

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matters of

ALL OPERATING BOILING WATER REACTOR
LICENSEES WITH MARK I AND MARK II
CONTAINMENTS: ORDER MODIFYING LICENSES
WITH REGARD TO RELIABLE HARDENED
CONTAINMENT VENTS (EFFECTIVE
IMMEDIATELY)

Docket No. EA-12-050

ALL POWER REACTOR LICENSEES AND
HOLDERS OF CONSTRUCTION PERMITS IN
ACTIVE OR DEFERRED STATUS: ORDER
MODIFYING LICENSES WITH REGARD TO
RELIABLE SPENT FUEL POOL INSTRUMENTATION
(EFFECTIVE IMMEDIATELY)

Docket No. EA-12-051

CLI-13-02

MEMORANDUM AND ORDER

Pilgrim Watch has appealed the decision of the Atomic Safety and Licensing Board to deny its petitions to intervene and requests for a hearing in the captioned matters.¹ As discussed below, the Board did not err in its interpretation of the law relating to requests for hearing on enforcement orders. We affirm the Board's decision.

¹ See *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Petitions for Hearing)*, LBP-12-14, July 10, 2012 (July 20, 2012) (Petition for Review).

I. BACKGROUND

As part of the NRC's ongoing and multifaceted response to the tsunami-triggered nuclear accident at the six-unit Fukushima Dai-ichi nuclear power plant site, in March 2012 the Staff issued, pursuant to 10 C.F.R. § 2.202, three immediately effective Orders, two of which are at issue here. The first challenged Order requires certain licensees of boiling water reactor facilities with Mark I and Mark II containments to install reliable hardened venting systems to preserve core and containment cooling in order to prevent core damage in the event of an accident.² The second challenged Order requires identified licensees to enhance spent fuel pool instrumentation, to ensure that operators have a reliable means of remotely monitoring wide-range spent fuel pool levels to effectively prioritize event mitigation and recovery actions during a beyond-design-basis external event.³

As relevant here, each Order stated that the licensee and "any other person adversely affected" by the Order could request a hearing on the Order.⁴ Each Order also specified that "[i]f a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained." None of the licensees to whom the Orders were addressed requested a hearing. Entergy Nuclear Operations, Inc. (Entergy), the license holder for the Pilgrim Nuclear

² See *In the Matter of All Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)*, 77 Fed. Reg. 16,098, 16,099-100 (Mar. 19, 2012) (Hardened Vents Order).

³ See *In the Matter of All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)*, 77 Fed. Reg. 16,082, 16,084 (Mar. 19, 2012) (Spent Fuel Pool Instrumentation Order). The third Order, relevant to strategies to address beyond-design-basis external events, is not at issue here.

⁴ See *Spent Fuel Pool Instrumentation Order*, 77 Fed. Reg. at 16,085; *Hardened Vents Order*, 77 Fed. Reg. at 16,100-01.

Power Station in Plymouth, Massachusetts (Pilgrim), expressly consented to the Orders with respect to Pilgrim.⁵

Pilgrim Watch—an organization that represents certain individuals living near, and potentially affected by activities at, Pilgrim—requested hearings on both Orders.⁶ Pilgrim Watch argued that the Orders were inadequate to protect public health and safety in various specific respects. First, Pilgrim Watch argued, the Hardened Vents Order should require the installation of filters in the direct torus vents to prevent a radioactive release when the vents are opened.⁷ Second, Pilgrim Watch asserted that the Hardened Vents Order should require a passive release mechanism, such as a rupture disc, that would open the direct torus vents without active operator intervention.⁸ Finally, Pilgrim Watch claimed that the Spent Fuel Pool Instrumentation Order is inadequate because it does not require the licensee to reduce density of fuel in the pools, or to remove fuel assemblies that are five years old or greater to dry cask storage.⁹ Pilgrim Watch requested hearings to “redress inadequacies of past and future modifications to containment with respect to [each § 2.202 order].”¹⁰

⁵ See *Entergy's Answer to the March 12, 2012, Commission Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-051) Pilgrim Nuclear Power Station* (Mar. 30, 2012) (ADAMS Accession number ML12093A343); *Entergy's Answer to the March 12, 2012, Commission Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Order Number EA-12-050) Pilgrim Nuclear Power Station* (Mar. 30, 2012) (ML12093A342).

