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Draft Environmental Assessment and Finding of No Significant Impact

**Comment On:** NRC-2013-0063-0002  
Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit No. 3; Extension of Public Comment Period

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## Submitter Information

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122

## General Comment

See attached file(s)

## Attachments

Final NRC exemption comments 6.3.13

SUNSI Review Complete  
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E-R105 = ADM-03  
Add: O. Pickett (dupl)

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U.S. Nuclear Regulatory Commission,  
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June 3, 2013

Dear Ms. Bladey,

Please accept the following comments with respect to No. 50-286; NRC-2013-0063.

#### Introduction

These comments and requests are hereby submitted pursuant to an Order of the United States Court of Appeals for the Second Circuit in Brodsky v. NRC as remanded for further action to the Honorable Loretta Preska, Chief Judge of the Southern District, and a Notice of a request for public comment on a draft environmental assessment ("EA") and a finding of no significant impact ("FONSI") appearing on page 20144 of the Federal Register/ Vol. 78, No. 64 / Wednesday, April 3, 2013. The NRC has docketed the case as No. 50-286; NRC-2013-0063.

These comments are submitted by the signatories below on their own behalf and on behalf of the thousands of members of their organizations and the nearly 20 million people who live and work within fifty miles of Indian Point, whose health, safety and security have been substantially jeopardized by the issuance and application of the exemption. These comments are submitted in support of our request that the NRC deny the Entergy exemption request, and/or that it withdraw the EA and FONSI and produce a full Environmental Impact Statement, and/or that it conduct a public hearing.

#### **Comment 1**

#### Legal Background And Issues

This administrative proceeding is the result of protracted litigation known as "Brodsky et. al. v. NRC" which has resulted in two rulings by the United States Court of Appeals for the Second Circuit, and one ruling by Judge Preska (collectively "the "Opinion") in the Southern District of New York ("the Court") concerning a 2007 exemption from fire safety requirements of Appendix R ("the exemption") granted to the Indian Point licensee by the Nuclear Regulatory Commission (the "NRC"). Those decisions, and their underlying filed and/or docketed documents, are hereby made part of this administrative record by reference. They are in the possession of the NRC and/or the licensee, as evidenced by statements made in the NRC announcements of this proceeding. This administrative proceeding is currently sub judice, and is the subject of communications among the parties and the Court which may affect it now or in the future. We specifically and without limitation incorporate attach a letter to Judge Preska dated May 10, 2013, which sets forth legal and factual defects in and concerns about this administrative proceeding and the NRC's response to the Opinion and is, because of its' recent submission, attached to and included in these comments as Appendix A.

We also note considerable confusion as to the legal status of the 2007 exemption, including whether or not it has been implemented, amended or withdrawn, why the NRC includes in the FONSI a reference to the plural "exemptions" rather than the singular "exemption". We and the public are entitled to an authoritative explanation of the legal status of the exemption.

There are a variety of legal issues which are raised by this proceeding and the NRC's actions. Most are raised in the legal papers referred to above and incorporated herein. They could be argued at length in these comments (these include but are not limited to the standards for determining whether the NRC has taken a "hard look" at any or all of the issues raised herein; the legal and evidentiary insufficiency of the record compiled in 2006-7 and apparently used here; whether a public hearing must be called, and many others. We are willing to present further discussion of all these issues, and reserve the right to do so either on our own motion or in response to any questions or concerns raised by the NRC.

We assert, based on repeated citizen input to us, that the refusal of the NRC to accept comments by e-mail constitutes an illegal and unfair obstacle to full public participation in this proceeding.

### Factual Background

We begin by pointing out that this exemption applies to the cables that control shutdown in an emergency, and that a consequence of such a fire going beyond 24 minutes is a meltdown of the reactor, the most serious and extreme consequence of a failure of NRC regulation. The public health, safety and security

of the nearly 20 million people who live and work within fifty miles of Indian Point have been substantially jeopardized by the issuance and application of the exemption.

We have previously set forth, in the documents referenced above, the facts that led to NRC consideration and adoption of Appendix R, and the NRC approval in 2007 of the exemption which is the subject of the litigation and this proceeding .

We reassert those factual descriptions, but in the interest of clarity offer this additional brief summary.

Almost 40 years ago the NRC, after an extremely serious fire at a nuclear facility that almost led to a reactor meltdown, promulgated rules governing fire safety, Appendix R to 10 CFR Part 50. Compliance with Appendix R required numerous safety improvements including that the insulation of electric cables which control reactor shutdown in an emergency have physical insulation that last three hours in a fire, or one hour if additional administrative and manual fire suppression systems were in place. These were intended to provide redundant and reliable protection against reactor meltdown. The Indian Point units, and many others, have used and continue to use insulation material known as HEMYC, with NRC knowledge and approval, as part of compliance with the one-hour option. Some years ago, tests revealed that HEMYC does not last the required one-hour, becoming ineffective after 27 minutes. The NRC notified licensees and asked for their plans to deal with this problem. Entergy responded by requesting an "exemption" from the one hour requirement, asking initially for a 30 minute standard and subsequently revising the request to 24 minutes, three minutes below the HEMYC test results. In 2007 without prior public notice or opportunity for participation, the NRC granted the 24 minute exemption.

