. Because these are predictions regarding future plant events—severe reactor accidents—whose probability of occurrence is very low, a mitigation measure's capability to reduce environmental impacts in a severe accident at the plant must be discounted by the low likelihood that a circumstance calling for the measure's use at the plant would ever arise.[16] This is in line with the overall thrust of NEPA reviews, whose purpose is inherently predictive. *See American Bird Conservancy v. FCC*, 516 F.3d

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[16] Similarly, the foundation of the GEIS finding that Massachusetts's rulemaking petition challenges is a series of studies analyzing spent-fuel-pool-fire probability and consequences, with consequences discounted by probability of a fire's occurrence to determine overall the "risk" values supporting the generic finding. *See* JA1202; *see also* JA2005-08.

1027, 1033 (D.C. Cir. 2008) ("[T]he basic thrust of the agency's responsibilities under NEPA is to predict the environmental effects of a proposed action.").

The bottom line is that neither the Task Force Report nor the ensuing NRC orders address the NEPA-type questions Massachusetts's claims ostensibly raise, and thus they provided no reason to grant Massachusetts's request to revisit particular NEPA-based studies of severe accidents.

Massachusetts's brief nowhere reconciles or explains away these fundamental distinctions, leaving only a bare assertion that Massachusetts's conclusion follows from its premise. This approach is insufficient. Analysis, not assertion, is required. "Where the agency is dealing with a very complicated and technical subject, this takes a lot of work by lawyers in culling the record and organizing the information for the reviewing court, but it can be done." *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 60 (1st Cir. 2001). Here, though, "[n]othing offered by [Massachusetts] approaches such an effort," and its undeveloped assertions "are not even a start at a serious assault." *See id; see also Town of Winthrop*, 535 F.3d at 9. Thus, Massachusetts's conclusory argument gives this Court no basis to question NRC's reasoned decision.

Massachusetts also claims that the Commission's adjudicatory decision (CLI-12-6) should have focused on the Task Force recommendations instead of explaining

why Massachusetts had failed to satisfy the regulatory standard for record reopening. *See* Massachusetts Br. at 41. But the Commission decision did not analyze the Task Force Report at length because of Massachusetts's procedural default: Massachusetts did not engage meaningfully with the actual NEPA analysis that it was ostensibly challenging. For example, Massachusetts did not attempt to show (except in a sweeping, conclusory fashion) that NRC's current SAMA methodology was unreasonable or insufficient, and Massachusetts portrayed hydrogen explosions and filtered vents as brand-new issues brought light by Fukushima when, in fact, the Pilgrim SAMA analysis had already analyzed the same issues. JA20-27; *see also* pp. 10-12 and 24-30, *supra*. The Task Force Report never once mentioned NEPA, Pilgrim, or SAMA analyses, *see generally* JA2431-2526, nor did it provide any analysis comparable to the NEPA analyses being challenged. The Task Force Report therefore by no means cured the flaws in Massachusetts's petition.[17]

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[17] The Task Force Report also in no way would undermine the Board and Commission findings that Massachusetts's could have claimed at the outset of the Pilgrim proceeding—rather than waiting until 2011—that NRC should use Dr. Thompson's "direct experience" methodology. Even before Fukushima, Dr. Thompson's approach would have yielded an aggregate core-damage-frequency value much higher than the value associated with the Pilgrim SAMA analyses. *See* JA21 n.99; JA116; JA1930-31; *see also Union of Concerned Scientists*, 920 F.2d at 55 (holding that if an (continued. . .)

In short, while the Commission was certainly cognizant that Massachusetts's new contention was, at least in part, prompted by the Task Force Report, *see* JA 17, 19, and repeatedly referenced Dr. Thompson's supplemental declaration regarding the Task Force Report when discussing Massachusetts's claims, *see* JA20 n.16; JA 22 n.100; JA22 n.103; JA22 n.108; JA24 n.113; JA25 n.121; JA26 n.127, a focused discussion of the Report was unnecessary.

Massachusetts also complains that the "Commission provides virtually no explanation" for issuing orders based on the Task Force Report while finding Massachusetts's information "inchoate" for the purposes of Massachusetts's NEPA challenges. Massachusetts Br. at 40-41. The obvious reason the Commission did not specifically answer this question is that Massachusetts never raised it (although Massachusetts had over two months in which to do so).[18] In any event, the distinction

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(. . .continued)

argument could have been raised at the outset of an NRC proceeding but was not, NRC need not find the argument timely when raised later even if some evidence proffered in support of it at may qualify as "new").

[18] The orders were issued on March 12, 2012, while the agency did not take final action on the Pilgrim renewed license until the end of May, 2012. *See* JA3125, 3163, 3203 (orders); JA47 (notice of issuance of Pilgrim renewed license).

between the precautionary nature of defense-in-depth safety regulation and the predictive nature of NEPA estimates explains why the Commission had no need to address this point *sua sponte*. As the Third Circuit has observed, "precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis."[19] *New Jersey Dep't of Envtl. Prot. v.* NRC, 561 F.3d 132, 142-43 (3d Cir. 2009). And, of course, *benefiting* the environment does not trigger new NEPA obligations. *See Public Citizen v. NRC*, 573 F.3d 916, 929 (9th Cir. 2008).

And there is another reason why, in this instance, the precautionary nature of the defense-in-depth approach explains how the Task Force recommendations might support new safety orders without also requiring new NEPA analysis. As Massachusetts's own expert recognized, the Task Force Report itself acknowledged

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[19] The Commission made a similar point when denying Massachusetts's first rulemaking challenge to the GEIS finding on spent-fuel-pool environmental impacts, explaining that mitigation measures added after the 1996 GEIS finding were a basis for finding the pool-fire risk to be *lower* than previously thought, not *higher* as Massachusetts's petition had claimed. JA1203 (finding the probability of pool fires to be "less than reported in NUREG-1738 and previous studies"). The GEIS finding was based on a series of NRC studies finding very low pool-fire risk (with risk equaling probability of occurrence multiplied by consequences—JA 1202 n.4 and accompanying text) that were conducted prior to, and thus were not based upon or dependent upon, more recent mitigation strategies adopted after September 11th. *See* JA1202-03.

the often "unavailable, unreliable, or ambiguous" nature of the information available about Fukushima. JA2552. Under defense-in-depth principles, information in such a state may still support taking precautions while awaiting more information. But for the NEPA challenges at issue here, the question is a different one: namely, whether the information seems likely to improve the *accuracy* of previously-developed environmental impact predictions.

In sum, the Task Force Report and subsequent orders do not provide new information on the specific questions relevant to the Commission's NEPA analysis of the Pilgrim license renewal, and hence do not support Massachusetts's various attempts to delay or reopen that proceeding. Massachusetts's conclusory arguments regarding the Task Force Report and subsequent orders fall short of demonstrating a NEPA violation, let alone a NEPA violation so obvious as to excuse Massachusetts's failure to satisfy applicable NRC threshold standards.

CONCLUSION

For the reasons stated above, this Court should deny Massachusetts's petition for review.

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October 10, 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains 11847 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it contains proportionally spaced 14 point Garamond type style. This brief was prepared on Microsoft Office Word 2007.

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ADDENDUM

REGULATIONS CITED:

10 C.F.R. § 2.309 – Hearing requests, petitions to intervene, requirements for standing, and contentions.

. . . .

(f) Contentions.

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant

matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

10 C.F.R. § 2.326 – Motions to Reopen

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).