⁶ *Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents* (Apr. 2, 2012) (Hardened Vents Hearing Request), *Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent Reliable Spent Fuel Pool Instrumentation* (Apr. 2, 2012) (Spent Fuel Pool Hearing Request).

⁷ Hardened Vents Hearing Request at 3.

⁸ *Id.*

⁹ Spent Fuel Pool Hearing Request at 6.

¹⁰ See Hardened Vents Hearing Request at 2; Spent Fuel Pool Hearing Request at 2.

Several of the licensees to whom the Orders were addressed, as well as the NRC Staff, opposed Pilgrim Watch's hearing request.¹¹ The Board, noting that Pilgrim Watch had established standing, "if at all," only with respect to Pilgrim, directed that oral argument be held in Boston with representatives of Pilgrim Watch, Entergy, and the Staff.¹² The Board considered the filings of the other licensees as *amicus curiae* briefs.¹³

The Board rejected Pilgrim Watch's hearing requests because the concerns raised therein are beyond the proceedings' scope. Relying on the 1983 decision in *Bellotti v. NRC*,¹⁴ the Board held that Pilgrim Watch cannot enter these proceedings in order to argue that safety modifications additional to those in the Orders should be implemented. Citing a long line of Commission case law developed in the years after the *Bellotti* decision, the Board found that measures intended to "strengthen" an order issued under the provisions of 10 C.F.R. § 2.202 are not within the limited scope of the proceedings.¹⁵ The Board held that "Pilgrim Watch's

¹¹ See *Entergy's Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents* (Apr. 27, 2012); *Joint Answer Opposing Hearing Requests Regarding Sufficiency of Order EA-12-051 Modifying Licenses with Regard to Spent Fuel Pool Instrumentation* (Apr. 27, 2012); *Answer of Detroit Edison Company to Requests of Pilgrim Watch and Beyond Nuclear for Hearing Regarding Alleged Insufficiency of NRC Orders Modifying Licenses with Regard to Hardened Containment Vents and Spent Fuel Pool Instrumentation* (Apr. 27, 2012). Because Pilgrim Watch's hearing requests concerned the Orders generally, these licensees took the position that the hearing requests potentially would affect a large number of licensees, not just Entergy.

¹² Memorandum and Order (Scheduling Oral Argument) (May 9, 2012) (unpublished). Oral argument was held on June 7, 2012.

¹³ *Id.* at 3 n.5.

¹⁴ 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

¹⁵ See LBP-12-14, 76 NRC ___ (July 10, 2012) (slip op at 5-8) (citing *Bellotti*, 725 F.2d at 1381, 1383; *Pilgrim*, CLI-82-16, 16 NRC at 46-47; *Alaska Department of Transportation & Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 401-04 (2004), *reconsideration denied*, CLI-04-38, 60 NRC 652 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52 (2004); *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49 (2010)).

contentions—on their face—fall squarely within the *Bellotti* rule because those contentions explicitly complain that the safety enhancements in the Enforcement Orders are insufficient and require additional safety measures.”¹⁶ Accordingly, the Board found it unnecessary to address Pilgrim Watch’s standing separately.¹⁷

Pilgrim Watch’s petition for review followed. Both Entergy and the Staff oppose Pilgrim Watch’s petition.¹⁸

II. DISCUSSION

We find that the Board followed applicable law in rejecting Pilgrim Watch’s request for a hearing on the “inadequacies of past and future modifications to containment.”¹⁹ At bottom, Pilgrim Watch seeks additional NRC actions, beyond those imposed by the Staff in the Orders at issue here. The Board correctly denied the hearing requests.

