

**NUCLEAR REGULATORY COMMISSION**

**[Docket No. 50-286; NRC-2013-0063]**

**Entergy Nuclear Operations, Inc.,**

**Indian Point Nuclear Generating Unit 3**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Environmental assessment and finding of no significant impact; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has concluded that existing exemptions from its regulations, "Fire Protection Program for Nuclear Power Facilities Operating Prior to January 1, 1979," for Fire Areas ETN-4 and PAB-2, issued to Entergy Nuclear Operations, Inc. (the licensee), for operation of Indian Point Nuclear Generating Unit 3 (Indian Point 3), located in Westchester County, NY, will remain as originally granted and will not be modified.

**ADDRESSES:** Please refer to Docket ID NRC-2013-0063 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- **Federal Rulemaking Web site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0063. Address questions about NRC dockets to Carol Gallagher; telephone: 301-287-3422; e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):**

You may access publicly available documents online in the NRC Library at

<http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[ADAMS Public Documents](#)" and then select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Douglas V. Pickett, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-1364; e-mail: [Douglas.Pickett@nrc.gov](mailto:Douglas.Pickett@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 24, 2006, Indian Point 3 submitted exemption requests from part 50 to Title 10 of the *Code of Federal Regulations* (10 CFR), appendix R, section III.G.2, for a one-hour rating fire barrier. On September 28, 2007 (72 FR 55254), the NRC issued the exemptions. As required by 10 CFR 51.21, the NRC prepared an Environmental Assessment (EA) and a finding of no significant impact (FONSI). The EA on the impacts of the exemptions and FONSI were published in the *Federal Register* (FR) on the same day the exemptions were issued. The

exemptions were then implemented at Indian Point Unit 3. A draft EA/FONSI for public comment was not issued for this licensing action.

In 2007, Mr. Richard Brodsky, then a New York State Assemblyman, and others (the petitioners) petitioned the NRC to hold a public hearing before granting the exemptions. The NRC denied Mr. Brodsky's petition. In 2008, the petitioners filed suit in the U.S. Court of Appeals for the Second Circuit, challenging the NRC's denial of a hearing. On August 27, 2009, the Court of Appeals denied the suit for lack of jurisdiction, but afforded the petitioners an opportunity to refile their claims in the U.S. District Court (ADAMS Accession No. ML092610050). In 2011, the U.S. District Court for the Southern District of New York granted the NRC summary judgment on the refiled claims, finding no violation of the Administrative Procedure Act (APA), the Atomic Energy Act (AEA), or the National Environmental Policy Act (NEPA) in the denial of a hearing on the exemption (ADAMS Accession No. ML110660214). The petitioners then sought review of that decision in the U.S. Court of Appeals for the Second Circuit.

On January 7, 2013, the Second Circuit reversed and vacated the U.S. District Court decision with respect to public participation on the EA and FONSI issued in support of the exemptions (ADAMS Accession No. ML13199A023). All other aspects of the U.S. District Court decision were upheld as described in the Second Circuit's Summary Order (ADAMS Accession No. ML13164A362). The Circuit Court remanded the case 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 explain why allowing 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." The Court directed that proceedings were to be concluded within 120 days of the Mandate, which was issued on March 1, 2013.

In response to the Mandate of the U.S. Court of Appeals, on April 3, 2013 (78 FR 20144), a *Federal Register* notice was published seeking public comment, pursuant to 10 CFR 51.33, for a draft EA and FONSI. Due to requests from the public to extend the comment period, on May 7, 2013 (78 FR 26662), a *Federal Register* notice was published that extended the public comment period to June 3, 2013. In light of this extension, the NRC sought and the Court of Appeals granted an extension until August 30, 2013, to complete its actions.

## **II. Environmental Assessment**

### Identification of the Proposed Action:

The proposed action would revise the January 7, 1987, safety evaluation to reflect that the installed Hemyc electrical raceway fire barrier system (ERFBS) configurations provide either a 30-minute fire resistance rating, or in one case a 24-minute fire resistance rating, in lieu of the previously stated one-hour fire resistance rating. The licensee states that a Hemyc ERFBS fire resistance rating will provide sufficient protection for the affected raceways, with adequate margin, to continue to meet the intent of the original requests for exemption and conclusions presented in the NRC's January 7, 1987, safety evaluation. The licensee concludes that the revised fire resistance rating of the Hemyc ERFBS does not reflect a reduction in overall fire safety, and presents no added challenge to the credited post-fire safe-shutdown capability which remains materially unchanged from the configuration originally described in previous letters and as credited in the January 7, 1987, safety evaluation.

