

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of)	
AMERGEN ENERGY COMPANY, LLC (Oyster Creek Nuclear Generating Station))	Docket No. 50-219-LR
In the Matter of)	
ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point Nuclear Generating Unit Nos. 2 and 3))	Docket Nos. 50-247-LR and 50-286-LR
In the Matter of)	
ENTERGY NUCLEAR OPERATIONS, INC. (Pilgrim Nuclear Power Station))	Docket No. 50-293-LR
In the Matter of)	
ENTERGY NUCLEAR OPERATIONS, INC. (Vermont Yankee Nuclear Power Station))	Docket No. 50-271-LR

CLI-08-23

MEMORANDUM AND ORDER

This Memorandum and Order responds to four petitions¹ (Petition) filed jointly by a number of public interest groups, each of which is a party in one or more of the captioned

¹ Identical petitions were filed in each of the four captioned proceedings.

license renewal proceedings (hereinafter, Petitioners),² and to a Supplemental Petition filed by the same parties alleging illegal actions by the NRC Staff.³ The Petition requests that the Commission suspend these proceedings until it has conducted a “comprehensive overhaul” of the manner in which the NRC Staff reviews license renewal applications.⁴ Petitioners base their request principally on an audit report issued by NRC’s Office of the Inspector General (OIG)⁵ regarding the effectiveness of the agency’s license renewal safety reviews. The Supplemental Petition was based on an OIG memorandum following up on its initial report, which focused on the “extent” of NRC Staff reviews of license renewal applications.⁶

² Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation are parties to the *Oyster Creek* proceeding. *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188 (2006). Pilgrim Watch is a party to the *Pilgrim* proceeding. *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257 (2006). New England Coalition is a party to the *Vermont Yankee* proceeding. *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131 (2006). Riverkeeper is a party to the *Indian Point* license renewal proceeding. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Power Station, Units 2 and 3), LBP-08-13, 68 NRC __ (slip op. July 30, 2008).

³ *Supplemental Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper; Pilgrim Watch and New England Coalition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants* (May 15, 2008)(Supplemental Petition). The Supplemental Petition was also served in all four captioned proceedings.

⁴ *Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper; Pilgrim Watch and New England Coalition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies* (Jan. 3, 2008).

⁵ Audit of NRC’s License Renewal Program, OIG-07-A-15, (Sept. 6, 2007), available at ADAMS accession number ML072490486 (OIG Report).

⁶ Memorandum from Hubert T. Bell to Dale E. Klein regarding NRC Staff Review of License Renewal Applications (May 2, 2008) (ADAMS ML081280227) (OIG Memorandum).

As explained below, the OIG did not determine, and we do not otherwise find, that past license renewal safety reviews were inadequate or that the license renewal review process requires a comprehensive revision. The OIG's recommendations do not undermine our general confidence in the Staff's safety review, and consequently we see no threat to the public health and safety or the common defense and security. There is, therefore, no need to delay the license renewal proceedings and we deny Petitioners' request.

I. BACKGROUND

A. The License Renewal Process

Over several years, the NRC has developed a regulatory process to review power reactor license renewal applications that is efficient, thorough, and appropriately focused on certain aging effects that would not reveal themselves through performance indicators associated with active functions. The Staff's conduct of safety reviews for license renewal applications is governed by 10 C.F.R. Part 54, and principally guided by two documents: NUREG-1800, *Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants*, Rev. 1 (Sept. 2005) (SRP-LR), and NUREG-1801, *Generic Aging Lessons Learned Report*, Rev. 1 (Sept. 2005) (GALL Report).

Part 54 provides that each license renewal application must include an integrated plant assessment (IPA) identifying structures and components subject to aging management review, an evaluation of time-limited aging analyses, and a final safety analysis report (FSAR) supplement describing the plant's aging management programs.⁷ The license renewal applicant identifies all plant systems, structures and components (SSCs) related to safety and

⁷ 10 C.F.R. § 54.21. The application must be periodically amended to reflect any changes to the plant's current licensing basis made after the license renewal application was submitted. 10 C.F.R. § 54.21(b).

regulatory compliance.⁸

The aging management review covers “passive” structures and components, which perform their intended function without moving parts or without a change in configuration or properties, such as the reactor vessel, the steam generators, piping, component supports, and seismic Category I structures. Structures and components are not subject to an aging management review unless they are “long-lived.” A structure or component is long-lived if it is not subject to replacement based on a qualified life or specified time period. The application must demonstrate that the effects of aging will be managed in such a way that the intended functions of passive and long-lived structures and components will be maintained for the period of extended operation.⁹ In contrast, the aging management review does not cover active components — such as motors, diesel generators, and switches — because routine surveillance and maintenance programs detect and manage the effects of aging on these components.¹⁰ The evaluation of Time Limited Aging Analyses (TLAAs), which are calculations or analyses that involve systems, structures, and components within the scope of the rule, considers the effects of aging and involves assumptions based on the original 40-year operating term. For each TLAAs, the applicant must demonstrate that (a) the analyses remain valid during the period of extended operation; (b) reanalysis (recalculation) bounds the period of extended

⁸ These are SSCs that are safety-related, or whose failure could affect safety-related functions, or that are relied on to demonstrate compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout. 10 C.F.R. § 54.4(a).

⁹ 10 C.F.R. § 54.21(a).

¹⁰ 10 C.F.R. § 54.21(a)(1). See also Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,471-72 (May 8, 1995) (explaining the rationale for reliance on maintenance requirements to manage aging effects of active components). See generally *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-10 (2001).

operation; or (c) the aging effects will be adequately managed for the period of extended operation.¹¹

In addition to the information supplied for the technical safety review, the license renewal applicant is required to submit a supplemental environmental report that complies with 10 C.F.R. Part 51.¹²

The SRP-LR provides guidance to the Staff reviewers for conducting license renewal reviews. It assigns review responsibilities among Staff technical organizations and describes methods for identifying those SSCs that are subject to aging effects within the scope of license renewal review. It defines ten program elements — including scoping, acceptance criteria, corrective actions, monitoring, and operating experience — that are essential to an effective aging management program.¹³ It also provides that for each of the SSCs identified, the license renewal applicant may rely on an aging management program that is consistent with the GALL Report, or may choose to use a plant-specific aging management program.¹⁴

The GALL Report identifies generic aging management programs that the Staff has determined to be acceptable, based on the experiences and analyses of existing programs at operating plants during the initial license period.¹⁵ The report describes each aging

¹¹ 10 C.F.R. § 54.21(c)(1).

¹² See 10 C.F.R. § 54.23. Petitioners' request here does not embrace environmental issues.

¹³ SRP-LR at A.1-3 through A.1-8.

¹⁴ *Id.* at 3.0-2.