### Organization and Purpose

These comments are submitted in support of our request that the NRC deny the Entergy exemption request, and/or that it withdraw the EA and FONSI and produce a full Environmental Impact Statement, and/or that it conduct a public hearing. We assert that such decisions are justified and required by each comment, taken individually, or all comments read cumulatively. We reserve the right to submit further comments and evidence if requested or on our own motion.

We have, for the sake of clarity and convenience, grouped the substance of our comments to reflect the regulatory and statutory requirements governing the exemption process. They should be read together, and are numbered for convenience and not in order of importance or as unrelated comments.

We point out that these groupings are not limitations on the applicability of or

evidentiary weight assigned to any particular fact or comment, or the nature of our comments and concerns. For instance, we discuss the absence of discussion of terrorism in the EA, FONSI and exemption text in our comment entitled "The exemption is not consistent with the common defense and security." The facts and arguments presented therein are not limited to consideration of the validity of that portion of 50.12. They apply to the general sufficiency of the EA and FONSI, to our assertion that the exemption is not authorized by law, and to each and all other assertions and concerns raised herein. The same broad application of facts and argument is hereby asserted for each comment and in support of our assertion that the exemption should be denied, that a full EIS should be prepared, and that a public hearing should be called.

We assert that all the information and comments herein concern matters that are reasonably foreseeable and sufficiently likely to occur such that a person of ordinary prudence would take them into account when reaching a decision. They are neither remote nor highly speculative and "have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. § 1502.22. We again point out that this exemption applies to the cables that control shutdown in an emergency, and that one clear consequence of a fire going beyond 24 minutes is a meltdown of the reactor, an unthinkable and catastrophic consequence of a kind included in the language of 1502.22.

We assert that the NRC has, to our best information, possession and detailed knowledge of the documents, both legal and administrative, that are discussed herein. If there is any confusion about such documents we offer to clarify and/or re-provide them.

All the contents of this document, and the contents of the documents and records described, referenced or incorporated, are submitted as Comments under the terms of NEPA, the APA, the AEA, all other relevant statutes rules and regulations, the April 3 Notice, and the Opinion. We assert that the information, documents, opinions and facts contained herein, considered individually and jointly, when given proper weight are sufficient to require the NRC to prepare an Environmental Impact Statement, and/or to deny the request for the exemption, and/or convene a public hearing .

## **Comment 2**

The EA and FONSI have not considered reasonable alternatives to the requested exemption in violation of the AEA, NEPA, the AEA, the Opinion and regulatory requirements.

Federal agencies are required to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The NRC is also required as part of the EA process to examine alternatives. See 10 CFR § 51.30 (a) (ii) and §102(2)(E) of NEPA. In this case the NRC did not do so, and limited its consideration to either issuing the "exemption", or taking no action at all. This is a violation of these requirements. There are many other reasonable alternatives ignored by the NRC. We again point out that this exemption applies to the cables that control reactor shutdown in an emergency, and that a consequence of such a fire going beyond 24 minutes is a meltdown of the reactor. The availability of alternatives to the 24 minute rule must be weighed in the light of the horrific consequences of an error.

These viable unconsidered alternatives include a requirement that the fire insulation be upgraded to meet the one-hour requirement, or to a different time frame not tied to the test results showing that HEMYC lasts only 27 minutes, or that other non-administrative remedies be fashioned that leave the one-hour requirement in place.

An additional and widely known alternative that should have been and was not considered is a modification of the units fire protection programs from Appendix R to 10 C.F.R. 50.48(c), the National Fire Protection Association Standard [NFPA 805] ("805"). This would change IP's fire safety plans from a deterministic to a probabilistic model.

In other words, the Appendix R model requires full analysis of matters affecting public safety in the event of full destruction of physical structures of the plant, and other outcomes which would affect public health, safety and security. The alternative 805 model requires that upon a showing that the odds of any fire is more than one in one million, no further fire safety action is required (with the caveat that a spurious action analysis still has to be done.) The NRC has encouraged licensees across the nation to use this new system. About two thirds of American nuclear plants have opted for an 805 program. Entergy has refused to do so (probably because it cannot produce adequate information and drawings required for 805 transition). While the choice between these two fire safety alternatives is certainly subject to reasonable disagreement, it is precisely the kind of alternative to the exemption that the law and the Opinion require the NRC to consider before granting an exemption to existing safety rules.

By failing to address any of these three or other reasonable alternatives the NRC failed to protect the public health and safety and violated its' obligations under the AEA, NEPA, the APA and its' own regulations. We ask that, if the exemption is not denied, the EA and FONSI be withdrawn until these alternatives are considered as part of a comprehensive Environmental Impact Study, prepared by NRC and released for public comment prior to any final decision by the agency on

Entergy's exemption request..

**Comment 3**

Section 50.12 ( the "exemption" regulations used herein by the NRC) requires that the exemption be "authorized by law". The EA and FONSI contain the following language on this requirement:

This exemption would allow use of a fire barrier expected to provide less than 1 hour of fire protection. As stated in Section 3.0 above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR Part 50. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

We point out that, while the NRC exemption process in this case has been judicially sanctioned, the courts' have found that such exemption process is still bound by requirements of law. The record used by the NRC contains no document or evidence pertaining to this subject. The documents outlined and submitted below supplement that record and provide evidence that the exemption is not authorized by law. The EA and FONSI contain no consideration evidence or reasoned analysis of the requirement or of the following legal flaws which individually and collectively render this exemption unauthorized by law.