A. Standard of Review

Because this matter concerns the denial of Pilgrim Watch’s hearing requests, Pilgrim Watch may appeal as of right, pursuant to 10 C.F.R. § 2.311(c).²⁰

¹⁶ *Id.* at ___ (slip op. at 8). See 10 C.F.R. § 2.309(f)(1) (among other requirements, a petition must “(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding”).

¹⁷ LBP-12-14, 76 NRC at ___ (slip op. at 4).

¹⁸ See *Answer of Entergy Nuclear Operating Company and Entergy Nuclear Operations, Inc. in Opposition to Pilgrim Watch’s Petition for Review* (July 30, 2012); *NRC Staff’s Answer to Pilgrim Watch’s Petition for Review of Memorandum and Order (Denying Petitions for Hearing)*, LBP-12-14, July 10, 2012, and *Accompanying Brief* (July 30, 2012).

¹⁹ See *Hardened Vents Hearing Request* at 2; *Spent Fuel Pool Hearing Request* at 2.

²⁰ See *Fermi*, CLI-10-3, 71 NRC at 51 n.4 (petitioners’ appellate pleading in a matter involving the denial of an intervention petition on an enforcement order was appropriately considered under 10 C.F.R. § 2.311(c)). Pilgrim Watch cites 10 C.F.R. § 2.341, which provides for discretionary Commission review of decisions. Petition for Review at 1. While § 2.341 specifically allows a petitioner to reply to its opponent’s answer, § 2.311 does not provide the opportunity to reply. Compare 10 C.F.R. § 2.341(b)(3) with 10 C.F.R. § 2.311(b). Pilgrim Watch filed replies in this matter. See *Pilgrim Watch Reply to July 20, 2012 Answer of Entergy Nuclear*

(continued . . .)

The Board's ruling rests on its interpretation of law, specifically the limits of Section 189a of the Atomic Energy Act of 1954 (AEA) and the provisions of 10 C.F.R. § 2.202. Section 189a allows "any person whose interest may be affected" to request a hearing in a proceeding "granting, suspending, revoking or amending" any license. An order issued under 10 C.F.R. § 2.202, such as those in these proceedings, alters the requirements of a license and therefore falls generally under the terms of AEA § 189a. Before any hearing is granted on such an order, a threshold question, intertwined with both standing and contention admissibility issues, is whether the hearing requests are within the scope of the proceeding outlined in the § 2.202 order itself; that is, whether the confirmatory order should be sustained.²¹

Bellotti upheld an earlier Commission decision—coincidentally, also involving Pilgrim—to restrict the scope of a § 2.202 proceeding to the narrow issues of "whether the facts stated in the order are true and whether the remedy selected is supported by those facts."²² Given the narrow scope of such proceedings, we have excluded from hearing petitioners who argue that the subject order is inadequate and should be strengthened. Simply put, where an enforcement order imposes measures to enhance safety, no hearing will be granted to litigate additional

Operating Company and Entergy Nuclear Operation, Inc. in Opposition to Pilgrim Watch's Petition for Review (Aug. 6, 2012) (Pilgrim Watch Reply Brief); *Pilgrim Watch Reply to NRC Staff's Answer to Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Petitions for Hearing), LBP-12-14, July 10, 2012, and Accompanying Brief* (Aug. 6, 2012). Pilgrim Watch's procedural misstep is understandable, however, both because the Board did not direct the litigants' attention to the applicable regulation for appeal, and Pilgrim Watch is not represented by counsel on appeal. Although we took Pilgrim Watch's replies into account, we observe that the reply to Entergy focuses its arguments primarily on the perceived shortcomings of the Hardened Vents and Spent Fuel Instrumentation Orders, which are matters we do not reach today. The reply to the Staff reiterates arguments made in Pilgrim Watch's petition for review.

²¹ *Bellotti*, 725 F.2d at 1382; *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station)*, CLI-04-23, 60 NRC 154, 157 (2004). The Orders themselves articulate this standard. See *Hardened Vents Order*, 77 Fed. Reg. at 16,101; *Spent Fuel Pool Instrumentation Order*, 77 Fed. Reg. at 16,085.

