

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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In re: Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. June 29, 2012
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**STATE OF NEW YORK'S
REVISED STATEMENT OF POSITION
REGARDING CONTENTION NYS-37**

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PRELIMINARY STATEMENT

In accordance with 10 C.F.R. § 2.1207(a)(2) and the Atomic Safety and Licensing Board's ("Board") July 1, 2010 and April 18, 2012 Orders, the State of New York ("State") submits this revised statement of position on the State's admitted Contention NYS-37 regarding the inadequacy of Staff's analysis of the environmental impacts of the no-action alternative in the Final Supplemental Environmental Impact Statement ("FSEIS").

This Statement is supported by the testimony of David Schlissel, and responds to arguments made in Entergy's Statement of Position Regarding Contention NYS-37 (ENT000478); the Testimony of Entergy Witnesses Donald P. Cleary, David Harrison, Jr. and Eugene T. Meehan (ENT000479), and the exhibits thereto ("Entergy Testimony"); the report prepared for Entergy by NERA Economic Consulting (ENT000481); NRC Staff's Statement of Position (NRC000132) and the Testimony of Andrew L. Stuyvenberg (NRC000133) ("Staff Testimony") and the exhibits thereto.

Entergy and NRC Staff argue that 10 C.F.R. § 51.95(c)(2) precludes consideration of conservation and efficiency in the FSEIS's no action analysis, but both the Generic Environmental Impact Statement ("GEIS") for license renewal and the history of that regulation make it clear that the regulation has no such effect. Substantively, Entergy's no-action analysis is not credible because it concludes that old, dirty, coal and gas-fired generation will be the only sources of replacement energy until 2025.

LEGAL FRAMEWORK

The State's Initial Statement of Position contains a detailed discussion of the legal framework applicable to NYS-37 under the National Environmental Policy Act (NEPA). NYS000045 at 14-20. The following discussion responds to Entergy's presentation of the

applicable legal framework in their Statement of Position, as Entergy has conflated NEPA's alternatives analysis with the no-action analysis.

The GEIS for license renewal requires the NRC to "consider all reasonable alternatives to a proposed action before acting on a proposal, including consideration of the no-action alternative." *Generic Environmental Impact Statement for License Renewal of Nuclear Plants*, ("GEIS") NUREG 1437, Vol. 1, Chapter 8 at p. 8-1 (NYS00131D). As interpreted by Commission and Board decisions, the NEPA "alternatives analysis" examines "only the range of possibilities that are capable of achieving the goals of the proposed action," *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant)¹ – which the Board defined in this case as the generation of "approximately 2158 MWe of base-load energy for an additional twenty years of operation." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 N.R.C. 43 slip op. at 49-50 (July 31, 2008) (ML082130436).

The no-action alternative is defined differently. As the Board stated in *Exelon Generation Co., L.L.C.* (Limerick Generating Station, Units 1 and 2), "in essence, the no-action alternative is an analysis of what would be reasonably likely to happen were the Commission to deny the requested license renewal."² As this Board has recognized, the no-action alternative is not limited to an analysis of the environmental impacts of discrete alternative sources of baseload energy but includes the environmental impacts of other possible responses to the closure of Indian Point, such as conservation measures, renewable energy sources, decisions to import

¹ 62 N.R.C. 735, 753 (2005).

² *Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 and 2), ASLPB No. 12-916-04-LR-BD01 (April 4, 2012) slip op. at 35-36.

power or a combination of alternatives.³ Thus Entergy's claim that Staff need only consider discrete generation sources capable of providing the 2158 MWe of base-load energy now supplied by Indian Point⁴ is irrelevant to Contention 37, which addresses the deficiencies in Staff's no-action analysis, not its alternatives analysis.