A) The EA, FONSI and exemption arbitrarily exclude NEPA from consideration of the laws governing issuance of the exemption.

The language of the exemption itself references only the AEA and Commission regulations ("The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law."). The law of the cases underlying this proceeding establish what is already self-evident: NEPA and the APA are also applicable to the exemption and we are entitled to the protection and requirements of both. The This 50.12 Finding simply ignores those two statutes and do not analyze or mention their applicability to the exemption. This alone renders the EA, FONSI and exemption unauthorized by law.

B) This exemption is permanent, which renders it unauthorized by law.

Courts have held that an exemption must be limited in duration. We call the NRC's attention to Commonwealth of Mass.v.US. Nuclear Regulatory Com 'n, 878 F .2d 1516 (1st Cir. 1989) which sanctioned an exemption on the explicit grounds that it was temporary. "The exemption did not change [licensee's] duty to follow

NRC rules; it only changed which rule applied for a brief period of time .... This is not a situation in which the NRC permanently exempted the licensee from following a specific license requirement. Nor is this a case where the NRC has changed [the licensee's] license in such a way that [the licensee] is no longer required to follow NRC's regulations and rules. Rather, this is a case where the NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license." Mass., 878 F.2d 1521. Because this exemption is permanent the EA, FONSI and exemption itself are unauthorized by law.

C) The NRC's repeated and willful failure to consider relevant and probative evidence in its' possession renders its' earlier approval of the exemption unauthorized by law.

We bring to the NRC's attention the contents of the Motion To Supplement The Record' filed in the first 2nd Circuit case, Brodsky v. NRC, which is in the possession of the NRC and which we incorporate in its' entirety into these comments. It establishes that the original record used to approve the 2007 exemption was arbitrarily and illegally limited to a small fraction of the relevant and probative evidence in the possession of the NRC. That motion has not been subject of a court decision and more importantly, the refusal of the NRC to consider relevant and probative evidence in its' possession renders the EA and FONSI unauthorized by law and in violation of the AEA, NEPA and the APA. The documents listed below are relevant and probative and establish that the exemption request should be denied and a full EIS prepared.

D) The NRC's failure to publish the exemption request and allow for public comment and participation renders its' earlier approval of the exemption unauthorized by law.

E) We also note considerable confusion as to the legal status of the 2007 exemption, including whether or not it has been implemented, amended or withdrawn. Given that confusion we assert that the 2007 exemption was unauthorized by law, and a reconsideration of it violates the AEA, the APA, NEPA, NRC regulations and the Opinion and is therefore now unauthorized by law..

F) The NRC's characterization of this proceeding as a reconsideration of the 2007 exemption is unauthorized by law.

The NRC decision to reconsider the 2007 exemption ("The NRC is reconsidering its issuance of a revision of an existing exemption..." FONSI 20145) is not a permitted exercise of its powers under the AEA, the APA, NRC rules and regulations or the Opinion and is therefore unauthorized by law.

We are unable to find anything in the NRC's legal or regulatory scheme that authorizes a reconsideration of an existing exemption, and no description of the

process used, or the evidentiary or legal standards to be applied. The creation of a new, ad hoc administrative process not grounded in rule or law is impermissible, leaves us unsure of their legal or administrative rights and obligations, As set forth in law, regulation and the Opinion. This is not a technical objection. We are forced to comment without knowledge of the procedures used by the NRC, the record upon which it based the issuance of the EA and FONSI, our rights and obligations, whether we may seek a public hearing, and more.

For example, the NRC in its approval of the 2007 exemption sought the opinion of officials of New York State. "In accordance with its stated policy, on February 13, 2007, the NRC staff consulted with the New York State official, Alyse Peterson of the New York State Energy Research and Development Authority, regarding the environmental impact of the proposed action. The State official had no comments." FONSI 20146. Does this "stated policy" still apply? Has the State been contacted again? If the NRC has not consulted with New York State as required by its "stated policy" then the Notice and the NRC's various actions and decisions are deficient and should be withdrawn and re-issued once such consultation has been completed.

For a second example, we have repeatedly asked the NRC to examine its' own documents and records and determine whether it believes there are other relevant and probative materials in its' possession or available to it. We do not know whether or not the NRC has done so, will do so or whether it rests the entire decision to issue a new EZ and FONSI on the 31 documents in the existing record. This has placed an unreasonable and prejudicial burden on us to review technical and other documents which are in the possession of the NRC. If the NRC believes that the 31 documents are its entire stock of relevant and probative evidence, fine. If it believes there are other such documents it should so state. But its silence on what evidence it may or may not have renders its' decision and this process unauthorized by law.

For a third example, we have no knowledge of the legal standard the NRC will apply to the evidence in exercising its discretion over the exemption. Must the licensee show a preponderance of the evidence? Will the NRC exercise such discretion broadly, satisfying only the judicial review standard of "arbitrary and capricious"? Our burden of offering comment and evidence is affected by these considerations, and we have no knowledge of what we are required to produce.