The proposed action is in accordance with the licensee's application dated July 24, 2006, as supplemented by letters dated April 30 (ADAMS Accession No. ML071280504), May 23 (ADAMS Accession No. ML071520177), and August 16, 2007 (ADAMS Accession No. ML072400369).

*The Need for the Proposed Action:*

The proposed revision of existing exemptions from 10 CFR part 50, appendix R, is needed in response to NRC Information Notice 2005-07, Results of Hemyc Electrical Raceway Fire Barrier System Full Scale Fire Testing, dated April 1, 2005 (ADAMS Accession No. ML050890089). The information notice provided to licensees the details of Hemyc ERFBS full-scale fire tests conducted by the NRC's Office of Nuclear Regulatory Research. The test results concluded that the Hemyc ERFBS does not provide the level of protection expected for an one-hour rated fire barrier, as originally designed. The proposed revision to existing exemptions would revise the fire resistance rating of Hemyc ERFBS configurations.

*Environmental Impacts of the Proposed Action:*

The NRC has completed its safety evaluation of the proposed action and concludes that the configuration of the fire zones under review provides reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate. Based on the presence of redundant safe-shutdown trains, minimal fire hazards and combustibles, automatic cable tray fire suppression system, manual fire suppression features, fire barrier protection, existing Hemyc configuration, and the installed smoke detection system, the NRC staff finds that the use of this Hemyc fire barrier in these zones will not significantly increase the consequences from a fire in these fire zones.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC staff concludes that there are no significant environmental impacts associated with the proposed action.

*Environmental Impacts of the Alternatives to the Proposed Action:*

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (i.e., the “no-action” alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources:*

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Indian Point 3, dated February 1975.

*Agencies and Persons Consulted:*

Development of this EA/FONSI did not result in consultation.

*Comments*

The NRC received 135 submissions containing comments from interested members of the public, organizations, and the State of New York. The majority of these comments expressed opposition to the granting of the requested exemptions, and many commenters suggested that the NRC prepare an environmental impact statement (EIS) and convene a formal evidentiary hearing or other form of public hearing to consider the matter. Many of the commenters were concerned that granting the exemptions could result in a degradation of fire

protection levels afforded by current regulatory requirements that would leave the licensee unable to respond to a serious fire and result in catastrophic offsite consequences.

Each comment was carefully reviewed by the NRC staff. In this document, the NRC has responded to the various comments received by category. However, many comments received did not fall into the broader categories discussed in this document and were outside the scope of the draft EA, which deals strictly with the environmental impacts of granting the exemption. These comments are not addressed in this document, but the NRC has responded to all comments received in a separate comment resolution document (ADAMS Accession No. ML13203A145).

*Legal objections and request for hearing*

Some commenters questioned whether the NRC has the authority to grant exemptions from its regulations, whether the NRC has complied with each applicable statute, and whether the NRC may grant permanent exemptions. These questions have recently been addressed by the U.S. District Court for the Southern District of New York and, on appeal by the U.S. Court of Appeals for the Second Circuit. These courts upheld the agency's authority and statutory compliance in these respects, except in the case of NEPA's requirement for an opportunity for public participation on the proposed exemptions. (*Brodsky v. NRC*, 783 F. Supp. 2d 448, 457 n.7 (S.D.N.Y. 2011), *vacated in part on other grounds*, 704 F.3d 113 (2d Cir. 2013); *Brodsky v. NRC*, No. 11-2016-cv, "Summary Order" (2d Cir. Jan. 7, 2013)). That noncompliance was corrected by the *Federal Register* issuance of the draft EA and FONSI for public comments.