PROCEDURAL HISTORY

The previous procedural history of this proceeding is set forth in detail in New York State's Initial Statement of Position (NYS000045). Since then, on January 30, 2012, Entergy filed a Motion in Limine, seeking to exclude from the proceeding certain sections of the State's pre-filed testimony and exhibits because they discussed the need for power from Indian Point, an issue that Entergy argued is outside the scope of the proceeding pursuant to 10 C.F.R. § 51.95(c)(2) and the Board's decision.⁵ Staff did not file a Motion in Limine, but submitted an Answer supporting Entergy's position.⁶

On February 17, 2012, the State responded that the challenged testimony and exhibits did not expand NYS-37 to include a broad need-for-power analysis but were submitted to address deficiencies in Staff's analysis of the environmental impacts of the no-action alternative, including its inadequate assessment of scenarios involving conservation, other demand side management techniques or renewable sources of replacement power.⁷

³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 N.R.C. 43 (July 31, 2008) slip op. at 51(ML082130436).

⁴ Entergy's Statement of Position on Contention NYS-37, ENT000478 at 17-18 ("Entergy SOP")

⁵ Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits (January 30, 2012)

⁶ NRC Staff's Answer in Support of Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) (February 9, 2012)

⁷ State of New York's Answer to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (February 17, 2012).

On March 6, 2012, the Board denied Entergy's Motion in Limine regarding NYS-37.

The Board stated that the testimony and exhibits were not a broad need-for-power analysis but a challenge to Staff's analysis of several no-action alternative issues.⁸ As the Board stated,

New York has long challenged the NRC Staff's analysis of several no-action alternatives, including, *inter alia*, energy conservation, the viability of renewable energy resources, and energy transmission capacity. New York's testimony does not indicate any attempt to turn NYS-37 into a battle over the need for power. Rather, . . . New York's evidentiary submissions and testimony focus on the accuracy of the NRC Staff's assessment of the No- Action Alternative.⁹

The Board's March 16, 2012 denial of Entergy's Motion in Limine is its third rejection of Entergy's claim that NYS-37 constitutes a "broad ranged inquiry into the need for power."¹⁰ Notwithstanding this third rebuke by the Board, Entergy makes the same argument again in its Statement of Position.

⁸ *Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant's Motions in Limine) slip op. at 19 (March 6, 2012).

⁹ *Id.*

¹⁰ *Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3) ASLBP No.07-858-03-LR-BD01 (March 6, 2012) slip op. at 19; *Energy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) slip op. at 34-35 (July 6, 2011); *Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Ruling on New York State's New and Amended Contentions), slip op. at 11-13 (June 16, 2009).

ARGUMENT

POINT I

ANALYSIS OF THE POSSIBILITY THAT CONSERVATION OR ENERGY EFFICIENCY COULD REDUCE THE NEED FOR SOME OR ALL OF THE POWER CURRENTLY GENERATED BY INDIAN POINT IS AT THE HEART OF THE NO-ACTION ALTERNATIVE ANALYSIS

Both Staff and Entergy assert that the State's critique of Staff's analysis of the "no-action" alternative improperly discusses "the need for the power" because the State seeks consideration of conservation, efficiency and other demand-side management techniques. They assert that any discussion of the future need for power from Indian Point is prohibited by 10 C.F.R. § 51.95(c)(2).¹¹ They are wrong. Both the GEIS for license renewal and the history of 10 C.F.R. § 51.95(c)(2) make it clear that that regulation was not intended to preclude consideration of conservation and efficiency in a no-action analysis.

10 C.F.R. § 51.95(c)(2) does not address the proper analysis of the environmental impacts of the no-action alternative – that is, denying the renewal license. It is the license renewal GEIS which guides Staff in conducting its no-action alternative analysis, and the GEIS makes it clear that that analysis should take into account whether the demand for power may be affected by conservation, efficiency or other demand-side management techniques.

The GEIS states that one environmental consequence of the denial of a renewed license is the use of other electric generating sources "*if the power is still needed*" (emphasis added).¹² The qualifier "if the power is still needed" recognizes that the no-action impact analysis for

¹¹ NRC Staff's Initial Statement of Position on Contention NYS-9, NYS-33 and NYS-37 ("Staff SOP") at 7-11; Entergy's Statement of Position on Contention NYS-37 (Energy Alternatives) ("Entergy SOP") at 18-19.