It should be noted for the Record that we posed these and other questions to the NRC, through counsel, and were told that we would not receive answers, our only remedy being through the courts at the conclusion of the administrative process. We remind the NRC that it is required under 50.12 to evaluate whether the exemption and the process by which it is considered is "authorized by law". The failure to give us adequate information about the process and our rights and obligations renders this FONSI and EA unauthorized by law.

G) The NRC's explicit refusal to consider the option of denial of the exemption request renders this proceeding unauthorized by law.

The NRC has limited the actions it may take in this "reconsideration" process to modification of the exemption. "As necessary, the underlying action (i.e., approval of the exemptions) may be modified in light of public comments." Although the record before it is substantially different than what it considered in 2007, it has refused to consider the option of denying approval. By so doing the NRC has prejudged the outcome of the proceeding, which is inconsistent with the requirements of law, regulations and the Opinion.

This decision to prejudge the outcome and to arbitrarily limit the actions it will take renders our rights meaningless. At the outset of this proceeding, without knowledge of the nature and extent of information that we may provide, no matter how powerful the evidence may be that the exemption is both dangerous and illegal, the NRC has arbitrarily limited itself to modification of the exemption. The NRC may not, consistent with law and the Opinion, refuse to consider the option of denying the exemption request. This renders the proceeding unauthorized by law.

#### **Comment 4**

The exemption is not consistent with the common defense and security.

Section 50.12 requires that the exemption be "consistent with the common defense and security" The full text of the 2007 exemption's discussion of this requirement is as follows:

The proposed exemption would allow use of a fire barrier expected to provide less than 1 hour of fire protection based on the existing fire barriers, fire detectors, automatic and manual fire suppression equipment, administrative controls, the fire hazard analysis, the HEMYC configuration, and the absence of significant combustible loads and ignition sources. This change to the plant requirements for the specific configuration in this fire zone has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

A review of the 31 documents which the NRC considered in reaching this conclusion shows no documents that discuss the "common defense and security".

It is self-evident that the belated discovery that HEMYC does not meet Appendix R fire safety standards affects the ability of the plant to withstand fires resulting from acts of terrorism and other breaches of security, which in turn is affected by

the dynamics and consequences of a terrorist attack. It simply defies rationality to assert that the ability to learn of, identify the site of, mobilize human resources and extinguish a fire within 24 minutes is identical whether the fire is started by a short circuit or an attack by armed gunmen or airborne attack. While Entergy may argue that its' exemption request would, in fact, address such security and defense issues, the NRC is required to take a hard look at that assertion. It did not do so.

For example, Entergy and the exemption assert that administrative controls and manual fire suppression required by the exemption are sufficient to make up for the lost 33 minutes (the difference between the 1 hour rule and the 27 minutes HEMYC will survive). Yet the NRC did not consider any documents which analyze and discuss the ability of these administrative controls and manual suppression to survive acts of terrorism. The electric cables at issue here are not wholly contained within containment, being protected at certain locations with walls 2 inches thick.. Nor does containment have to be broken to affect plant shutdown. An insider, with a match and a five gallon can of gasoline for example, ( the amount of transient combustibles required to be analyzed under the requirements of Appendix R) can find locations that are difficult to find and difficult to suppress. These are scenarios peculiar to a terrorist modality and have not been considered. Under the exemption a fire which had already started would be discovered and suppressed within 24 minutes. Can this be accomplished if the plant is under attack and fire brigades are delayed in their response?

We assert that the specific elements of the exemption increase the risk of terrorist attack. We also assert that the exemption substantially increases the consequences of a terrorist attack. Fairly summarized, this exemption takes a long-standing regulatory requirement that relied on physical fire barriers and does two things: 1) It reduces the survival time of the physical barrier and 2) it increases reliance on man-made administrative controls and manual detection and suppression. Where previously, in the event of a fire affecting electric cables that control shutdown, the licensee had at least one hour to learn of, get to and suppress the fire, all three things now have to be done in 24 minutes. We again point out that this exemption applies to the cables that control shutdown in an emergency, and that a consequence of such a fire going beyond 24 minutes is a meltdown of the reactor.

The exemption will increase the risks of a catastrophic fire in the event of a terrorist attack because, if history is a guide, such attacks are carefully planned and target the weakest and most easily disrupted security measures, which are often the marshaling and implementation of human interventions. An increased reliance on such human actions could be understood and acted on, thereby increasing risk.

The exemption will substantially worsen the consequences of such an attack because it will interfere with the marshaling and implementation of manual fire

suppression and administrative controls. The EA and FONSI are completely silent about any analysis of the interface between the new fire-safety procedures and existing security procedures, or any other security or defense based evidence or analysis.

We assert again that reliance upon automatic detection cannot be credited given the automatic detection system is not a safety-related system. This reliance raises the question how will the fire be detected-and how much time will was improperly credited in the extraordinarily short period from ignition to suppression of less than 24 minutes. The record provided does not indicate this limit was established nor is the response time credible. The exemption violates the Defense In Depth approach to fire protection as established federal regulations including Appendix R.

We note, on information and belief, that the NRC has categorically refused to consider the impacts of terrorism with respect license amendments and exemptions. Whatever policy exists, this exemption cries out for the reasoned, hard look at the risks and consequences of a terrorist attack, which has not occurred.