¹⁵ The GALL Report was developed because the Staff discovered, in reviewing the initial license renewal applications, that many of the programs the licensee would rely on to manage aging effects during the renewal period were already in place during the initial license period. See SRP-LR, at 1.

management program with respect to the ten program elements defined in the SRP-LR.¹⁶ The report also includes a table summarizing various structures and components, the materials from which they are made, the environment to which they are exposed, the aging effect (e.g., loss of material through pitting, leaching or corrosion), the aging management program found to manage the particular aging effect in that component, and whether additional evaluation is necessary.¹⁷

An applicant for license renewal “may reference the GALL Report … to demonstrate that the programs at the applicant’s facility correspond to those reviewed and approved” therein, and the applicant must ensure and certify that its programs correspond to those reviewed in the GALL Report.¹⁸ In other words, the license renewal applicant’s use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period. If the applicant uses a different method for managing the effects of aging for particular SSCs at its plant, then the applicant should demonstrate to the Staff reviewers that its program includes the ten elements cited in the GALL Report and will likewise be effective. In addition, many plants will have plant-specific aging management programs for which there is no corresponding program in the GALL Report. For each aging management program, the application gives a brief description of the licensee’s operating experience in implementing that program.

The Staff then reviews the application and supporting documents and conducts inspections and onsite audits to verify the information in the application. License renewal inspections verify, *on a sampling basis*, that the applicant has properly scoped the aging

¹⁶ See GALL Report, Vol. 2, Rev. 1, sec. XI.

¹⁷ See generally GALL Report, Vol. 2, Rev. 1.

¹⁸ *Id.*, Vol. 1 at 3.

management review; that the existing or planned aging management programs conform to the descriptions in the license renewal application; and that the documentation used to support the application is auditable, retrievable, and in fact does support the application.¹⁹ The Staff produces a Safety Evaluation Report (SER) – usually first as an SER listing open items, then as a final SER (FSER) – summarizing its findings with respect to the licensees' programs for aging management. The Advisory Committee on Reactor Safeguards (ACRS) reviews the SER and makes its own recommendation to the Commission on whether the license should be renewed.

The Commission also offers a parallel hearing process where members of the public with a cognizable interest in the particular renewal application may obtain an independent adjudicatory review of their challenges to the application.²⁰ The Commission will issue a renewed license if it determines, among other things, that there is reasonable assurance that the plant will operate in accordance with its current licensing basis during the period of extended operation.²¹ The renewed license takes effect immediately, with a term of up to 20 years plus the number of years remaining on the initial operating license.²² To date, the NRC has completed the process for issuing renewed licenses for 48 existing reactors.

B. The OIG Report and OIG Memorandum

The OIG Report on which Petitioners premise their argument was issued in September 2007, and reflects findings of the OIG's audit of the effectiveness of the Staff's license renewal safety reviews. The OIG concluded that the Staff has developed a "comprehensive license

¹⁹ NRC Inspection Manual, Inspection Procedure 71002 (Feb. 18, 2005).

²⁰ See AEA Section 189.a, 42 U.S.C. §2239(a). See generally *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998).

²¹ 10 C.F.R. § 54.29.

²² 10 C.F.R. § 54.31.

renewal process” to evaluate license renewal applications.²³ The OIG also identified, however, areas that could be improved.²⁴ Primarily, the OIG Report found that the Staff should improve the transparency of its report writing so that a reader can more easily understand what materials the reviewers evaluated and how they reached conclusions. The OIG Report made eight specific recommendations for improving the effectiveness of the license renewal review programs in five general areas:

- A. License renewal reporting efforts need improvements. OIG found that the Staff does not consistently provide adequate descriptions of audit methodology or support for conclusions in “license renewal reports.” OIG recommended that the Executive Director for Operations (EDO) (1) establish report-writing standards, and (2) revise the “report quality assurance process for license renewal report review” by establishing management controls for NRR and DLR to gauge the effectiveness of team leader and peer group report reviews, and by implementing procedures to specify additional steps to be taken in the event that such team leader and peer group report reviews “fail to ensure report quality to management’s expectations.”²⁵
- B. Guidance for removing licensee documents from audit sites could be clarified. OIG found inconsistencies in the guidance provided to license renewal auditors relative to the removal of licensee documents obtained at audit sites and recommended that the EDO clarify the relevant guidance and procedures.²⁶
- C. Consistent evaluation of operating experience would improve license renewal reviews. OIG concluded that audit team members do not review operating experience consistently, and that most auditors do not conduct independent verification of a licensee’s operating experience, relying instead on licensee-supplied information. OIG recommended that the EDO establish requirements and management controls to standardize the

²³ OIG Report at 7.

²⁴ *Id.*

²⁵ *Id.* at 7-13.

²⁶ For example, the OIG Report stated that Headquarters Staff, in conducting onsite audits, is hampered by a policy of not removing documents from a licensee site, even though regional Staff, in conducting inspections, may remove licensee documents. *Id.* at 15-17.

- conduct and depth of license renewal operating experience reviews.²⁷
- D. More attention is needed to planning for post-renewal inspections. OIG concluded that planning for post-renewal inspections is incomplete because the agency has “only recently focused its attention on developing and overseeing the details associated with these inspections.” OIG recommended that the EDO expedite the revision of Inspection Procedure 71003 and to communicate the details of the revised procedure to affected Staff and stakeholders.²⁸
 - E. License Renewal Issues Need Evaluation for Backfit Application. OIG recommended that the EDO establish a review process to determine whether or not certain guidance meets the provisions of 10 C.F.R. § 54.37(b), and that the Commission reconsider its previous policy decision that the backfit rule does not apply to license renewal applicants.²⁹

Of these recommendations, only those relating to A, license renewal reporting efforts, and C, evaluation of licensee operating experience, are central to the arguments in Petitioners’ initial Petition. Petitioners’ Supplemental Petition belatedly raises arguments related to B, the need to clarify guidance for removing licensee documents.

The OIG Report did not question the use of the SRP-LR or the GALL Report as guidance for conducting license renewal safety reviews, nor did it suggest that these guidance documents would not provide a mechanism to satisfy the safety requirements of 10 C.F.R. Part 54. On the contrary, the OIG Report cited these documents as authority on the proper conduct of reviews. Further, the OIG Report pointed to the GALL Report’s inclusion of “operating experience” as one of ten key elements that should be present in an effective aging management program.

²⁷ *Id.* at 18-23.

²⁸ *Id.* at 24-30. Post-renewal inspections (that is, inspections performed after the agency has granted the renewed license) were not addressed in either petition, and therefore are not further discussed here.

²⁹ *Id.* at 31-35. The backfit issue is not raised by the Petition or Supplemental Petition, and is not considered further here.

The OIG Report's conclusions regarding the Staff's review of licensee operating experience are central to Petitioners' claims. The OIG Report found that audit team members did not approach reviews consistently and "most" did not independently verify plant-specific operating experience, for example, by searching the licensee's corrective action databases.³⁰ The OIG Report suggested that auditors may not be aware of all relevant operating experience, and further noted that there are no formally established requirements for verifying operating experience. As noted above, it recommended that requirements and management controls be implemented to "standardize the conduct and depth of license renewal operating experience reviews."³¹

The Staff formally agreed to implement seven of the eight OIG recommendations.³² Relative to the issues raised in the Petition, the Staff committed to: (1) update report-writing guidance to include management expectations and report-writing standards (April 30, 2008); (2) enhance the report review process to enable peer reviewers to verify that Staff reports meet management expectations, including a method to gauge the effectiveness of team leader and peer group review (April 30, 2008); (3) develop consistent guidance for removal of applicant and licensee documents from applicant and licensee sites (September 30, 2008); and (4) establish additional guidance and management controls to standardize the conduct and depth of license renewal operating experience reviews (April 30, 2008).³³ In a January 7, 2008 memorandum,

³⁰ *Id.* at 19-20.