¹² Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS"), NUREG-1437, (May 1996) Volume 1, Section 8.1, "Introduction".

license renewal may differ from the analysis when the plant was first licensed because energy needs and supplies may have changed over the plant's 40 year life span and those changes may affect the substance of the no-action analysis.

The GEIS further states that:

[T]he no-action alternative is denial of a renewed license. Denial of a renewed license as a power generating capability may lead to a variety of potential outcomes. In some cases, denial may lead to the selection of other electric generating sources to meet energy demands as determined by appropriate state and utility officials. In other cases, denial may lead to conservation measures and/or decisions to import power. In addition, denial may result in a combination of these different outcomes. *Therefore, the environmental impacts of such resulting alternatives would be included as the environmental impacts of the no-action alternative.*¹³

Similarly, in the regulatory proceedings leading up to the promulgation of the license renewal rule, the NRC recognized that the implementation of the no action alternative “would create a range of potential environmental impacts including those impacts which would result from the *possible* replacement of the nuclear plant's power by some other source of energy” (emphasis added).¹⁴ Again, in speaking of the “possible replacement” of the nuclear plant's power, the GEIS recognizes that closing a plant may result in increased conservation or energy efficiency that would reduce the demand for the power once generated by the plant, obviating its replacement with other sources of electricity.

In other words, the “no-action alternative is an analysis of what would be reasonably likely to happen” were the requested license renewal denied.¹⁵ “What would be reasonably

¹³ GEIS, Volume 1, Section 8.2, “Environmental Impacts of the No-Action Alternative” (emphasis added).

¹⁴ 59 Fed. Reg. 37724, 37725 (July 25, 1994).

¹⁵ *Exelon Generation Company, LLC* (Limerick Generating Stations 1 and 2) ASLPB No. 12-916-04-LR-BD01 (April 4, 2012) slip op. at 35-36.

likely to happen” will obviously depend on whether any or all of the power previously generated by Indian Point can be replaced by conservation, efficiency or other demand-side management techniques. Logically, then, the environmental impacts of substitute electric generating sources cannot be effectively assessed without estimating the amount of substitute generation that might be required.

When understood in the context of its administrative history, 10 C.F.R § 51.95(c)(2) does not circumscribe the discussion of need for power in a NEPA no-action alternative analysis. The license renewal rule initially proposed by the NRC in 1991 assumed the need for all the electric generating capacity then being provided by the nation’s nuclear power plants, presumed that relicensing them was preferable to replacing them with a different facility, and determined that no analysis of alternatives was needed.”¹⁶ A number of states expressed “strong concerns that the proposed rule would intrude adversely on traditional State regulatory authority over these matters” and that

designation of need for generating capacity and alternative energy sources as Category 1 (i.e. generic) issues would substantially eliminate public participation, would adversely affect independent State consideration of these matters, and would inadequately provide for use of current, project specific information.¹⁷

In other words, in the context of regulated electric systems, in which a state regulatory agency determines whether a particular generating facility is needed, states objected to language in the rule that could suggest that those state-specific and sovereign determinations of need would be

¹⁶ 56 Fed. Reg. 47,016, 47,023 (September 17, 1991).

¹⁷ Environmental Review for Renewal of Operating Licenses, Supplemental Proposed Rulemaking, 59 Fed. Reg. 37,724, 37,725 (July 25, 1994).

pre-empted by the NRC in its relicensing decisions.¹⁸

In response, the NRC promulgated 10 C.F.R § 51.95(c)(2), which provides “the supplemental environmental impact statement for license renewal is not required to include discussion of need for power.” It did so in recognition that “the issues of need for power and utility economics should be reserved for State and utility officials to decide.”¹⁹ Thus, that provision was not intended to address the analysis of the environmental impacts of the no-action alternative under NEPA but simply to clarify that the NRC will not grant or deny a renewal license based on NRC’s determination of whether or not the power is needed.²⁰