We identify below documents in the possession of the NRC which address each and every such issue, including but not limited to the Fire Hazards Analysis, the Design Basis and Design Basis Threat documents, the Operator Manual Actions, and the Spurious Hazard Analyses. These documents, jointly and severally consider specific circumstances including the ability of the units to carry out public health and safety actions as planned in the event of a terrorist attack. Yet none of them are in the record of documents and evidence considered by the NRC in 2006-7 or now, and the relevant contents of which were not considered,

We ask that these documents, among others, be reviewed and that the NRC engage in a reasoned, evidence based analysis of the consequences of the exemption on the common defense and security.

### **Comment 5**

The exemption will present an undue risk to the public health and safety:

The underlying purpose of Subsection III.G.2 of 10 CFR Part 50, Appendix R, is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. Based on the existing fire barriers, fire detectors, automatic and manual fire suppression equipment, administrative controls, the fire hazard analysis, the HEMYC configuration, and the absence of significant

combustible loads and ignition sources, the NRC staff judges that application of Subsection III.G.2 of 10 CFR Part 50, Appendix R, for these Fire Areas is not necessary to achieve the underlying purpose of this regulation. No new accident precursors are created by allowing use of a fire barrier expected to provide less than 1 hour of fire protection and the probability of postulated accidents is not increased. Similarly, the consequences of postulated accidents are not increased. Therefore, there is no undue risk (since risk is probability multiplied by consequences) to public health and safety.

We first comment on a matter raised separately herein, the intentional and impermissible use of probabilistic analysis for a regulatory scheme that is deterministic. We call attention to the two references to "probability" above, among other misuses. Appendix R is not subject to downward revision of safety standards based upon the probability of bad outcomes. If Entergy or the NRC want to apply such probabilistic analysis they may do so under the 805 program.

Second, in its approval of the 2007 exemption the NRC intentionally excluded evidence that shows that the licensee's request for an exemption is inherently dangerous, that it cannot and has not been executed in a manner consistent with its own assertions and promises, and that there are alternatives to the exemption that would be effective and possible. The 50.12 requirement is that the NRC establish that the exemption not cause "undue" risk. It is clear that such standard permits some risk. It is equally clear that the NRC must take a hard look at evidence of both heightened risk, heightened consequence and the availability of alternatives, which it has not done. The consequence of this refusal and the evidence included herein is an unacceptable risk of undue risk to the public health and safety.

We again point out that this exemption applies to the cables that control shutdown in an emergency, and that a consequence of such a fire going beyond 24 minutes is a meltdown of the reactor.

### **Comment 6**

The existing record upon which the NRC approved the exemption and now apparently relies is grossly inadequate as a matter of fact and law. It contains: (a) the exemption applications by the licensee, (b) environmental analysis by the NRC, (c) the Petition filed by Petitioners with the NRC and related documents, (d) the denial of said Petition, (e) an information notice and generic letter sent to the licensee regarding the ineffectiveness as HEMYC as fire insulation, (f) the licensee's response to the generic letter, (g) communications between the NRC and the licensee requesting additional information from the licensee, (h) memos submitting the fire protection safety evaluation input for Indian Point Unit 3, (i) a

letter to the licensee granting the exemption, (j) memo's and final reports of HEMYC 1-hour rated performance and test results, (k) a fire protection program description with proposed modifications submitted in 1984, (l) a proposed exemption and an exemption granted to the licensee in 1984-1985, (m) NRC internal documents concerning fire protection, and other documents.

This record contains 31 documents, 11 of which contain facts or analysis of issues and 20 of which are administrative notices, letters or documents part of the "exemption" itself. The 11 evidentiary documents tend to favor the grant of the "exemption. No documents raising concerns about the legality, safety and propriety of granting the exemption were part of the original record. The NRC deliberately excluded from the record and failed to consider dozens of specific documents in its possession which we identified and asked be considered and which tend to establish the "exemption" ought not to have been granted. Some of the issues which are raised by the exemption request and for which there are no documents in the record nor reasoned discussion of the issues include, but are not limited to the public health, safety and security, the legal authority for the exemption, the impact of terrorism, the need for full public participation, the failure to establish the required "special circumstances" and others.

### **Comment 7**

We submit as comments the matters, documents and substance described below which refer to documents that are relevant, probative and in the possession of the NRC. The contents of these documents apply to each comment and other assertions contained herein. We offer the contents of those documents as comments and note that they are jointly and severally relevant and probative with respect to issues of public health and safety, defense and security, and the adequacy of the process formerly and currently being used by the NRC to consider the exemption request. These documents taken jointly and severally establish that the exemption request should be denied and that the EA and FONSI should be withdrawn and a full EIS prepared. We ask that they be considered and made part of the record.

A) We draw the attention of the NRC to documents called, or entitled or otherwise known as Safety Analysis Reports and Plant Technical Specifications regarding or containing references to fire protection programs, hardware or operational changes, (including but not limited to the Fire Protection Program Manual) and are in their possession. .