²² *Pilgrim*, CLI-82-16, 16 NRC at 45.

measures the petitioner would like to see imposed.²³ The upshot of the post-*Bellotti* cases is that a petitioner may obtain a hearing only if the measures to be taken under the order would *in themselves* harm the petitioner.

B. The Limited Scope of Proceedings Under 10 C.F.R. § 2.202

1. *Bellotti's Origin and Reach*

Bellotti held that when the NRC issues orders that require “additional or better safety measures,” AEA § 189a does not provide a vehicle for third parties to seek a hearing “on any issue some member of the public may wish to litigate.”²⁴ Our practice of limiting the scope of a § 2.202 proceeding to the terms of the order offers several advantages. First, this approach allows safety improvements to be put in place quickly, without the delay of litigation over whether additional measures are also warranted.²⁵ In addition, the terms of § 2.202 orders often have been negotiated with the affected licensee or licensees, who would have little

²³ See *Alaska DOT*, CLI-04-26, 60 NRC at 408.

²⁴ *Bellotti*, 725 F.2d at 1383. Pilgrim Watch claims that *Bellotti* states that “[w]here the public health and safety are concerned the right to a hearing is absolute.” Petition for Review at 3. But Pilgrim Watch misunderstands the court’s ruling. As noted by Entergy in its answer (at 5), the *Bellotti* decision states, “[p]ublic participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare. The upshot is that automatic participation at a hearing may be denied only when the Commission is seeking to make a facility’s operation safer.” *Bellotti*, 725 F.2d at 1383. As discussed further below, Pilgrim Watch has not asserted that the actions proposed in the challenged Orders will be “potentially harmful” to public health and safety.

²⁵ Indeed, the pendency of the filtered vent issue illustrates this concern: the Staff recently has made recommendations to us on the addition of filtered containment venting systems, as a matter separate from the Hardened Vents Order. See “Consideration of Additional Requirements for Containment Venting Systems for Boiling Water Reactors with Mark I and Mark II Containments,” Commission Paper SECY-12-0157 (Nov. 26, 2012) (ML12325A704). See also Hardened Vents Order, 77 Fed. Reg. at 16,099 (“The staff has determined that there are policy issues that need to be resolved before any regulatory action can be taken to require Licensees to install filtered vents . . . [including] consideration of severe accident conditions in the design and operation of the vent, addition of filters to hardened reliable vent systems, and consideration of vents in areas other than primary containment”). We currently are evaluating the merits of the Staff’s recommendations. Litigation before the Board on filtered vents not only falls outside the scope of the Hardened Vents Order, but also would be premature.

incentive to negotiate if so doing would expose them to formal litigation over additional terms or requirements that third party petitioners would like to see imposed.²⁶ Moreover, the scope of the proceeding is not so limited as to preclude any hearing. An interested stakeholder who stands to benefit from an order's safety measures may intervene in a contested enforcement proceeding to protect its interest in ensuring that the order is upheld as issued.²⁷ And a third party petitioner also would have standing where the terms of the order, as written, would harm the petitioner.²⁸

In sum, the *Bellotti* rule precludes litigation of either different or additional enforcement measures; a petitioner only may demonstrate standing if he will be harmed by the order, and if his injury is attributable to the order itself. Therefore, it is no matter if the petitioner would be better off if a different, hypothetical, order were imposed, or if the petitioner is no better off with the order than without it.²⁹ "The critical inquiry under *Bellotti* . . . is whether the order improves the licensee's health and safety conditions. If it does, no hearing is appropriate."³⁰

²⁶ See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980).

²⁷ *Sequoyah Fuels Corp. and General Atomics*, LBP-94-5, 39 NRC 54, 65-66 (1994) (the Board determined that the petitioner had standing because the petitioner sought to intervene to ensure that the enforcement order would be upheld). The Commission affirmed the Board's ruling on standing. *Sequoyah Fuels Corp. and General Atomics*, CLI-94-12, 40 NRC 64 (1994).