Therefore, 10 C.F.R. § 51.95(c)(2) does not prohibit Staff from discussing whether all of the electricity generated by Indian Point will need to be generated elsewhere when it analyzes what is likely to happen in the no-action alternative if Indian Point is not relicensed. Nor did Staff refrain from that discussion. Its no-action analysis included the possibility of reducing the need for Indian Point’s capacity through demand reduction measures such as conservation or energy efficiency. *See* FSEIS at 8-1, 8-28-29, 8-30, 8-37-39, 8-40-46, 8-59-60, 8-67, 8-71-72. Although the State challenges the adequacy and sufficiency of that analysis, and in particular Staff’s insistence that new or repowered natural gas generation must be constructed to replace

¹⁸ To address these concerns, the State proposed that the rule contain language that “the NRC’s findings with respect to need for generating capacity and alternative energy sources are only intended *to assist the NRC in meeting its NEPA obligations* and do not preclude the States from making their own determinations with respect to these issues” (emphasis added). *Id.* at 37,725. This language does not suggest, as Staff asserts (Staff SOP at 8), that New York wanted to bar discussion in the NEPA no-action analysis of whether all of Indian Point’s capacity needed to be replaced. Instead, as its explicit language indicates, New York wanted to ensure that any such discussion would not bar the State from making its own determinations regarding the need for power and alternative resources.

¹⁹ 61 Fed. Reg. 28,467, 28,484 (June 5, 1996).

²⁰ Staff’s more extensive analysis of the rule’s administrative history further supports the State’s analysis. Staff SOP at 7-11.

some part of Indian Point's capacity, Staff's discussion does not implicate 10 C.F.R.

§ 51.95(c)(2) and neither do the State's responsive testimony and exhibits, which it is surely entitled to submit in response to Staff's analysis.

Indeed, in the FSEIS, Staff agrees with some of the State's expert testimony about New York State's reduced need for power. For example, at page 8-42 of the FSEIS, Staff notes that in 2005:

NYSERDA estimated that its energy efficiency programs *had reduced peak energy demands in New York by 860 MW(e)* [and NYSERDA] further forecasted that the technical potential of its efficiency programs in New York would result in a cumulative 3800 MW(e)-reduction of peak load by 2012 and 7400 MW(e) by 2022

(emphasis added). Staff also concluded:

In addition to the currently anticipated peak load reductions resulting from the NYSERDA energy efficiency initiatives, additional conservation measures and demand-side investments in energy efficiency, demand response, and combined heat and power facilities *could significantly offset peak demand Statewide* (emphasis added).

FSEIS at 8-42. Although Staff acknowledges the State's success in reducing demand through conservation and efficiency, it inexplicably ignores that success in assuming that all of Indian Point's capacity will need to be replaced. This disconnect between facts and assumptions forms much of the basis for Contention NYS-37, and the State is entitled to the opportunity to disprove Staff's assumptions.

POINT II

ENTERGY'S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE NO ACTION ALTERNATIVE IS UNREASONABLE

In Contention 37, the State asserts that the FSEIS is inadequate "because it does not discuss the economics of the Indian Point Units in comparison to the economics of alternatives,"

and therefore “gives decision-makers no sense of which among the alternatives are likely to be deployed in what quantities in the event the no action alternative is pursued.”²¹

In its expert testimony and report, Entergy attempts to remedy this deficiency in the FSEIS by presenting an economic analysis of the likely alternatives to Indian Point and the environmental impacts of those alternatives.²² Entergy fails on both procedural and substantive grounds. First, a deficiency in the FSEIS cannot be cured by an after-the fact study which was not circulated for review and comment in accordance with procedures established to comply with NEPA. *See* Point III, *infra*. Substantively, Entergy’s analysis of likely replacement sources of power in the no-action alternative is not credible because it provides almost no role for renewable energy, conservation or new, clean and efficient natural gas fired combined cycle power plants. Instead, it concludes that old, dirty, coal and gas-fired generation will be the only sources of replacement energy until 2025, ten years after the second Indian Point unit would shut down under the no-action analysis.²³

If the NRC does not relicense Indian Point, *i.e.*, takes no action, then some of the power that the facility would have produced would come from somewhere else. The State estimates that energy efficiency and renewable resources have sufficient technical and economic potential to replace Indian Point's capacity and that at the least, renewable energy and conservation will play a large replacement role soon after Indian Point is closed.²⁴ Entergy claims the opposite — that all the replacement power will come from existing dirty and inefficient coal and natural gas

²¹ Contention NYS-37 at ¶ 58.