³¹ *Id.* at 23.

³² See Memorandum from William F. Kane to Stephen D. Dingbaum, "Audit of NRC's License Renewal Program" (Oct. 30, 2007)(ADAMS ML072630299)(Kane Memorandum). The Staff disagreed with the OIG's recommendation that the Commission affirm or, preferably, modify its decision not to apply the backfit rule to license renewal applicants.

³³ *Id.* at 1-2.

the OIG stated that it considered the seven recommendations resolved.³⁴

Later, on May 2, the OIG issued an additional memorandum on the NRC Staff's license renewal review process.³⁵ That memorandum stated that the NRC safety review process includes both technical reviews performed in NRC headquarters and on-site audits. The OIG's investigation found that the Staff's audit reports indicate that the Staff reviews approximately 280 applicant documents during each audit. The OIG's analysis of work hour data indicated that significant numbers of hours — an average of approximately 10,582 per reactor unit — are spent performing the NRC Staff reviews.³⁶

The OIG Memorandum found, however, that the Staff does not preserve copies of all applicant documents reviewed during on-site audits. It also found that Staff reviewers prepare "working papers," including checklists, during the audits, but the Staff reviewers typically dispose of their working papers after they use them to prepare the audit reports. The OIG noted that an agency Management Directive "provides criteria as to what constitutes personally held non-record materials which may be retained or discarded at the author's sole discretion."³⁷ The OIG did not suggest that the Staff disregarded the guidance in the Management Directive, but it did say that the Staff's failure to maintain copies of applicant documents reviewed and its own

³⁴ See Memorandum from Stephen D. Dingbaum to Luis A. Reyes, "Status of Recommendations: Audit of NRC 's License Renewal Program (OIG-07-A-15)" (ADAMS ML080070247).

³⁵ See n. 6, *supra*. In its follow-up review described in the OIG Memorandum, the OIG looked at the Staff's review of two aging management programs each at Browns Ferry, Brunswick, D.C. Cook, and Oyster Creek.

³⁶ *Id.* at 4.

³⁷ OIG Memorandum, at 3 n.7. See Handbook 1 of NRC Management Directive 3.53, "NRC Records and Document Management Program" (Rev. Mar. 15, 2007).

working papers “made it difficult to verify specific details of staff on-site review activities.”³⁸

The OIG Memorandum did not make further recommendations for improving the reporting for license renewal reviews.³⁹

C. Status of the Proceedings and Relationship to OIG Reports

Each of the four license renewal adjudicatory proceedings that are the subject of Petitioners’ request is at a different stage. In *Oyster Creek*, the Atomic Safety and Licensing Board issued its Initial Decision and is considering on remand from the Commission an issue relating to the drywell liner,⁴⁰ and the Board’s decision rejecting a late-filed contention is on appeal to the Commission.⁴¹ In *Pilgrim* an evidentiary hearing was held on April 10, 2008, and a Board decision is pending.⁴² In *Vermont Yankee*, the Staff issued an FSER in February

³⁸ OIG Memorandum, at 3-4.

³⁹ On June 26, 2008, the NRC Staff provided a status update to the OIG. Memorandum from Eric J. Leeds, Director, Office of Nuclear Reactor Regulation, to Stephen D. Dingbaum, OIG, “Status of Recommendations from ‘Audit of NRC’s License Renewal Program,’ (OIG-07-A-15)” (ADAMS ML081480064). Thereafter, the OIG responded to the Staff with its analysis and status of its initial recommendations. Based on the Staff’s response, the OIG “closed” recommendations 1, 2, 5, 6, and 8 (no further action requested), and “resolved” recommendations 3, 4, and 7, subject to Staff updates in early 2009. Memorandum from Stephen D. Dingbaum, OIG, to R. William Borchardt, “Status of Recommendations: Audit of NRC’s License Renewal Program (OIG-07-A-15)” (Sept. 11, 2008) (ADAMS ML082550627). Conclusions drawn by OIG in its September 11 memorandum do not alter the conclusions we reach today.

⁴⁰ *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327 (2007) (Initial Decision), referred to Board by order of the Secretary (Aug. 21, 2008) (unpublished).

⁴¹ See *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC __ (slip op. July 24, 2008) (Denying Citizen’s motion to reopen the record and to add a new contention).

⁴² See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Memorandum (Notice Pursuant to 10 C.F.R. § 2.309(i)) (Sept. 2, 2008)(unpublished).

2008,⁴³ an evidentiary hearing was held in late July 2008, and a Board decision is pending. The *Indian Point* Board recently ruled on the majority of the various petitions for intervention and requests for hearing.⁴⁴

According to the OIG Report, the OIG looked at the *Oyster Creek* SER with Open Items and at some information relating to *Vermont Yankee*, but did not review the *Vermont Yankee* SER with Confirmatory Items.⁴⁵ The Pilgrim license renewal review was not included in the OIG's analysis. The OIG Report expressly notes that it "does not extrapolate results from the sample to the entire universe of license renewal reviews."⁴⁶

D. Petitioners' Request

The crux of the initial Petition is that the OIG Report shows that the license renewal process is so fatally flawed that the NRC cannot use the Staff's FSERs as a foundation for issuing renewed licenses. Petitioners argue that doing so would violate the Atomic Energy Act requirement that the Commission may issue a license only after finding that it is "in accord with the common defense and security and will provide adequate protection to the health and safety of the public."⁴⁷ In addition to the OIG Report, Petitioners argue that the Boards' decisions in

⁴³ Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station (Feb. 2008), ADAMS ML080560462.

⁴⁴ *Indian Point*, LBP-08-13, 68 NRC __ (slip op. July 30, 2008). Previously, the Board rejected petitions from the City of New York and from the New York Affordable Reliable Electricity Alliance for failure to state any admissible contentions. Memorandum and Order (Denying the City of New York's Petition for Leave to Intervene) (Dec. 12, 2007), Memorandum and Order (Denying the New York Affordable Reliable Electricity Alliance's Petition for Leave to Intervene) (Dec. 12, 2007).

⁴⁵ According to the OIG Report, "there was no inspection report or safety evaluation report yet available for *Vermont Yankee* at the time of OIG's analysis." See Safety Evaluation Report with Confirmatory Items relating to the License Renewal of Vermont Yankee Nuclear Power Station (Mar. 2007). See OIG Report at 46 (Table 2).

⁴⁶ *Id.* at 45 n.24.