²⁸ See *Alaska DOT*, CLI-04-26, 60 NRC at 406 n.28 ("an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation. Such an order remains open to challenge.") (citing LBP-04-16, 60 NRC at 122 n.4 (Bollwerk, J., dissenting)).

²⁹ See *id.* at 406 ("That the corrective measures outlined in the Confirmatory Order do not improve [the petitioner's] personal situation does not provide grounds to rescind the Confirmatory Order").

³⁰ *Id.* at 408.

2. Pilgrim Watch's Hearing Requests Fail Under Bellotti

a. Pilgrim Watch Does Not Claim That the Orders Diminish Safety

Pilgrim Watch argues that it is entitled to a hearing on both Orders under AEA Section 189 notwithstanding the holding of *Bellotti*, and makes several attempts to distinguish the instant proceedings from the post-*Bellotti* line of cases. We find its arguments unconvincing.

Pilgrim Watch argues that both the Hardened Vent Order and the Spent Fuel Pool Instrumentation Order “admit” that the status quo does not adequately protect public health and safety.³¹ Pilgrim Watch reasons that if the Orders are not sustained, then either the Orders will have to be strengthened (and re-issued), or Pilgrim will have to shut down.³² Pilgrim Watch argues that it “would be better off under either option.”³³ According to Pilgrim Watch, this argument distinguishes it from petitioners in prior post-*Bellotti* cases, who sought to intervene only for the purposes of strengthening an enforcement order.³⁴ Further, Pilgrim Watch argues that the cases the Board cited in its ruling all involved “discretionary” enforcement proceedings, whereas the instant Orders involve a “non-discretionary statutory duty . . . to provide reasonable assurance that public health and safety are protected.”³⁵

As an initial matter, we observe that Pilgrim Watch is mistaken that any of the facilities at which the Orders are directed (including Pilgrim) would have to shut down if the Orders are not sustained. On the contrary, the Near-Term Task Force convened following the Fukushima accident found that “continued operation and continued licensing activities do not pose an

³¹ Petition for Review at 3. See also Pilgrim Watch Reply Brief at 1.

³² Petition for Review at 3-4. See also *id.* at 15.

³³ *Id.*

³⁴ *Id.* at 14-16.

³⁵ *Id.* at 15.

imminent risk to public health and safety.”³⁶ Since then, we have agreed with the Staff’s recommendations to proceed in a step-wise fashion to take appropriate actions to enhance safety at domestic facilities.³⁷ Further, both Orders reiterate that, in view of current regulatory requirements and existing plant capabilities, “continued operation and continued licensing activities do not pose an imminent threat to public health and safety.”³⁸ In short, if the Orders were not sustained, the licensing bases of the subject licensees would return to the status quo. This action would not leave Pilgrim Watch better off, as it claims, and is not what Pilgrim Watch truly seeks in its hearing requests.³⁹

Pilgrim Watch is incorrect that the challenged Orders are unlike other post-*Bellotti* cases, which, it argues, involved “discretionary punishments” for regulatory violations.⁴⁰ *Maine Yankee* also involved an order modifying licenses, procedurally similar to those in these proceedings, which imposed enhanced security measures at spent fuel storage facilities after the events of September 11, 2001.⁴¹ *Fermi* involved a similar order, issued later to the Fermi licensee

³⁶ See “Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident” (July 12, 2011) (Near-Term Report) (transmitted to the Commission via SECY-11-0093, “Near-Term Report and Recommendations for Agency Actions Following the Events in Japan” (July 12, 2011) (ML11186A950 (package)) (cited in *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 75 NRC 141, 147-48 & n.6 (2011)).

³⁷ See, e.g., Staff Requirements—S”ECY-11-0137—Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML11272A111).

³⁸ Hardened Vents Order, 77 Fed. Reg. at 16,099; Spent Fuel Pool Instrumentation Order, 77 Fed. Reg. at 16,083.