²² Entergy SOP at 24.

²³ Schlissel Rebuttal Testimony at 8-9, 12-13

²⁴ Pre-Filed Written Testimony of David A. Schlissel Regarding Contention NYS-37 (December 13, 2011) at 34-35.

plants until 2025, including plants that would otherwise be retired in 2015 but would continue to operate merely because Indian Point retired on schedule.²⁵ Entergy then analyzes the environmental impacts of relying solely on older fuel fired generation until 2025 and, not surprisingly, concludes that the FSEIS underestimates the severity of those impacts.

Entergy bases this claim on the testimony of three witnesses whose conclusions are derived almost solely from simulations performed using an unsuitable computer model that produced results that are not credible. Testimony of Entergy Witnesses Donald P. Cleary, David Harrison, Jr., and Eugene T. Meehan Regarding Contention NYS-37 (Energy Alternatives) (March 30, 2012) ENT000497 (“Entergy Testimony”). As the State’s witness David Schlissel explains in his rebuttal testimony, the National Energy Modeling System (“NEMS”), is designed to model the effects of proposed national policy alternatives, rather than the retirement of one or two specific generating plants. Entergy’s witnesses agree with that characterization of the purpose of NEMS.²⁶

Although NEMS is a widely used model for policy analysis that attempts to replicate systems in the entire United States and even portions of Canada, it offers only very simplified descriptions of the electric grid and the electric dispatch process in any one state, including New York. For example, generating units are dispatched in NEMS for only nine demand points or segments during a model year, instead of 8760 hours. Thus, the model does not provide a detailed or accurate picture of the dispatch of generating units in a state, and is susceptible to

²⁵ Entergy SOP at 24, Entergy Testimony at 58-60.

²⁶ Schlissel Rebuttal Testimony at 9-10; Entergy Testimony at 72, A88.

gross distortions of the consequences of a no action decision in this proceeding.²⁷ *See* examples at 13-14, *infra*.

Nor was there any reason for Entergy's witnesses to rely on NEMS. There are several electric system models that are routinely used for capacity expansion planning analyses or examining the economic and environmental impacts of retiring existing generating facilities, including GE-MAPS, Strategist, Market Analytics, and PROMOD. These models provide more detailed replications of the existing electric grids and the economic dispatch of existing generating facilities and are more appropriately used to model the effects of retiring only one or two units.²⁸ Entergy has not explained why it used NEMS rather than one of the more appropriate generation capacity analysis programs such as GE-MAPS, Strategist, Market Analytics, or PROMOD, even though two of these same witnesses previously used an appropriate program, GE-MAPS, to model the consequences of retiring Indian Point.²⁹

In the context of accurately analyzing the impacts of the no-action alternative, one of NEMS' major failings is its inability to model conservation or energy efficiency as a resource.³⁰ Because reducing electricity demand is analogous to replacing existing power, other models treat energy efficiency as a resource. NEMS cannot do that. The only way for NEMS to model the effects of additional energy efficiency in New York State is to reduce the energy forecast. However, Entergy did not reduce the energy forecast, either in the baseline to account for the State's "15 by 15" efficiency program, or in its analysis of the no-action alternative to account

²⁷ Schlissel Rebuttal Testimony at 10-12.

²⁸ *Id.* at 11-12.

²⁹ Entergy Testimony at 7, 9.

³⁰ Schlissel Rebuttal Testimony at 14-15.

for the availability of additional efficiency measures.³¹ Thus, Entergy's NEMS modeling could not have added additional energy efficiency, even if it were the least costly resource. This is a particularly glaring omission in an analysis of the potential need to replace Indian Point's power in the no-action alternative.