⁴⁷ Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2232(a). See Petition at 9-10.

three early site permit cases — completely unrelated to license renewal — all show that the Boards found the Staff's reviews to be lacking in some respect.⁴⁸

Petitioners directed their request to the Commission itself, rather than to the Atomic Safety and Licensing Board Panel, because, according to Petitioners, their complaint focuses on the adequacy of the Staff's review, rather than the license applications in the various proceedings. Petitioners ask us to consider their requests under our inherent supervisory authority over licensing proceedings, citing the general principle that the Board's jurisdiction does not extend to overseeing or directing the NRC Staff in its license reviews.⁴⁹

Petitioners ask that NRC suspend the four captioned license renewal proceedings — including both the Staff technical reviews and the pending adjudicatory proceedings in which Petitioners are parties — and perform a “complete overhaul” of the license renewal review process. They ask further that we initiate a second investigation, broader in scope than the OIG’s, by a body “independent of the NRC Staff”; revise our standards for license renewal reviews; revise the SERs accordingly; and allow new contentions in all four proceedings based on the findings in the “new” SERs.⁵⁰

Petitioners’ Supplemental Petition, filed in response to the OIG Memorandum, focuses on the documentation, rather than the conduct, of the reviews. The Supplemental Petition

⁴⁸ Petition at 19-21. Petitioners refer to *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539 (2007), aff’d, CLI-07-23, 66 NRC 35 (2007); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27 (2007), aff’d CLI-07-14, 65 NRC 216 (2007); and *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), LBP-06-28, 64 NRC 460 (2006), aff’d, CLI-07-12, 65 NRC 203 (2007).

⁴⁹ See *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22 (1995), citing *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516 (1980).

⁵⁰ See Petition at 1-2. Petitioners request that the independent investigation be performed by the OIG, the Atomic Safety and Licensing Board Panel, or the ACRS.

claims that the Staff's destruction of its working papers and its failure to retain and make public copies of all licensee documents reviewed was "illegal."⁵¹ Petitioners ask the Commission to order the Staff to "conduct an investigation to determine how this illegal document destruction became standard practice"⁵² and order the Staff to preserve such documents in the future.⁵³ The Supplemental Petition also asks that the Commission go back to the applicants, determine which documents the Staff reviewed, and, for each aging management program, make a new independent determination of both whether the scope of the Staff review was adequate and whether the aging management program is sufficient to manage the effects of aging.⁵⁴

The NRC Staff and Applicants oppose both Petitions.⁵⁵ Principally, they argue that the Petition has no substantive basis because the OIG Report did not conclude that Staff generally neglected to conduct necessary reviews, audits, and inspections. Further, they argue that Petitioners did not show "compelling" grounds for the Commission to take the extraordinary action of suspending all proceedings. Both the NRC Staff and Applicants emphasize that the only issue appropriate for adjudication is the sufficiency of the license application, not the

⁵¹ Supplemental Petition at 14.

⁵² *Id.*

⁵³ *Id.* at 18.

⁵⁴ *Id.* at 17.

⁵⁵ *NRC Staff Answer to Petition for Suspension of License Renewal Reviews Pending Investigation of NRC Staff License Renewal Process* (Jan. 18, 2008)(Staff Answer to Petition); *Answer of Entergy Nuclear Operations, Inc. Opposing Petition to Suspend License Renewal Reviews and Proceedings* (Jan. 18, 2008) (with respect to the *Indian Point, Pilgrim and Vermont Yankee* proceedings)(Entergy Answer to Petition); *AmerGen's Answer Opposing Petition for Stay and to Reopen the Record* (Jan. 15, 2008) (with respect to the *Oyster Creek* proceeding)(AmerGen Answer to Petition); *NRC Staff's Answer to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews* (May 27, 2008)(Staff Answer to Supplemental Petition); *Answer of Entergy Nuclear Operations, Inc. Opposing Supplemental Petition to Suspend License Renewal Proceedings* (May 27, 2008)(Entergy Answer to Supplemental Petition); *AmerGen's Answer Opposing Citizens' Supplemental Petition* (May 23, 2008)(AmerGen's Answer to Supplemental Petition).

adequacy of the Staff's review. They point out that Petitioners — all intervenors in the individual license renewal proceedings — had the opportunity to raise contentions on the license renewal applications themselves. Staff and Applicants also raise issues regarding timeliness and service, and point to Petitioners' failure to certify that they attempted to contact the non-moving participants in order to resolve the dispute prior to filing a motion.⁵⁶ In addition, the NRC Staff and Applicants vigorously oppose the suggestion that the Staff was required to retain and make public the "working papers" mentioned in the OIG Memorandum.

Petitioners filed replies⁵⁷ to the Staff's and Applicants' answers to both the initial Petition and the Supplemental Petition, together with motions for our approval to file a reply.⁵⁸ The Staff

⁵⁶ See 10 C.F.R. § 2.323(b).

⁵⁷ Replies were filed in each of the captioned dockets, identical except for certificates of service. *Reply by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper; Pilgrim Watch and New England Coalition to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies* (Jan. 25, 2008); *Reply by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper; Pilgrim Watch and New England Coalition to NRC Staff Opposition to Supplemental Petition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants* (June 4, 2008).

⁵⁸ *Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper; Pilgrim Watch and New England Coalition for Leave to Reply to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies* (Jan. 25, 2008); *Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch and New England Coalition for Leave to Reply to NRC Staff's Oppositions to Supplemental Petition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants* (June 4, 2008).
(Continued ...)

opposed the replies.⁵⁹ In addition, the State of New York, a party to the *Indian Point* license renewal matter, filed a Response in support of the initial Petition.⁶⁰ We have considered the replies but we see nothing in them that alters our analysis of the initial Petition or the Supplemental Petition, which we deny for the reasons set forth below.

II. DISCUSSION

Petitioners' requests do not fit cleanly within any of the procedures described within our rules of practice.⁶¹ We treat them here as general motions brought under the procedural requirements of 10 C.F.R. § 2.323. Notwithstanding the requirement that motions initially be addressed to the Presiding Officer when a proceeding is pending,⁶² here we agree with Petitioners that their motions are best addressed by us pursuant to our inherent supervisory authority over agency proceedings.⁶³

⁵⁹ See NRC Staff's *Response in Opposition to Motion for Leave to Reply* (Feb. 4, 2008), and NRC Staff's *Response to Joint Motion for Leave to Reply to NRC Staff Opposition to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews* (June 16, 2008). See 10 C.F.R. § 2.323(c) ("The moving party has no right to reply except as permitted by the ... presiding officer. Permission shall be granted only in compelling circumstances, such as where the moving party could not have anticipated the arguments to which it seeks leave to reply").

⁶⁰ *State of New York's Response in Support of the Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies* (Jan. 18, 2008). The New York State Attorney General's office also sent a letter to the Commissioners in support of the Petition. Letter from Katherine Kennedy to the Commissioners (Jan. 18, 2008).

⁶¹ The Petitioners note at the outset that, in the context of this Petition, they do not seek enforcement action pursuant to 10 C.F.R. § 2.206, nor do they request rulemaking pursuant to 10 C.F.R. § 2.802. Petition at 7.

⁶² 10 C.F.R. § 2.323(a).

⁶³ See *Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-02-23, 56 NRC 230, 237 (2002). As acknowledged by the Petition (at 7), our consideration of these petitions should not be read as tacit approval for participants in adjudicatory proceedings to bypass the Board by filing motions directly with us. (Continued ...)

A. Merits of the Petitions

The purpose and scope of a licensing proceeding is to allow interested persons the right to challenge the sufficiency of the application. The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications.⁶⁴ Each of Petitioners' pleadings, however, simply builds upon the fundamentally flawed premise that Petitioners do have that right.

It is the applicant, not the Staff, that has the burden of proof in litigation.⁶⁵ Our contention pleading rules emphasize that the petitioner must show that a "genuine dispute exists *with the applicant/licensee* on a material issue of law and fact."⁶⁶ Petitioners have had ample opportunity to present such contentions during the course of these proceedings. Their request for a complete overhaul of the license renewal review process is largely, if not entirely, outside the scope of these adjudications.