These documents establish accurate, factual and scientific realities in the units as they affect fire safety and which contradict assertions made by Entergy Nuclear Operations, Inc. in its request for the exemption. Contrary to Entergy's assertions, these documents establish that Entergy has made binding legal commitments to operate the units in full compliance with all requirements of

Appendix R including but not limited to the one-hour insulation requirement.

These documents also establish that Entergy's subsequent attempt to modify its' original exemption request from 30 minutes to 24 minutes was not based on public health, safety and security concerns but was crafted in order to conform with the stark realities of HEYMYC test results showing it lasted on 27 minutes.

B) We draw the attention of the NRC to documents called, or entitled or otherwise known as Design Basis Documents and Design Basis Threat Documents created pursuant to 10 C.F.R. 73.1, 10 C.F.R. 50.54 (f) and other regulatory and legal sources. They contain a series of required subjects of report, analysis and effective management of the units as impacted by terrorism, attack and sabotage (DBT) and safety related systems (DB), including fire protection.

For example, the DBT requirements include a required response to the impact of terrorism on those elements of the exemption which rely on manual inspection, prevention and suppression. It is clear and unambiguous that a terrorist attack could make the enhanced human response to fire much more difficult if not impossible. The EA and FONSI simply do not consider this eventuality.

For a second example, DB documents establish that the automatic detection and suppression systems are not Safety Related. In spite of the systems not being Safety-Related the exemption relies on such systems to start the 24 minute response protocol. This is a violation of the existing fire protection program.

C) We draw the attention of the NRC to documents called, or entitled or otherwise known as the Safe Shutdown Analysis. Appendix R requires that the SSA be reviewed and updated every time an operational procedure is changed, ( as well any design change, maintenance change, change in fire brigade procedures or constituents, and/or training programs). The SSA was not so reviewed and updated with respect to the exemption. The SSA was not part of the documents reviewed by the NRC when it granted the exemption. This is a violation of law and regulation. In fact, the SSA was ignored because the exemption sets up a dangerous and unsustainable practice as a substitute for the one-hour rule.

D) We draw the attention of the NRC to documents called, entitled or otherwise known as the Fire Hazards Analysis. It is a detailed analysis of the fire loading in each distinct room in the units affected by the exemption. The FHA was not so reviewed and updated with respect to the exemption. The FHA was not part of the documents reviewed by the NRC when it granted the exemption. This is a violation of law and regulation. In fact, the FHA was ignored because the exemption sets up a dangerous and unsustainable practice as a substitute for the one-hour rule, including but not limited to the loading consequences of the addition of a junction box and additional fire-enhancing heat caused by transmission of electricity through the cables. ( Note that tests of the system

were run at artificially high voltage artificially decreasing amperage and therefore heat). These documents must be fully considered and weighed before any exemption is granted.

E) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as PI&Ds (Piping& Instrument Diagrams). This information and documents will provide the background and design input that are required for the Safe Shutdown Analysis and the Fire hazards Analysis. These documents were not and are not part of the record considered by the NRC in granting the exemption and in approving the FONSI and EA.

F) We draw the attention of the NRC to documents called, entitled or otherwise known as Current Electrical Separation Analysis. These documents were not and are not part of the record considered by the NRC in granting the exemption and in approving the FONSI and EA. The documents establish the physical configuration of the electrical cables subject to the exemption. This proves that the physical proximity of the electric cables is repeatedly too close to permit a 24 minute fire suppression standard. Simply stated, the cables are too close together to last 24 minutes in a fire and will fail prior to the ability of the licensee to detect and suppress fire.

G) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as types and installation dates of fire seals, fire wraps, barriers, and insulation materials. These were not reviewed and updated by the NRC with respect to the exemption, the EA or the FONSI. These documents and information establish that the licensee is currently not in compliance with NRC regulations and/or recommendations. Such a lack of compliance is significant and essential in any complete and fair analysis of the impacts on the public health safety and security of the exemption.

H) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as interim compensatory measures. These are commitments by the licensee to maintain administrative controls to ensure public health safety and security during the period it takes to make permanent design changes, training and procedural modifications. We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as interim compensatory measures. This will establish that the licensee is currently non-compliant with NRC requirements a factor of great importance in determining whether it should be granted further exemptions.

I) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as Operator Manual Actions. These are permanent actions by the licensee necessary to meet the requirements of Appendix R. These were not reviewed and updated by the NRC with respect to the exemption, the EA or the FONSI. They establish that the planned fire suppression protocol cannot be successfully implemented with 24 minutes. This establishes that the public

health safety and security is substantially endangered by the exemption.

J) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as Spurious Action Analysis including Multiple Spurious Action Analysis. These are analyses of plans and systems intended to cope with a wide variety of threats to plant safety., including unexpected and dangerous threats. These were not reviewed by the NRC with respect to the exemption, the EA or the FONSI. These documents establish that the existing systems and plans cannot cope with fire safety dangers within 24 minutes and after., and that the exemption should not have been and should not now be granted.

K) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as 50.59 reviews. These are proceedings before the NRC brought by a licensee which demonstrate the health and safety impacts of particular modifications or changes. These were not reviewed by the NRC with respect to the exemption, the EA or the FONSI. These documents establish that the public health and safety is negatively affected by a 24 minute insulation requirement and that the exemption should not be granted.

L) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as commitments (docketed or undocketed). These are promises made by a licensee to engage in actions and behaviors related to fire safety. They are referenced in the text of the exemption. These were not reviewed by the NRC with respect to the exemption, the EA or the FONSI. These documents establish that the licensee is not in conformance with its commitments and that fire safety standards can only be analyzed and understood with full knowledge of such side agreements.

M) We draw the attention of the NRC to information and/or documents called, entitled or otherwise known as Exemptions granted or rejected to any nuclear power plant in which the exemption permits said nuclear plant to reduce fire safety requirements below one hour. These are documents which establish what if any policies and practices have been adopted by the NRC as to reduced insulation fire safety.

### **Comment 8**

Pursuant to the relevant law and regulations we ask that the NRC convene a formal hearing for the purposes of taking public comment and receiving evidence, witnesses and testimony with respect to the issues and concerns expressed herein as well as other issues relevant to the statutory and regulatory obligations of the NRC with respect to the exemption. Although we do not believe it necessary to so recite, we also submit this document as a petition for such hearing.

For the reasons set forth above and in the documents cited and incorporated herein, we assert that the original exemption was improperly and illegally granted, that the instant administrative proceeding is illegal and inconsistent with the Opinion, that applicable statutory and case law, and regulation, require that the exemption request be denied, and/or a full Environmental Impact Statement be prepared, and or/ a public hearing take place and for such other relief as may be just and appropriate.

We reserve all legal rights in this proceeding or any litigation related to or arising from this proceeding.

Respectfully submitted,

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# PUBLIC SUBMISSION

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Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit No. 3; Extension of Public Comment Period

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## General Comment

The attached document is Appendix A to a previously filed Comment letter, Document ID: NRC-2013-0063-0002  
Comment Tracking Number: 1jx-85p3-8f4y, also entitled "Final NRC exemption comments 6.3.13" and is part of that document.

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## Attachments

Brodsky v NRC Status Order Letter 5.10.13

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Hon. Loretta A. Preska  
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May 10, 2013

Re: Brodsky v. NRC 1:09-cv-10594

Dear Judge Preska,

This letter is submitted pursuant to your amended Status Order of April 23, 2013.

On January 7, 2013 the United States Court of Appeals for the Second Circuit issued an Opinion (the "Opinion") in the above captioned case specifying the procedures, and the purposes thereof, to be followed upon remand to this Court. "...we remand the matter to the district court with instructions for it in turn to remand to the NRC so that the agency may: (1) supplement the administrative record to provide an explanation, with supporting affidavits or findings of fact, as to why affording public input into the exemption request was inappropriate or impracticable or (2) take other such action as it may deem appropriate to resolve this issue."<sup>1</sup> These proceedings were to be completed within 120 days of the issuance of the mandate.

On April 3, 2013 the NRC published in the Federal Register a "Draft environmental assessment and finding of no significant impact; request for public comment." (the "FONSI")<sup>2</sup> with respect to the exemption which is the subject of this litigation. Comments were to be received by May 3, 2013. Subsequently, at Plaintiff's request, the comment period was extended to June 3, 2013.<sup>3</sup>

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<sup>1</sup> Brodsky v. NRC, p. 23

<sup>2</sup> Federal Register/Vol. 78, No. 64 / Wednesday, April 3, 2013 / Notices, page 20144.

<sup>3</sup> As a result of this extension of the comment period the NRC has indicated that it will seek from the Court of Appeals a 30-day extension of the 120 day completion date, at which time the NRC's actions will be ripe for review by this Court. Plaintiffs will not object to such extension.

On April 23, 2013 this Court issued a Status Order directing the parties to "confer and inform the Court by letter no later than May 6, 2013, how they propose to proceed." That Order was subsequently modified by the Court by extending the response date to May 10, 2013.

Pursuant to that directive, Counsel for the parties have repeatedly conferred and exchanged ideas and information. In an abundance of caution, and to ensure that all our rights and arguments are preserved, Plaintiffs submit this letter to the Court and respectfully ask for guidance on how and when to seek clarification or disposition of our serious concerns that the NRC's April 23 action does not satisfy the requirements of the Opinion.

Counsel for Plaintiffs and the NRC agree that the NRC action on April 3 is based on its' decision to decline the Opinion's command to "supplement the administrative record to provide an explanation, with supporting affidavits or findings of fact, as to why affording public input into the exemption request was inappropriate or impracticable;". Instead the NRC has chosen to "take other such action as it may deem appropriate to resolve this issue." Plaintiffs have carefully reviewed the April 3 FONSI, have raised with opposing Counsel a number of procedural and legal questions, and sought clarification of them. These include but are not limited to the following:

- 1) Does the NRC action include a public hearing?
- 2) Will the documents and issues raised by Plaintiffs' Comments be included in the administrative record?
- 3) Will the original NRC contact with state government made in 2007 be supplemented with a new contact whose answer may be the same or different than the one set forth in the April 23 FONSI? <sup>4</sup>
- 4) Will the NRC examine its own documents to determine which, if any, are relevant and probative and therefore ought to be considered in its' evaluation and decision on the exemption?

We have also sought clarification of three fundamental failures of the NRC's actions to meet the requirements of the Opinion.