Entergy's NEMS results also predict that the only replacement power for Indian Point until 2025 is the continued operation of inefficient and dirty existing natural gas and coal plants that otherwise would have retired in 2015.³² This prediction is not credible. First, Entergy's NEMS analysis ignores the 2,000 MW of new natural gas generation proposed for completion between 2014 and 2017 in and near New York City.³³ Second, Entergy argues that existing fossil generation plants will provide all the replacement power for years after Indian Point is closed because their marginal costs are lower than the costs of new gas generation. Entergy, however, skews the analysis by basing the allegedly lower marginal costs of existing fossil generation on the reduced fuel use of new efficient gas plants and not the higher fuel use of the existing ones.³⁴

Finally, Entergy's NEMS results are facially unreasonable. For example, Entergy predicts that the first new generation capacity in response to the retirement of Indian Point at the end of the license period would be built in New England in 2025, and that the majority of the new generating capacity attributable to the retirement of Indian Point will be built in New England. This result is highly unlikely.³⁵ In particular, Entergy's prediction that the retirement

³¹ *Id.*

³² *Id.* at 12-13, 17-18.

³³ *Id.* at 26-27

³⁴ *Id.* at 18-19; Entergy Testimony, Table 1 at page 58

³⁵ *Id.* at 23-24.

of Indian Point would cause a small decrease in New England generation in 2029 and a 1400 MW increase in New England generation in 2030, but only a 300 MW increase in New York in the same year makes no sense. Indeed, Entergy's prediction is that in every year after 2029 Indian Point's retirement would cause more than twice as much new generation to be built in New England as in New York. These results are graphically depicted in Tables 1, 2 and 3 in the Schlissel Rebuttal Testimony.³⁶

Finally, Entergy's NEMS results predict that 408 MW of coal generation in New York State and New England will replace almost 18% of Indian Point's capacity.³⁷ This prediction has no basis in reality. In fact, coal generating units in both New York State and New England have reduced their generation or have been shut down as a result of competition from extremely low natural gas prices.³⁸

Entergy's NEMS predictions are both inconsistent with reality and patently illogical. The Board should not rely on them to evaluate the environmental impacts of retiring Indian Point on schedule.

POINT III

A NEPA DEFICIENCY MUST BE CURED THROUGH A SUPPLEMENT TO FSEIS THAT IS CIRCULATED FOR PUBLIC COMMENT, NOT THROUGH THE ADJUDICATORY RECORD

In order to cure a NEPA deficiency, NRC's NEPA-implementing regulations require that NRC Staff be directed to conduct a reasonable site-specific analysis, and to include an explanation of that analysis in a supplement to the FSEIS that is circulated for public comment

³⁶ *Id.* at 21-23.

³⁷ *Id.* at 17-18.

³⁸ *Id.* at 18.

before it is finalized. *See* 10 C.F.R. § 51.92(a) (“NRC staff will prepare a supplement to a final environmental impact statement . . . if . . . [t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”); 10 C.F.R. § 51.92(d) (“The supplement to a final environmental impact statement will be prepared in the same manner as the final environmental impact statement except that a scoping process need not be used.”). The regulations require that any FSEIS supplement should include whatever new and significant information was brought to light during the proceeding that was not analyzed or discussed in the FSEIS.

Entergy suggests, however, that an Atomic Safety and Licensing Board may rule that an FSEIS is supplemented by submissions of NRC Staff, the applicant, and intervenors during the hearing process.³⁹ *Id.* Entergy further argues that the determination of NRC Staff’s NEPA compliance should be based on the entire hearing record as whole, as opposed to the FSEIS alone. *Id.* Relying on *Louisiana Energy Services* (Nat’l Enrichment Facility), CLI-06-15, 63 N.R.C. 687, 707 n. 91 (2006), Entergy argues that, even if the FSEIS is found deficient, the Board can find that the record as a whole remedies the deficiency so that NRC Staff need not prepare a supplemental analysis. But that D.C. Circuit finding that supplementation of the FSEIS by the hearing record did not violate the Atomic Energy Act’s requirement that the EIS be prepared before the hearing was completed does not resolve the issue. Plainly, this method of supplementing the EIS violates NRC’s NEPA regulations. *See* 10 C.F.R. § 51.92; *see also Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, n.1 (D.C. Cir. 2007) (“Petitioners have not argued that the NRC’s method of supplementing the EIS violated its regulations implementing NEPA”).