Furthermore, neither the OIG Report nor the OIG Memorandum establishes a need for a complete overhaul of the license renewal process. For instance, the OIG does not question the comprehensive SRP-LR or the capability of the Staff to conduct the necessary reviews under 10 C.F.R. Part 54. The OIG identified certain weaknesses in the review process (which it illustrated with concrete examples), and made precise recommendations for addressing the identified areas of improvement. The Staff agreed with, and is in the process of implementing,

⁶⁴ See Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182; 2202 (Jan. 14, 2004) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121-122, and prior agency rulings holding same). See also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004); *Calvert Cliffs*, CLI-98-25, 48 NRC at 349-50. An exception to this is the NRC staff's review under the National Environmental Policy Act (NEPA). NEPA places legal duties on the NRC, not on license applicants.

⁶⁵ See *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121.

⁶⁶ 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added).

all but one of these recommendations (Recommendation 8). The OIG did not characterize any of the findings as posing a risk — imminent or otherwise — to the public health and safety, or to the common defense and security.

In sharp contrast to the OIG’s specific recommendations, the initial Petition asserted generally that the entire license renewal process is inadequate and needs a complete “overhaul.” Then, in response to the OIG Memorandum, which confirmed that Staff does indeed spend a significant amount of time and effort in the license renewal process, Petitioners shifted the focus of their complaint to the amount of documentation that is made publicly available.

1. No Need Shown to Overhaul the License Renewal Review Process

Petitioners’ fundamental concern appears to be that the NRC Staff is not faithfully carrying out the process that has been developed. But in support of their Petitions, Petitioners have offered nothing more than speculation that the Staff has simply copied the license renewal applications rather than conducting the audits and inspections described in the standard review plan.⁶⁷ They argue that the OIG Report “shows” that the Staff “merely copied directly from the license renewal applications”⁶⁸ and that “the Staff may not have conducted any independent reviews at all.”⁶⁹

As the Staff suggests, however, the Staff’s reliance on program basis documents in some instances is part of an overall review that reflects independent Staff judgment in a variety of ways.⁷⁰ For instance, the Staff notes that it propounded over a hundred requests for additional information and over 350 audit questions in the course of its review of the Oyster

⁶⁷ See, e.g., Petition at 14.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 23.

⁷⁰ NRC Staff Answer to Supplemental Petition at 13.

Creek license renewal application.⁷¹

Furthermore, the OIG Report *did not* conclude that the Staff generally neglected to conduct necessary reviews, audits and inspections. Rather, the OIG Report identified one area where it might appear that the Staff may not be gathering facts independently, i.e., that portion of the application where the applicant describes its experience in implementing the aging management programs that are already in place. The OIG Report cites several examples in which the description in an SER of a licensee's operating experience seemingly was copied directly out of a license renewal application.⁷² However, the OIG Report notes that the Staff may have independently investigated operating experience even where the SERs' description of operating experience is the same as in the license renewal application.⁷³ For example, the OIG Report cites a portion of the Oyster Creek SER with Open Items pertaining to the licensee's flow-accelerated corrosion program as an example where the Staff's discussion seems simply to repeat the licensee's description of its operating experience.⁷⁴ In that instance, the Staff states that it confirmed the application information through interviews with the licensee's technical staff.⁷⁵ The OIG Report did not opine that discussion with an applicant's staff was an "invalid" method of verifying experience, *per se*. Rather, the OIG Report recommended use of

⁷¹ *Id.*

⁷² OIG Report at 49.

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 49. We note that the GALL Report only provided a brief and general description of operating experience on this aging management program, whereas the Oyster Creek application provided a lengthy description of that licensee's operating experience in the implementation of this program. Compare GALL Report at sec. XI.M17 (page XI M-62) with Oyster Creek Generating Station License Renewal Application, App. B at B-41 to B-42 (ADAMS ML052080185)(July 22, 2005).

⁷⁵ See NUREG-1875, Vol. 2 at 3-15.

license applicants' corrective action databases for "spot checking" operating experience and establishment of guidelines for doing so.⁷⁶

It is also important to keep in mind that "operating experience" is only one element of ten considered essential in evaluating an aging management program, which in turn is only one of the matters the Staff must consider for license renewal. Petitioners, however, would have us assume that what the OIG found with respect to this one element is true with respect to the entire safety review. Petitioners have provided no examples from other portions of the pertinent SERs, where it appears that the Staff copied material from the license renewal applications.

Petitioners' complaint that the Staff is merely "parroting" the license application, which is in turn merely "parroting" NRC Guidance documents, merits comment.⁷⁷ The portions of the SERs that the OIG Report referenced as not showing independent verification concerned the plant's individual operating experience, but neither the OIG nor the Petitioners cited any example from any license renewal application where the applicant's description of operating experience was "copied" from the GALL Report. With respect to other elements of the aging management programs in particular, Petitioners are mistaken that it is inappropriate for the applications to "parrot" the GALL Report. The purpose of the GALL Report is to identify and describe programs which have proved effective in managing aging effects in reactors. Deviations from the generically approved programs must be individually justified by the license renewal applicant. The license renewal applicant would, therefore, naturally use similar wording to describe its own aging management programs in order to demonstrate that they are the same as the corresponding programs described in the GALL Report.

Significantly, the OIG Report did not suggest that the Staff should abandon all reliance

⁷⁶ See OIG Report at 19-21.

⁷⁷ See Petition at 3.

on a license renewal applicant's regulatory obligation to submit complete and accurate information.⁷⁸ Rather, it recommended that management should *standardize* the scope and depth to which the Staff verifies the facts with respect to operating experience.⁷⁹ Importantly, the OIG Report did not suggest, as Petitioners have, that members of the NRC Staff represented that they conducted audits or inspections that they did not in fact perform.⁸⁰

Petitioners have not shown a compelling basis for their demand for a complete license renewal "overhaul." The OIG Report provides no basis for such an overhaul, as we have explained. Further, Petitioners have not demonstrated any other basis to comprehensively revisit the Staff's regulatory review process. Indeed, they have not pointed to any weakness in the SRP-LR or shown any reason why license renewal applicants should not be permitted to reference the GALL Report to show that their existing aging management programs will effectively maintain safety systems. They have not made any specific suggestions as to additional steps to be taken in addition to the procedures the Staff has developed for license renewal review.

Petitioners fail to make the important distinction between the entire license renewal review process — including the Staff's document reviews, audits, and inspections — and the final step, which is documentation of the Staff's review in an FSER. Many of the portions of the OIG Report to which Petitioners cite discuss the Staff's report-writing, not the substance of its review. For example, the OIG Report stated that the "lack of precision in differentiating quoted and unquoted text makes it difficult for the reader to distinguish between the licensee-provided

⁷⁸ See, e.g., 10 C.F.R. §§ 50.9, 54.13.

⁷⁹ OIG Report at 11.