- I. The NRC decision to "reconsider" the 2007 exemption is not a permitted exercise of its powers under the AEA and the APA and therefore does not conform to the requirements of the Opinion.

The FONSI describes the action taken by the NRC as a "reconsideration" of the 2007 exemption.<sup>5</sup> We are unable to find anything in the NRC's regulatory scheme that authorizes a reconsideration of an existing exemption, and no description of

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<sup>4</sup> "In accordance with its stated policy, on February 13, 2007, the NRC staff consulted with the New York State official, Alyse Peterson of the New York State Energy Research and Development Authority, regarding the environmental impact of the proposed action. The State official had no comments." FONSI 20146

<sup>5</sup> "The NRC is reconsidering its issuance of a revision of an existing exemption..." FONSI 20145

the process used, or the evidentiary or legal standards to be applied. The NRC's position throughout this litigation has been that it is bound by the clear wording of its' regulations. The creation of a new, ad hoc administrative process not grounded in rule or law is impermissible, leaves Plaintiffs' unsure of their legal or administrative rights and obligations, and violates the requirements of the Opinion.

- II. The 2010 NRC regulatory change effectively bars Plaintiffs from asserting their rights under NEPA with respect to this and future NRC actions on the 2007 exemption, which is inconsistent with the requirements of the Opinion.

The NRC admits in the FONSI that subsequent to issuing the 2007 exemption and during the pendency of *Brodsky v. NRC* in the Federal District and Appellate Courts, it amended its regulations to no longer require environmental review and public notice of many exemptions, including the exemption litigated in *Brodsky v. NRC*.<sup>6</sup> Plaintiffs understand that the general wisdom and legality of this change are not before this Court. Plaintiffs do point out however that under the terms of this change there appears to be no reliable opportunity to know of and comment on any amendments, reconsiderations, revisions or other modifications of the 2007 exemption. It is the law of the case that NEPA applies to this exemption. Any actions taken by the NRC in secret will effectively deny to Plaintiffs' their right to knowledge of and participation in the required NEPA analysis. Plaintiffs' therefore assert that such regulatory change, as applied to this exemption, is facially inconsistent with the Opinion and must be voided by this Court.

- III. The NRC, by limiting its' eventual action solely to modification of the exemption, has prejudged the outcome of the proceeding, which is inconsistent with the requirements of the Opinion.

The FONSI states that after submission of comments the NRC may take certain specified actions. "As necessary, the underlying action (i.e., approval of the exemptions) may be modified in light of public comments."<sup>7</sup> The NRC, at the beginning of the process, states in the FONSI that it will not consider the option of disapproving the exemption request.<sup>8</sup> This decision to prejudge the outcome of the NEPA process and to arbitrarily limit the actions it will take makes illusory Plaintiff's exercise of their rights under the Opinion.

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<sup>6</sup> "...the NRC need not prepare any environmental review for exemptions from the requirements of Parts 50 and 52 "with respect to installation or use of a facility component located within the restricted area, as defined in [10 CFR Part 20], or which changes an inspection or surveillance requirement," provided there are no significant hazards considerations, no significant increase in offsite effluents, and no significant occupational dose increase." FONSI 20146

<sup>7</sup> FONSI, 20145

<sup>8</sup> We note that the NRC characterizes the 2007 exemption as a "revision of an existing exemption." FONSI 20144 It is unclear whether this new process is about a revision of the revision, or is a new exemption. In either case, it has arbitrarily and illegally refused to consider disapproval.

We have raised these questions with the NRC and asked for responses. While our conversations have been civil and thorough, we have been told that no answers or clarifications will be forthcoming, and that our concerns should be included in our comments submitted pursuant to the FONSI. Any correction of shortcomings or defects must await an NRC decision on the issuance or modification of the exemption, and this Court's review of those actions. We understand the legal position of the NRC to be that this Court has no jurisdiction over any of these concerns because the matter has been remanded to the agency.

We have discussed this at length with Opposing Counsel and reviewed cases referred to us. We believe the cases are not apposite or persuasive, and accordingly, we respectfully disagree.

We do not seek Court intervention in the administrative process. We do assert this Court has the power and discretion to ensure that the process chosen by the NRC is consistent with the Opinion. We are actively preparing and plan to submit detailed comments. Our ability to effectively participate in this new administrative process is conditioned on its legality, our understanding of the rules and standards it will apply, and the fair application of the law of the case. This Court, while not managing the administrative process, has the power to assure that it is consistent with the Opinion. If, as we assert, the NRC has prejudged the outcome, has created an ad hoc and illegal proceeding, has left Plaintiffs' uncertain of their rights and responsibilities, and has refused to clarify or respond when asked, then it is appropriate that this Court inquire into these matters now and settle them consistently with the Opinion.

We have carefully considered the contents of this letter and believe it is prudent to raise them with this Court now. We believe that the defects in the NRC's actions are inconsistent with the Opinion and fundamentally prejudice us in the exercise of our legal rights. These are fundamental legal and procedural flaws, and it is in the interest of fairness and judicial economy to correct them now, rather than await an inevitably flawed outcome.

We respectfully request the attention and action of this Court now, in order to assure that the purposes and requirements of the Opinion are fulfilled.

Respectfully submitted,

Richard Brodsky, Esq.