The NRC is denying the commenters' request for a hearing. Neither the AEA nor the NRC's regulations grant the right to a hearing on an application for an exemption. (42 U.S.C. § 2239(a); *Kelley v. Selin*, 42 F.3d 1501, 1514–17 (6th Cir. 1995); *Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989)). Moreover, in the Summary Order for *Brodsky v. NRC*, the

U.S. Court of Appeals for the Second Circuit recently rejected the argument that the AEA or the APA requires the NRC to hold a hearing on granting an exemption.

Safety objections

A number of commenters questioned the NRC's technical judgment that the exemptions to the fire protection requirements of 10 CFR 50.48 and appendix R, section III.G.2, would afford equivalent protection of public health and safety in the event of a fire in the two affected areas of the plant for which exemptions had been proposed. One commenter stated that a fire lasting beyond the 24-minute fire rating of the Hemyc fire barrier would result in a reactor meltdown. Other commenters expressed concern whether the exemptions present an undue risk to the public health and safety, would compromise the AEC standard of "reasonable assurance" for the safety of plant operations, or would degrade the plant's margin of safety.

However worded, these concerns are beyond the scope of the NRC's notice of opportunity to comment on the draft EA and FONSI, which deal strictly with the environmental impacts of granting the exemptions. Safety issues, on the other hand, pertain to the NRC's responsibilities under the AEA. As noted, the AEA does not require a hearing on the agency's consideration of an exemption. Moreover, to the extent that the NRC's technical judgment on these safety concerns is judicially reviewable, the U.S. Court of Appeals for the Second Circuit has concluded: "After reviewing the administrative record, it is apparent that the Commission conducted a detailed evaluation, considered the factors listed in the specific regulations and in the end acted reasonably. . . . This is a case where deference to the substantive decision of the Commission, as it relates to nuclear safety, is warranted." The remand by the Second Circuit to allow public participation on environmental concerns did not envision a second round of safety analysis. Nonetheless, to the extent practicable, the NRC has responded to safety concerns expressed by commenters in the comment resolution document.

Risk of terrorism and other low-probability, high-consequence events

Many comments raised the specter of a terrorist attack or other event that would defeat the Indian Point 3 defense-in-depth fire protection measures in place at the two affected fire areas for which exemptions have been granted. These commenters were concerned that a severe fire caused by these events could result in a loss of reactor safe shutdown capability and serious offsite consequences. As explained in this document, however, issues relating to terrorism and other low-probability, high-consequence events are beyond the scope of the EA and FONSI.

Acts of terrorism are inherently unpredictable and stochastic and, therefore, are not separately considered in preparing the NRC's environmental analyses. The NRC has, therefore, determined that NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts" because those acts are "too far removed from the natural or expected consequences of agency action." (*Amergen Energy Co. LLC (Oyster Creek Nuclear Generating Station)*, CLI-07-8, 65 NRC 124, 128 (2007), *aff'd*, *New Jersey Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009)).<sup>1</sup>

Although the inherent uncertainty of terrorism precludes reliably quantifying the likelihood of a terrorist attack, under credible threat conditions assumed by the NRC, the probability of such an attack is believed to be low. To provide high assurance that a terrorist act will not lead to significant radiological consequences, the NRC has analyzed plausible threat scenarios and has defined, by regulation, a Design Basis Threat of radiological sabotage in 10 CFR 73.1 that licensees must protect against. Aside from the Design Basis Threat of radiological sabotage, the NRC has also established new physical protection requirements in 10 CFR 73.55 to protect against radiological sabotage as well as requirements for

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<sup>1</sup> The NRC acknowledges that a split in the circuit courts exist on this point, see *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir.2006), but adheres to its position, outside of the Ninth Circuit, that NEPA does not require consideration of terrorists attacks.

safety/security interface in 10 CFR 73.58, potential aircraft threats in 10 CFR 50.54(hh)(1), and the loss of large areas of the plant due to explosions and/or fire to mitigate potential consequences for these threat scenarios as well as accident scenarios with similar radiological consequences in 10 CFR 50.54(hh)(2). Each of these protective and mitigation measures has been taken without regard to the probability of an attack. The NRC's approach is consistent with NEPA. As the Third Circuit has held, "precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis."