⁸⁰ See, e.g., Petition at 14-15, 25, 29.

data and NRC Staff's independent assessment and conclusions.”⁸¹ This is a question of effective documentation, not a question of whether Staff has verified an appropriate selection of facts. Similarly, the Report said that the Staff’s “description of the methods used and the support they provided for their conclusions often lack substance.”⁸² As the Staff suggested in its brief, the recommendation could be implemented by adding “appropriately placed citations to the established methodologies in the SERs.”⁸³ Similarly, the issue raised in the Supplemental Petition – whether the Staff reviewers should have kept their working papers as agency records – relates to documentation.

In addition, Petitioners’ reference in their initial Petition to comments made by the licensing boards in three early site permit (ESP) cases adds no weight to Petitioners’ insinuations that the Staff does a generally poor job of reviewing any sort of license application. First of all, we note that all three boards (and, in each case, the Commission) found that the permit should be issued.⁸⁴ Even considering the Boards’ comments in a light most favorable to Petitioners, they were insufficient to render invalid the Staff’s ESP reviews, and do not support a determination that the Staff’s review processes (be they license renewal or otherwise) are substantively flawed.

Indeed, in reviewing the *Clinton* ESP decision, we expressly rejected the idea that the Staff’s review of that ESP application had not been adequate.⁸⁵ There, we explicitly endorsed

⁸¹ *Id.* at 9.

⁸² OIG Report at 11.

⁸³ Staff Brief at 19.

⁸⁴ In any event, a Board’s criticism of the Staff’s review with respect to one application is in no way material to the review of another, wholly distinct application, absent an obvious and direct connection to the licensing action at issue. We see no such connection here.

⁸⁵ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, (Continued ...)

the Staff's "longstanding regulatory practice" of prioritizing which facts to verify and generally expecting the license applicants to provide correct and complete information in applications submitted under oath.⁸⁶ We take this opportunity to reiterate that it is neither possible nor necessary for the Staff to verify each and every factual assertion in complex license applications, including license renewal applications. The Staff's audit, or sampling, method of verifying a license renewal applicant's aging management programs, together with the other components of its review, enables the Staff to make the safety findings necessary for issuance of a renewed license.⁸⁷

In December, 2006, the NRC turned down a petition for rulemaking urging that deficiencies in the NRC Staff's safety reviews required fundamental changes in — and broadening the scope of — the license renewal process.⁸⁸ Lawsuits challenging the rulemaking denial, brought by some of the *Oyster Creek* intervenors (among others), were recently resolved in the NRC's favor.⁸⁹ For the reasons given in the NRC's rulemaking denial, we remain convinced that the agency's current license renewal approach and process are sensible and lawful. That is not to say that improvements cannot be made, as, for example, the transparency-driven enhancements OIG suggested in its recent report. But we are aware of nothing calling for the complete overhaul that Petitioners demand.

207-08 (2007).

⁸⁶ *Id.*

⁸⁷ See also 10 C.F.R. § 54.13 (requiring, among other things, that information provided to the Commission by a license renewal applicant for a renewed license must be complete and accurate in all material respects).

⁸⁸ *Petition for Rulemaking: Denial*, 71 Fed. Reg. 74,848 (Dec. 13, 2006).

⁸⁹ *Spano v. NRC*, No. 07-0324-ag (L) (2d Cir. Sept. 19, 2008)(Summary order) (denying petitions for review).

For these reasons, Petitioners have not demonstrated, nor do we otherwise find, a basis for conducting a “comprehensive overhaul” of the Staff’s license renewal review process. With this in mind, we now turn to Petitioners’ claims that the Staff improperly destroyed records.

2. *Claims That Staff Illegally Destroyed Records*

Petitioners’ claim that the NRC Staff improperly destroyed official agency records does not support their motion to suspend these particular license renewal proceedings or to overhaul the license renewal review process in general. As discussed above, the Petitioners are mistaken that they have a legal entitlement to scrutinize, second guess, and adjudicate the “quality” of the Staff’s review *per se*. Further, this claim is based on a misinterpretation of an NRC Management Directive intended to clarify the agency’s obligations under the Federal Records Act (FRA)⁹⁰ and regulations promulgated by the National Archives and Records Administration.⁹¹

The focus of the license proceeding must be the sufficiency of the application, not the adequacy of the Staff’s review. Petitioners’ initial Petition acknowledged this principle.⁹² But their Supplemental Petition goes well beyond the initial Petition in proposing that the Commission investigate the Staff’s review of each aging management program, determine whether that review was sufficient, and allow Petitioners an opportunity to file new contentions.⁹³ Even if the working files at issue should have been preserved as agency records, the Petitioners have made no argument regarding how destruction of these working

⁹⁰ The “Federal Records Act” is the common name of a series of statutes that govern the creation, management, and disposal of records by federal agencies. See 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24.

⁹¹ 36 C.F.R. pt. 1220.

⁹² Petition at 6-7.

⁹³ Supplemental Petition at 17-18.

files could meet the contention admissibility standards in our regulations. The Commission pointed out in *Curators of the University of Missouri* that it would be unfair to deny a meritorious application because the Staff's review was found lacking.⁹⁴ It would make even less sense to punish the applicant for the Staff's paperwork management practices.

The FRA gives federal agencies some discretion in determining which documentary materials are appropriate for preservation as an agency "record." Agency "records" are defined as:

all books, papers, maps, photographs, or other documentary materials ... made or received by an agency ... in connection with the transaction of public business and preserved or appropriate for preservation by that agency ... as evidence of the organization functions, policies, decisions, procedures, operations or other activities of the government or because of the informational value of the data in them.⁹⁵

NRC's Management Directive 3.53⁹⁶ provides the Commission's interpretation of its obligations under the FRA, as well as the Commission's expectations for the Staff in fulfilling those obligations. It should be noted, however, that the Management Directive itself does not have the force of law. The pertinent section of the Management Directive provides that:

Working files, such as preliminary drafts and rough notes and other similar materials, will be maintained and filed with the official record for purposes of adequate and proper documentation if they meet the following two conditions:

- They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, followup, and to communicate with agency staff about agency business.
- They contain unique information, such as substantive annotations or comments, that adds to a proper understanding of the agency's formulation and execution of basic

⁹⁴ CLI-95-1, 41 NRC at 121-22.

⁹⁵ FRA, 44 U.S.C. § 3301; see also 36 C.F.R. § 1220.14 (same definition).

⁹⁶ Handbook 1 of Management Directive 3.53, "NRC Records and Document Management Program," (Rev. Mar. 15, 2007).

policies, decisions, actions, or responsibilities.⁹⁷

Petitioners interpret this provision as meaning any document that satisfies *either* condition must be preserved.⁹⁸ They contend that the destroyed Staff working papers satisfy the second condition, because they contain “unique information … that adds to a proper understanding of [the reviewer’s] decision” that a particular aging management program meets the criteria listed in the GALL report.

We disagree with that interpretation. The phrase “if they meet the following two conditions” clearly requires that both conditions be satisfied.⁹⁹ Moreover, the provision in the Management Directive is taken almost word for word from National Archives and Records Administration regulations, with the exception that the Code of Federal Regulations provision uses the word “and” between the two conditions that must be present to qualify a “working file” as an agency record.¹⁰⁰ So, to constitute an agency record, a working file must contain unique information that underlies an agency decision, *and* it must also have been made available to other agency employees for purposes of helping to reach or support that decision. Otherwise, materials created by an employee for the individual’s own use in performing his or her job, and which are not circulated (and are not otherwise required by NRC policy to be maintained), may be discarded at the employee’s discretion.¹⁰¹

⁹⁷ Handbook 1, Management Directive 3.53 (Rev. Mar. 2007), at 19-20.