³⁹ Compare *Alaska DOT*, CLI-04-26, 60 NRC at 405 (in seeking rescission of an enforcement order, “[a]lthough [the petitioner] says he is not seeking a harsher penalty against [Alaska DOT], that is precisely what he wants”).

⁴⁰ See Petition for Review at 4.

⁴¹ See *Maine Yankee*, CLI-04-5, 59 NRC at 54; Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,150 (Oct. 23, 2002) (*Maine Yankee Order*).

specifically.⁴² Neither order was based on a violation, nor did they impose penalties on the licensees. Each order found (with wording similar to that upon which Pilgrim Watch bases its “adequate protection” argument) that the requirements to be imposed would “provide the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment.”⁴³ And in both *Maine Yankee* and *Fermi*, the Boards rejected the petitioners’ attempts to frame their concerns in terms of “opposing” the orders to evade the limits of *Bellotti*.

We expect our boards to look beyond claims of opposition which are, at bottom, attempts to expand improperly the scope of the proceedings. In *Maine Yankee*, the petitioner argued against the order unless it were modified to clarify various points, including the costs of state and local law enforcement resources that would be needed to implement the order.⁴⁴ The *Maine Yankee* Board, however, based its analysis on whether the petitioner had shown that the requirements, as stated in the order, would make the facility “less safe.”⁴⁵ The Board held that “whether and to what extent the measures the State seeks [were] needed to make the facility ‘safer’ [was] essentially irrelevant” because those additional measures were outside the scope of the order.⁴⁶ In *Fermi*, we rejected the petitioners’ argument opposing an order which imposed additional security measures at a spent fuel storage facility, because it created a “false sense of

⁴² See *Fermi*, CLI-10-3, 71 NRC at 50; In the Matter of Detroit Edison Company, Fermi Power Plant; Independent Spent Fuel Installation; Order Modifying License (Effective Immediately) 74 Fed. Reg. 17,890 (Apr. 17, 2009) (Fermi Order).

⁴³ See *Maine Yankee* Order, 67 Fed. Reg. at 65,150; *Fermi* Order, 74 Fed. Reg. at 17,891.

⁴⁴ *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-03-26, 58 NRC 396, 401 (2003), *aff’d*, CLI-04-5, 59 NRC 52 (2004).

⁴⁵ *Id.* at 402.

⁴⁶ *Id.*

security.”⁴⁷ We observed that the *Fermi* petitioners did not explain how they would be better off without the measures in the order, “whose security benefits Petitioners do not question.”⁴⁸

Fundamentally, Pilgrim Watch’s petition suffers from the same defect. Pilgrim Watch’s claimed “opposition” to the Orders does not open the door to a hearing on additional or different safety measures, not included in the Orders. With respect to both Orders, the question for hearing is whether the implementation of any of the requirements in the Orders would adversely affect the safe and secure operation of the facility, and thereby harm Pilgrim Watch. Pilgrim Watch has offered neither argument nor evidence that the Orders, or any specific requirement within them, will diminish the margin of safety at Pilgrim.⁴⁹ Therefore, we conclude that the Board properly denied the hearing requests.

b. Standing

Pilgrim Watch, the Staff, and Entergy all reiterate their arguments, raised before the Board, regarding Pilgrim Watch’s standing—an issue the Board did not reach. We note that the proceedings’ limited scope undermines Pilgrim Watch’s claim of standing as well as the materiality of its proposed contentions.⁵⁰ Standing requires the petitioner to show a “concrete

⁴⁷ *Fermi*, CLI-10-3, 71 NRC at 53.

⁴⁸ *Id.*

⁴⁹ Pilgrim Watch was given the express opportunity at oral argument to explain its claims, and Pilgrim Watch’s counsel did not argue that the existing level of safety would be reduced by the Orders:

Judge Hawkens: You’re saying safety would not be enhanced, the status quo would be actually—safety would be diminished by implementing both of these orders?

Mr. Webster: Not quite, your Honor. What we’re saying is that the level of safety enhancement that’s required by these orders is insufficient to meet adequate protection.