³⁹ Entergy SOP at 15

In addition to violating NRC's NEPA regulations, Entergy's proposed method of curing NEPA deficiencies would undermine the very purpose of conducting an environmental analysis in an EIS that is circulated for public comment. First, it would not be clear to the decision-makers or the public which part of the "record as a whole" was curing the NEPA deficiency. Second, the information that was deemed to supplement the FSEIS would not have been analyzed in a meaningful way by NRC Staff. An EIS is meant to present all the pertinent environmental information in one document that contains the agency's analysis of that information. *See Minn. Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976) ("The detailed statement serves to gather in one place a discussion of the relative impact of alternatives so that the reasons for the choice of alternatives are clear.") If the public looks to the record as a whole, it will not be able determine what this pertinent information is or upon what information the agency based its decision. Third, under Entergy's proposed method, the public would not be given an opportunity to comment on the changes to the FSEIS, as NRC's NEPA-implementing regulations require. 10 C.F.R. § 51.92(f)(1) ("A supplement to a final environmental impact statement will be accompanied by or will include a request for comments . . ."). The purpose of providing an opportunity for public comment is both to allow the general public to be an active participant in the decisionmaking process and to inform agency decisionmaking. *Ohio Valley Environmental Coalition v. Hurst*, 604 F.Supp.2d 860, 870 (S.D.W.Va. 2009) (NEPA requires that agencies "disseminat[e] ... relevant environmental information for public comment so that the general public may be an active participant in the decisionmaking process."); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001) ("[A]gencies must take a 'hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information . . ."). CEQ

regulations underscore the importance of public review of NEPA analyses, and state that “public scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). For these reasons, deeming the FSEIS “supplemented” by the hearing record is not a valid cure for a NEPA deficiency.

Despite Entergy’s claim to the contrary, courts have consistently held that a supplemental NEPA analysis, prepared by agency staff and open to public comment, is the appropriate remedy for a NEPA violation. In particular, the Second Circuit held that “studies [prepared after the EIS was finalized] could not cure these particular inadequacies because they were [not included in an EIS supplement and were] not circulated for review and comment in accordance with procedures established to comply with NEPA.” *I-291 Why? Ass’n v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975). Likewise, the First Circuit has found “no indication in the [NEPA] statute that Congress contemplated that studies or memoranda contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate.” *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (finding that even if agency staff made an informed, good faith decision to reject a proposed alternative, they had violated NEPA’s procedural mandate by failing to explain that decision in the EIS).

Where an agency has violated NEPA, in addition to ordering a supplemental EIS, courts often enjoin the agency action at issue until the NEPA review process is completed. In *Natural Res. Defense Council v. Callaway*, the Second Circuit held:

The Navy should not be permitted to proceed with further dumping at the New London site until . . . the serious deficiencies in the EIS [are] remedied. ***Otherwise application of a “rule of reason” would convert an EIS into a mere rubber stamp for post hoc rationalization of decisions already made.*** If the spirit as well as the letter of NEPA is to have any

real meaning in this case, the Navy should prepare and circulate for consideration and comment a supplemental statement

524 F.2d 79, 94-95 (2d Cir.1975) (emphasis added). Because the FSEIS is deficient, NRC Staff must complete a supplement to the FSEIS to remedy the deficiency before Indian Point can be relicensed. The Board should not countenance Entergy's and NRC Staff's untimely attempts to supplement their economic and environmental analyses outside the required NEPA process, particularly regarding the environmental impacts of the no-action alternative.

CONCLUSION

For the reasons stated the Board should reject Entergy's no-action alternative analysis and find that NRC Staff's analysis is also deficient.

Respectfully submitted,

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