⁹⁸ Supplemental Petition at 10.

⁹⁹ As with statutes, the plain meaning of a regulation controls its interpretation. See, e.g., *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005); *Time Warner Entertainment Co. L.P. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 438, 443 (10th Cir. 2004); *U.S. Department of Energy* (High-Level Waste Repository), CLI-06-5, 63 NRC 143 (2006).

¹⁰⁰ 36 C.F.R. § 1222.34(c).

¹⁰¹ Management Directive 3.53, at 45, 62. See also 36 C.F.R. § 1228.24 (b)(5) (Non-records may be discarded in accordance with instructions in the agency’s published records control (Continued ...)

Petitioners make no concrete showing of the destruction of unique and significant documentary information. They also make only the faintest attempt to address the requirement of circulation for official purposes.¹⁰² While the OIG observed that license renewal review audit team members do not keep all notes and working papers that they utilize in preparing formal audit reports, the OIG made no finding of a violation of law, regulation or agency policy regarding record retention, let alone wholesale violations warranting dramatic action.¹⁰³ We conclude, therefore, that there is no basis in the OIG Memorandum or in Petitioners' submission to find that Staff members improperly disposed of agency records.

B. The Petition Does Not Support Adjudicatory Relief

As discussed below, given that we find no basis to "completely overhaul" the license renewal process, there is no reason to "suspend" or otherwise stay the currently pending license renewal reviews or the associated adjudicatory proceedings. Nor have Petitioners justified

guidelines).

¹⁰² Supplemental Petition at 13.

¹⁰³ Even if the working papers should have been retained under the terms of MD 3.53 and applicable National Archives and Records Administration regulations, and thus constituted "agency records," Petitioners would not necessarily have been entitled to see them. The Freedom of Information Act (FOIA) protects intra-agency memoranda developed during the decisionmaking process under the deliberative process privilege. FOIA, 5 U.S.C. § 552(b)(5). If documents in the working papers were circulated for the purpose of reaching a decision on the adequacy of a particular aging management program, they would most likely fall under the deliberative process privilege. See, e.g., *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (deliberative process privilege protected summaries of information gathered to assist the agency in reaching a "complex" and "significant" policy decision, where the summaries reflected the judgment or opinion of their compiler); see also *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974) (deliberative process privilege purpose is "not only to encourage frank intra-agency discussion of policy but also to ensure that the mental processes of decision-makers are not subject to public scrutiny"). While this privilege is a qualified one, Petitioners would have to show that their need for the information outweighed potential harm to the agency from that disclosure. *Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827, 854 (3d Cir. 1995), cert. denied, 516 U.S. 1071 (1996); *Chevron U.S.A. v. United States*, 80 Fed.Cl. 340, 356 (2008).

reopening the record in the *Oyster Creek* proceeding.

1. Suspension of the Ongoing Adjudicatory Proceedings

The Commission considers suspension of licensing proceedings a “drastic” action that is not warranted absent “immediate threats to public health and safety.”¹⁰⁴ While our regulations do not provide for a “motion to suspend” a proceeding, we have occasionally considered similar requests to suspend proceedings or hold them in abeyance in the exercise of our inherent supervisory powers over proceedings. For example, we considered similar motions presented to us in the wake of the September 11 terrorist attacks. We ultimately rejected such requests pending the Commission’s comprehensive review of anti-terrorist measures at licensed facilities.¹⁰⁵ We declined to suspend the Diablo Canyon independent spent fuel storage installation license proceeding pending the post-9/11 security review, citing the public’s interest in expeditious resolution of adjudicatory matters.¹⁰⁶ But we also reasoned that, should the review result in security enhancements for spent fuel storage facilities, those enhancements could be implemented at Diablo Canyon even after the license issued.¹⁰⁷

Similarly, we expect licensees and license renewal applicants to adjust their aging management programs to reflect lessons learned in the future through individual and industry-

¹⁰⁴ *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing request to suspend all license transfer proceedings involving a particular transferee while the Commission examined effects of ownership by limited liability companies).

¹⁰⁵ See *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001). See also *Diablo Canyon*, CLI-02-23, 56 NRC 230; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001).

¹⁰⁶ CLI-02-23, 56 NRC at 238.

¹⁰⁷ *Id.* at 239.

wide experiences. “The license renewal program is a living program”¹⁰⁸ that continues to evolve. As new insights or changes emerge over time, we expect the Staff to require, as appropriate, any modification to systems, structures or components that is necessary to assure adequate protection of the public health and safety, or to bring the facility into compliance with a license, or the rules and orders of the Commission.¹⁰⁹

Finally, in all proceedings the stakeholders have an interest in “efficient and expeditious” resolution.¹¹⁰ We see no reason to suspend the proceedings to await an “overhaul,” which we have found unnecessary, to the license review process.

2. *Motion to Reopen the Record in Oyster Creek*

Petitioners in the *Oyster Creek* proceeding have not met the requirements for reopening the record, which closed on September 25, 2007.¹¹¹ Reopening a closed record requires, among other things, a showing that the motion is timely. Petitioners’ motion was filed four months after the OIG Report on which it is based became available to the public.¹¹² Next, such a motion “must address a significant safety or environmental issue.”¹¹³ Petitioners offer only the speculation that the Staff may have failed to identify such an issue because their review may have been insufficiently thorough.

¹⁰⁸ E.g., *Oyster Creek* FSER, NUREG-1875 at 1-6.

¹⁰⁹ 10 C.F.R. § 50.109. See *Diablo Canyon*, CLI-02-23, 56 NRC at 240.

¹¹⁰ See generally *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

¹¹¹ See 10 C.F.R. § 2.326. An appeal is currently pending before the Commission on a request to reopen the record and admit a contention on an unrelated matter. See *Oyster Creek*, LBP-08-12, 68 NRC __ (slip op.) (denying Citizen’s motion to reopen the record and to add a new contention).

¹¹² The OIG Report was released to the public on September 7, 2007.

¹¹³ 10 C.F.R. § 2.326(a)(2).

The moving party must show that a “materially different result … would have been likely” if the new information had been available to the Board.¹¹⁴ In fact, the OIG Report was publicly available at the time of the hearing. But it could not have altered the result in the license renewal hearing in a “material” way, both because the OIG Report does not provide support for a substantive challenge to the license renewal application and because the Staff review is outside the scope of the hearing.¹¹⁵

Finally, a motion to reopen must be supported by “affidavits setting forth the factual and/or technical basis for the movants’ claim” that a significant and material safety or environmental issue exists.¹¹⁶ Petitioners provided no affidavits — only mere speculation that, if the Staff undertook another review of the Oyster Creek license renewal application starting after all of the OIG recommendations have been fully implemented, the conclusions in the FSER might be materially different — something, in other words, *might* turn up supporting Petitioners’ concerns. This does not justify restarting the hearing process. For these reasons, the Oyster Creek Petitioners’ motion to reopen the proceeding is denied.¹¹⁷

¹¹⁴ 10 C.F.R. § 2.326(a)(3).