Tr. at 62. See LBP-12-14, 76 NRC at ___ (slip op. at 8 & n.36).

⁵⁰ See *Davis-Besse*, CLI-04-23, 60 NRC at 158.

and particularized” harm, stemming from the challenged action, and redressable by a favorable decision.⁵¹ But Pilgrim Watch has shown neither harm nor redressability here. As discussed above, Pilgrim Watch does not show—or claim—that the measures called for in the Orders, in themselves, increase the likelihood or severity of a potential accident at Pilgrim. Rather, the root of Pilgrim Watch’s argument is that the Orders do little to ameliorate the potential harm of such an accident.⁵² Pilgrim Watch does not meet the redressability requirement for standing, because vacating the orders would not ameliorate the injury of which Pilgrim Watch complains.⁵³

c. Factual Challenges

We need not reach what Pilgrim Watch characterizes as its “factual challenges” to the Orders.⁵⁴ Pilgrim Watch claims that the facts as stated in both Orders are inaccurate, but it goes on to state that it challenges the “factual assumption” that the Orders provide adequate protection.⁵⁵ This argument is merely a repackaging of its principal argument that additional measures would make the affected reactors safer. As discussed above, such additional measures are beyond the scope of these proceedings.

⁵¹ *Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning)*, CLI-01-2, 53 NRC 9, 13 (2001).

⁵² Petition for Review at 3, 8-11.

⁵³ See *Fermi*, CLI-10-3, 71 NRC at 52-53. The Board lacks the authority to amend the Orders to add the proposed safety measures Pilgrim Watch endorses.

⁵⁴ See Petition for Review at 8-11.

⁵⁵ *Id.* (Pilgrim Watch claims, for example, that reactor operators may decide not to open unfiltered vents for fear of radiological release; that human error or power failure could forestall opening the vents, leading to containment failure; and that improved instrumentation would aid only in identifying, but not remedying, problems in the spent fuel pool).

Finally, we stress that the agency's efforts on post-Fukushima lessons learned are ongoing on many fronts and we continue to consider additional actions to improve the safety of U.S. licensed facilities post-Fukushima.⁵⁶

III. CONCLUSION

For the foregoing reasons, the Board's decision in LBP-12-14 is *affirmed*.⁵⁷

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 31st day of January, 2013

⁵⁶ See *generally* "Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report," Commission Paper SECY-11-0124 (Sept. 9, 2011) (ML11245A127); SRM-SECY-11-0137; "Tier 3 Program Plans and 6-Month Status Update in Response to Lessons Learned from Japan's March 11, 2011 Great Tohoku Earthquake and Subsequent Tsunami," Commission Paper SECY-12-0095 (July 13, 2012) (ML12208A208); Station Blackout, Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 16,175 (Mar. 20, 2012); Onsite Emergency Response Capabilities, Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 23,161 (Apr. 18, 2012). As to filtered vents, see note 25, *supra*.

⁵⁷ A majority of the Board correctly observed that, "should Pilgrim Watch wish to have Entergy implement additional safety measures, its recourse is to petition for rulemaking pursuant to 10 C.F.R. § 2.802, or to petition for license modification suspension, or revocation pursuant to 10 C.F.R. § 2.206." LBP-12-14, 76 NRC at ___ (slip op. at 9 n.36). Judge Rosenthal appended a concurring opinion questioning whether a § 2.206 petition is truly a "realistic alternative to an adjudicatory hearing." *Id.* at ___, (slip op. Additional Opinion at 6). See *generally* Memorandum and Order (Requesting Filing on Petitions Under 10 C.F.R. § 2.206) (May 17, 2012) (unpublished). On appeal, Pilgrim Watch points to Judge Rosenthal's Additional Opinion in support of its argument that it is entitled to a hearing. Petition for Review at 17-19. We disagree. We recently reaffirmed the vitality of the section 2.206 process, finding that it "provides stakeholders a forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted." See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC ___, ___ (Nov. 8, 2012) (slip op. at 3-4).