UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
ALL OPERATING BOILING WATER REACTOR LICENSEES WITH MARK I AND MARK II CONTAINMENTS	)	
AND	)	Docket Nos. EA-12-050 and EA-12-051
ALL POWER REACTOR LICENSEES AND HOLDERS OF CONSTRUCTION PERMITS IN ACTIVE OR DEFERRED STATUS	)	
(Fukushima-Related Orders Modifying Licenses)	)	July 20, 2012

PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITIONS FOR HEARING), LBP-12-14, July 10, 2012

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PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITIONS FOR HEARING), LBP-12-14, July 10, 2012

Pursuant to 10 C.F.R. § 2.341, Pilgrim Watch ("PW"), by and through its pro se representative, Mary Lampert hereby petitions the Nuclear Regulatory Commission ("Commission") to review, reverse, and remand the Memorandum and Order (Denying Petitions for Hearing), LBP-12-14, July 10, 2012 ("Decision").

The matters of fact and law raised in the Petition for Review were previously raised before the Atomic Safety Licensing Board ("Board").[1] In the Decision, the Board denied PW's two petitions for hearing to show that two orders[2] issued by NRC Staff on March 19, 2012 in response to the March 2011 Fukushima Daiichi power plant disaster should not be sustained. The challenged orders are EA-12-050, an Order Modifying Licenses With Regard To Reliable Hardened Vents ("Petition Vents"); and EA-12-051 an Order Modifying Licenses With Regard To Spent Fuel Pool Instrumentation ("Petition Pool").

I. INTRODUCTION

A. The Decision of Which Review is Sought

[1] Pilgrim Watch Request For Hearing Regarding Insufficiency Of Orders Modifying Licenses With Regard To Reliable Hardened Vents (April 2, 2012) ("Petition on Vents"); Pilgrim Watch Request For Hearing Regarding Insufficiency Of Orders Modifying Licenses With Regard To Reliable Spent Fuel Pool Instrumentation (April 2, 2012) ("Petition on Spent Fuel Pool Instrumentation"); see also Pilgrim Watch Request For Leave to Supplement Request for Hearing Regarding Insufficiency Of Orders Modifying Licenses With Regard To Reliable Hardened Vents (April 2, 2012); Pilgrim Watch Request For Leave to Supplement Request for Hearing Regarding Insufficiency Of Orders Modifying Licenses With Regard To Reliable Spent Fuel Pool Instrumentation (April 2, 2012) ; Supplements granted; Pilgrim Watch Reply To Answers To Pilgrim Watch Requests For Hearing (April 27, 2012), May 4, 2012; Pilgrim Watch Motion To Strike Staff Response (June 26, 2012), June 27, 2012 ; Pilgrim Watch Comments On Significance Of Staff Disclosures, July 3, 2012; Pilgrim Watch Motion For Leave To Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012; Official Transcript of Proceedings, NRC, Fukushima Related Orders Modifying Licenses, June 7, 2012, Neal Gross & Co.

[2] EA-12-050 Order Modifying Licenses With Regard To Reliable Hardened Vents, March 12, 2012; EA-12-051 Order To Modify Licenses With Regard To Reliable Spent Fuel Pool Instrumentation, March 12, 2012

The Decision *did not hold* that PW failed to meet the only hearing prerequisites set by the Orders themselves. The prerequisites were (1) a "person whose interest is adversely affected" (EA-12-050 9, 13; EA-12-051, 11) and (2) "address the criteria set forth in 10 CFR 2.309(d)." (EA-12-050, 13; EA-12-051, 13) The only issue it considered was whether PW's petitions for hearing should be denied because "PW raises issues beyond the scope of the proceeding." (Order, 4) The Board held that:

> [W]e need here consider only ... that [PW's] petitions raise issues beyond the scope of the proceeding. For it is clear on the basis of both judicial precedent that enforcement orders such as the two here-involved are not open to challenge in an adjudicatory proceeding on Pilgrim Watch's claim of inadequacy. (Order, 4, relying on *Bellotti v. NRC,* 725 F..2d 1380 (D.C. Cir. 1983))

The reasons given by the Board to support its decision have nothing to do with either requirements or the substance of the Orders. The Decision that PW cannot challenge these Orders is wrong. The AEA provides a right to hearing on whether an order provides adequate protection

A. Why the Decision is Erroneous

First, the Board repeatedly invokes *Bellotti* and its progeny to show that the Commission has the authority "to permit challenges solely on whether an order should be sustained." (Order, 5; see also 6 and 7) PW will assume that this is correct, but *PW's position is that the Orders should not be sustained - because PW would be better off without them - and that is precisely what the Orders themselves say is "the issue to be considered at such hearing."* (EA-12-050, 9; EA-12-051, 11))

Second, the plain language of the Orders is that "[i]f a hearing is requested by ... a person whose interest is adversely affected, the Commission *will* issue an Order designating the time and place of any hearings." (Orders, V, emphasis added) PW showed that its interest is

adversely affected by the Orders. The Board never found otherwise, and under the terms of the Orders themselves PW thus is entitled to a hearing at which the issue will be whether the orders should be sustained.