Whether resulting from a terrorist attack or some internally-initiated event, the NRC staff determined from its independent safety evaluation of the licensee's proposal that the configuration of the fire zones under review provide reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate. From this and related findings, the NRC concluded that the proposed action would not significantly increase the probability or consequences of accidents. This finding renders a severe fire in the affected areas resulting from granting the exemptions, however initiated or whatever its consequences, so unlikely as not to require further environmental analysis. (*New York v. NRC*, 589 F.3d 551, 554 n.1 (D.C. Cir. 2009)).

#### Alternatives to the proposed action

Some commenters claimed that the NRC did not consider denying the exemptions and requiring compliance with 10 CFR part 50, appendix R, section III.G.2, or some other alternative. In fact, the NRC did consider the alternative of denying the exemption requests. The *Federal Register* notice for the EA and FONSI stated clearly that the "no action" alternative would involve the "denial of the proposed action" (*i.e.*, the denial of this exemption request). A necessary and implicit aspect of the "no action" alternative would be requiring the licensee to comply with 10 CFR part 50, appendix R.

The NRC determined, however, that denial of the exemption requests would result in no change in current environmental impacts, and that the environmental impacts of denying the exemption requests or approving the requested exemptions are similar. Thus, the NRC has considered imposing a requirement that the fire insulation be upgraded to meet the one-hour requirement in 10 CFR part 50, appendix R. Moreover, consideration of requiring the licensee to comply with the one-hour barrier requirement necessarily bounds any period less than one-hour, i.e, a fixed period not tied to Hemyc test results. In any event, “the range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact.” (*Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1558 (2d Cir. 1992); *City of New York v. DOT*, 715 F.2d 732, 744 (2d Cir. 1983)).

*Compilation of the record for granting the exemptions*

Several commenters suggested that the NRC had not considered categories of relevant documents or specific documents relating to Indian Point 3 or fire protection issues. The NRC staff reviewed all information supplied by the licensee and commenters in accordance with 10 CFR 50.12 and appropriate guidance and engineering judgment in granting the exemptions. The commenters, however, have either failed to identify specific documents not considered by the NRC or have failed to demonstrate the relevance or probative value of specific documents they have cited. On this point, the Second Circuit recently found that one commenter’s failure to demonstrate that specific “documents are in fact relevant or probative” was fatal to the individual’s claim that the NRC improperly failed to consider specific documents.

*NRC’s adoption of a new categorical exclusion for exemptions*

Some commenters questioned whether the NRC has applied or relied upon the recently revised provisions of 10 CFR 51.22(c)(9) in granting the exemptions. These provisions categorically exclude certain qualifying exemptions from environmental review, such as the

review given the exemptions in this instance. These new provisions, however, were adopted after 2007, when the exemptions at issue were initially granted. Consequently, the new provisions played no part in the NRC's decision-making on the current decision to grant the exemptions.

Publication of the draft EA and FONSI for the requested exemptions included a brief discussion of this regulatory amendment to inform the public of a topically-relevant change in the NRC's regulations occurring since the NRC approved the requested exemptions in 2007 (78 FR 20144: April 3, 2013). The NRC included this information because these changes will be relevant to future exemption requests, but did not suggest that 10 CFR 51.22(c)(9) applies to the requested exemptions. Moreover, the NRC observed in the discussion that "[a]lthough NRC approval of exemptions that meet the criteria of this section no longer require preparation of an EA/FONSI, the NRC retains discretion to prepare an EA and FONSI, including an opportunity for public comment, where special circumstances exist." Finally, we note that the NRC recently published an editorial correction to 10 CFR 51.22(c)(9) (78 FR 34245: June 7, 2013) to clarify that this provision categorically excludes certain kinds of stand-alone exemptions from environmental review, not just exemptions issued as a license amendment.

### **III. Finding of No Significant Impact**

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letters dated July 24, 2006, April 30, 2007, May 23, 2007, and August 16, 2007 (ADAMS Accession

Nos. ML062140057, ML071280504, ML071520177, ML072400369, respectively); the EA and FONSI, dated September 24, 2007 (ADAMS Accession No. ML072110018); the NRC letter dated September 28, 2007, approving the exemption (ADAMS Accession No. ML072410254); and the draft EA and FONSI, dated March 26, 2013 (ADAMS Accession No. ML13066A265).

Dated at Rockville, Maryland, this 19<sup>th</sup> day of August 2013.

For the Nuclear Regulatory Commission

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