¹¹⁵ Five of the Petitioners participated as intervenors in the *Oyster Creek* license renewal proceeding, and thus have had opportunity to be heard on litigable issues appropriately within the scope of the agency’s license renewal review. After an evidentiary hearing, the Board ruled in the applicant’s favor. (See LBP-07-17, 66 NRC 327 (2007)). Although in response to Intervenors’ Petition for Review, the Commission requested additional briefs (See CLI-08-10, 68 NRC __ (slip op. May 28, 2008)) and referred a single issue to the Board for consideration of additional evidence, (Order of the Secretary (Aug. 21, 2008) (unpublished)), it would be unfair to the applicant to delay this proceeding even further because of supposed deficiencies in the Staff’s review. *Compare Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121 (“even assuming *arguendo* that Staff did conduct an insufficient review, a denial of a meritorious application on that ground would be grossly unfair – punishing the applicant for an error by Staff”).

¹¹⁶ 10 C.F.R. § 2.326(b).

¹¹⁷ Petitioners also cite an incident pertaining to the Oyster Creek facility (Petition at 17-19), relevant to maintenance of certain equipment and the plant’s commitment tracking system. It is (Continued ...)

C. Other Matters

As an alternative to completely overhauling the review process, Petitioners suggest that “if the problems identified by the OIG turn out to primarily concern reporting rather than a failure to perform the reviews”, then the SERs should be “comprehensively revised.”¹¹⁸

We would not call upon the Staff to undertake cumbersome and resource-intensive revisions of the already-completed Oyster Creek, Vermont Yankee, and Pilgrim FSERs, or of other previously-completed license renewal reviews, where we have no basis for concluding that the Staff’s safety reviews were inadequate to assure that the licensees have appropriate aging management programs in place.¹¹⁹ As discussed above, we find no evidence, in either the OIG Report or the Petition, to require an “overhaul” of the license renewal review process. We base this conclusion on the fact that neither the Petition nor the OIG Report has identified any safety issue resulting from the OIG investigation.

It also bears noting that each license renewal application addressed by the Petition has been the subject of a hearing opportunity. In that context, Petitioners have had, or will have, the opportunity to ventilate litigable issues within the scope of license renewal. Substantive

not clear that this issue would appropriately fall within the scope of license renewal review, and therefore, it does not support Petitioners’ fundamental premise that the Staff’s license renewal review process is flawed. To the extent that Petitioners are attempting to raise concerns regarding an ongoing operational issue at the Oyster Creek facility, the appropriate avenue for resolution of such a concern is via the 10 C.F.R. § 2.206 process.

¹¹⁸ Petition at 30.

¹¹⁹ We note that, with respect to the *Indian Point* review, the Staff has stated its intent to revise the schedule for completion of its review for a number of reasons, including to account for corrective actions stemming from the OIG recommendations. See letter from Brian Holian, Director, Division of License Renewal, Office of Nuclear Reactor Regulation, to Joseph E. Pollock (Vice President Operations, Entergy Nuclear Operations, Inc.) (Sept. 2, 2008) (ADAMS ML082400214).

challenges to license renewal applications are appropriately made in that context.¹²⁰

In summary, we find no basis to require the Staff to revisit any completed SERs for license renewal. We expect that such an exercise would not result in any change to the Staff's conclusions or recommendations and, therefore, is not warranted.¹²¹

III. CONCLUSION

For the foregoing reasons, the Petitions are denied.

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of October, 2008

¹²⁰ In addition, even though Petitioners expressly declined to seek enforcement action pursuant to 10 C.F.R. § 2.206, if they, or any other person, wish to institute a proceeding to modify, suspend, or revoke a license, or to request other action, that mechanism remains open to them.

¹²¹ Commissioner Jaczko, in his partial dissent, expresses the view that the Commission should require the Staff to supplement the record with information on whether Staff followed applicable guidance and to provide verifications with respect to its exercise of independent judgment and its documentation. For multiple reasons discussed above, the Commission majority does not find it necessary to do so. For instance, the Staff's safety and environmental findings are already reflected in its formal reports that are made part of the record, and the applications themselves have been subject to adjudicatory hearing opportunities. In addition, it bears repeating that it is appropriate for the Staff to exercise judgment in deciding which facts to verify and the extent of its audits, since applicants are expected to provide complete and accurate information in all material respects. The OIG, while identifying methods for improving the Staff's review and documentation, also found that the Staff in fact expended enormous effort in conducting its license renewal reviews, including its review of the Oyster Creek application. Asking the Staff to provide verifications regarding completed reviews likely would subject the Staff to the task of replicating much of its prior work in order to complete a meaningful and thorough re-review – a task with no obvious end point.

Commissioner Gregory B. Jaczko respectfully dissents, in part:

While I concur with a majority of this decision, I respectfully dissent, in part. The Office of Inspector General's (OIG) Audit of the License Renewal Program found that the staff did not consistently provide adequate descriptions of audit methodology or support for conclusions in license renewal reports. I agree with the majority that this does not necessarily mean that the staff's safety findings are invalid, but it certainly means that it is difficult in some instances to ascertain the basis for the staff's safety findings from the license renewal documentation. And as the OIG noted, "adequate documentation of review methodologies and support for staff conclusions in license renewal reports is important for supporting the sufficiency and rigor of NRC's review process." (OIG Audit of NRC's License Renewal Program, pg. 7).

Because of the importance of these license renewal reports and their role in establishing a complete and sound basis for the agency's ultimate license renewal decisions, I supported a version of the Order that would have required the staff in each of the cases before us to supplement the record with information as to whether staff followed applicable guidance and whether its review reflected an exercise of independent staff judgment. I want to be clear that this is not an issue about the integrity of the NRC Staff, but an issue about the integrity of the documents upon which the agency relies in making its decision. I believe requiring these documents to be clarified or supplemented as necessary, would have been a simple yet effective way to verify to the public that the staff's analysis and findings in each of these cases was the result of an independent staff judgment – something that the IG report does call into question and something that the current record neglects to address.

I believe this is not only the obvious next step, but a necessary one if we intend to confirm what we think we know. After all, if this is, as we all assume, simply an issue with transparency of documentation, then it is a straightforward thing to resolve – request verification

of the documentation. If it is more than that, there is only one way to find out – request verification of the documentation. In either instance, the answer is the same. Thus, I disagree with the majority's decision on this point and instead believe we should have required staff to supplement the record with this information. I can find no justification or benefit to leaving a record begging these obvious questions.

I also believe, similarly, that the issue raised in the supplemental petition – that the staff improperly destroyed documentation – could be resolved through verification of the documentation. While the Petitioners have not argued how this issue could meet the standards for an admissible contention in our regulations, verification of the documentation could provide a basis for the Commission to judge the significance of the staff's discarding field notes created during onsite audits. This would assist us not only in resolving the issues raised by the Petitioners, but would provide us with information that might lead us to direct the staff to change its practices with respect to documenting field audits, or to initiate additional OIG investigation, if either of these actions are warranted.

Finally, I believe that the majority order misses an opportunity to highlight the ongoing efforts aimed at improving reviews in the license renewal area, including staff's efforts to address the recommendations in the IG's original report. Whether one characterizes such efforts as an "overhaul" or not, I believe these changes will bring increased transparency to the hard work the staff does in reviewing license renewal applications and I look forward to their implementation.