Third, the Board's reliance on *Bellotti* to deny PW a hearing overlooks *Bellotti's* clear statement that "Where the public health and safety are concerned, the right to a hearing is absolute." Nothing in *Bellotti,* or any other law or controlling decision, gives the NRC discretion not to grant a hearing here. The NRC has admitted that the status quo does not adequately protect the public health and safety and the issue is whether its recent Orders that do not meet the statutory standard either should be sustained.

Fourth, the Board's brief footnote (Order 9) relating to 10 C.F.R § 2.206 is clearly erroneous. The limited evidence that the NRC Staff provided the Board[3] showed that (with one possible exception) the NRC has not granted a petitioner the substantive relief it sought for 27 years, and the NRC's near 100% rejection rate is exacerbated by the fact that judicial review of Director's decisions is essentially impossible. At the very least, PW cannot be denied a hearing without being given the opportunity to show that 10 C.F.R § 2.206 in fact does not provide anything approaching "a meaningful avenue for seeking substantive relief." (Order, 9)

Finally, the Decision simply does not consider the key fact that sets this case apart from all of the prior opinions that the Decision cites. The NRC is *statutorily required* adequately to protect public health and safety. The Orders admit that the *status quo* does not do so. PW's Request shows that the Orders do not do so either. That is what PW's request for hearing is all about, and why

[3] PW was only permitted to comment on the significance of the staff's submissions. See Pilgrim Watch Comments On Significance Of Staff Disclosures, July 3, 2012; Pilgrim Watch Motion For Leave To Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012; Pilgrim Watch Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012; Memorandum And Order (Denying Petitions For Hearing), LBP-12-14, July 10, 2012, Additional Comments of Judge Rosenthal

PW is entitled to a hearing to show that these Orders should not be sustained. If these Orders are not sustained, under the applicable statutes the NRC has only two options - shut Pilgrim down, or require that it actually be operated in way that public health and safety are adequately protected. PW would be better off under either option. These simple facts, never mentioned in the Decision, are what set PW's request totally apart from *Bellotti* and its progeny. Unlike as in every one of the decisions cited by the Board, if these Orders are not sustained, the NRC will have no discretion to do nothing - it must take whatever steps are required to meet its statutory responsibilities.

C. The Commission Should Review the Decision

Fundamental principles and fairness require the Commission to review the Decision and record. This petition raises substantial and important questions of law, policy and fact that critically affect the public interest. The Board's legal conclusion conflicts with existing law and NRC regulations; and the only thing that could might be called a finding of fact - its footnote statement "that the record before the Board falls far short of rebutting the presumption that 10 C.F.R § 2.206 is a meaningful avenue for seeking administrative relief" - is erroneous. (Standards for Review 10 C.F.R. 2.341(a)(1))

The AEA provides a right to hearing on whether an order provides adequate protection; the APA provides for review of decisions that find an agency has fallen short of its statutory obligations; and it is the AEA Hearing that provides the record to make the APA review right meaningful. Whatever discretion the Commission may have to "limit the scope" of a hearing, it has no discretion to abrogate this right.

II. ARGUMENT: WHY THE DECISION IS WRONG

A. THE ISSUES RAISED BY PW ARE WITHIN SCOPE AND MATERIAL

The ASLB found that PW's Requests for Hearing were beyond the scope of the proceeding. It was wrong.

The terms of the Orders themselves define the scope of the hearing. (*See* Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290 n.6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976)); as even the Staff admitted. (Safford, Trans., 18)

As defined by the Orders, the issue for hearing is whether the Orders should be sustained. PW's position, short and simple, is that they should not:

> If, as PW contents, what the current orders require is not sufficient to "ensure adequate protection," the Order should not be sustained and the NRC is required to do something else to meet its fundamental obligations.[4]
>
> PW squarely addressed the issue whether the Order as it now stands, should be sustained/maintained. PW argued that it should not….[5]
>
> We will be better off without this order.[6]

Under the terms of the Orders, PW is entitled to have "the issue whether this Order should be sustained" considered "at such hearing." (Orders V) Whether the orders should be sustained is squarely within scope.

This single fact - that PW does oppose the Orders and has shown why they should not be sustained - shows why the Decision is wrong, and sets this case apart from every opinion on which the Board relies. In *Bellotti,* the Attorney General "[did] not oppose the issuance of the order." (Decision, 5) Neither did the petitioner *Maine Yankee* (Decision, 7: "the petitioner was not opposing the substance of the order"). In *Alaska Department of Transportation* (*see*

[4] Pilgrim Watch Reply to Answers to Pilgrim Watch Requests for Hearing (April 27, 2012), 9
[5] Id.
[6] Trans., 60

Decision, 6) and *Fermi* (*see* Decision, 7), the petitioners did say that orders should not be sustained, but neither showed that it would be better off without the order than with it. What these prior petitioners asked was not material to whether the orders should be sustained.

That is not the situation here. As shown in PW's request, said at the June 7 Pre-Hearing before the Board that led to the Decision, and discussed below, the principal reasons that the Orders should not be sustained are material - they show that the Orders are insufficient to satisfy the NRC's statutory obligations, and that the factual findings in the Orders suggesting the contrary are wrong. As Mr. Roisman said at the June 7 Pre-Hearing:

> [I]f we think these factual findings in this order are wrong, where is the forum for us to talk about them? It was created by the staff in this order. It said come on over. Here we are. We are ready to talk. (Trans, 105)

Mr. Webster made the same point:

> The commission…has directed us to this very proceeding. In the order, the staff state(s) very clearly that if you are a non-licensee and you think this order should not be sustained, you should come to this proceeding."(Trans., 69) and, "the point is that the order directs us here. (Trans., 70)

The Board Decision that *Bellotti* forecloses PW's right to a hearing on what the Commission Orders themselves say is the issue - whether the Orders should be sustained - is wrong as a matter of fact and law. Nothing in *Bellotti* requires that result. Nothing in *Bellotti* or any other decision of which PW knows allows the NRC to avoid its responsibilities under the Atomic Energy Act by defining the scope of a hearing in a way that forecloses any examination into whether Commission has met its statutory responsibility.

"Reasonable assurance of adequate protection of public health and safety ... are the fundamental NRC regulatory objectives." (Order II) They are what the statutes require.

PW's request for hearing showed, and PW has the right to a hearing to prove, that the Orders do <u>not</u> provide the statutorily required protection of the public health and safety, even in the areas that the

Orders say that they do. PW also has a right to a hearing to show that the Orders should not be sustained because the supposed facts on which the Orders are based are wrong; and that, contrary to the NRC's factual conclusions, what the Orders require will *not* provide adequate protection to public health and safety. PW's request repeatedly said that they did not.[7] At the Pre-Hearing, Judge Baratta noted PW is within its rights to challenge the facts because the licensee agreed to the orders after the notice of hearing was published[8].

B. PW Will Show Why the Orders Should Not be Sustained

1. The Status Quo Does Not Protect the Public Health and Safety

Unlike any other Order of which PW is aware, and particularly unlike any Order involved in any of the prior decisions on which the Decision relies, the Orders here admit that the status quo is not sufficient to protect the public health and safety, e.g.:

> Reliable hardened venting systems in BWR facilities with Mark I and Mark II containments *are needed to ensure that adequate protection of public health and safety is maintained* (EA-12-050, 4, italics added)
>
> *The Commission has determined that ensuring adequate protection of public health and safety requires* all operating BWR reactors with Mark I and Mark II containments have a reliable hardened venting capability for events that can lead to core damage (Ibid, 6, italics added)
>
> Accordingly, the NRC has determined that *these measures are necessary to ensure adequate protection of public health and safety* (Ibid, 7, italics added)
> NRC's assessment of new insights from the events at Fukushima Dai-ichi leads the NRC staff to conclude that *additional requirements must be imposed* on Licensees and CP holders to increase the capability of nuclear power plants to mitigate beyond-design-basis external events. These additional requirements

[7] PW Pleadings EA-12-050 stating and showing that order does not protect public health and safety: Request for Hearing, 2-3; 7, Section C; 8, Section E; 24. PW Pleadings EA-12-051 stating and showing that order does not protect public health and safety: 1-5; 11; 14; 19; attachments chronicle public health & safety risks densely packed pool, example Exh. 1: Report to The Massachusetts Attorney General On The Potential Consequences Of A Spent Fuel Pool Fire At The Pilgrim Or Vermont Yankee Nuclear Plant, Jan Beyea, PhD., May 25, 2006. Pilgrim Watch Reply To Answers To Pilgrim Watch Requests For Hearing, May 4, 2012,(April 27, 2012), subsection EA-12-050 & EA-12-057- Common Adverse Effects- backfitting & socio-psychological factors, pgs., 6-7.

[8] Transcript: Admin. Judge Baratta, 31

> represent a substantial increase in the protection of public health and safety" (EA-12-051, 4, italics added)
>
> These new requirements provide a greater capability, consistent with the overall defense-in-depth philosophy, and therefore *greater assurance of protection of public health and safety* from the challenges posed by beyond-design-basis external events to power reactors. (Ibid, 7-8, italics added)

Any possible doubt that the NRC has recognized that status quo fails to meet statutory requirements is dispelled by the Orders' statement that "the Commission may act in accordance with its statutory authority under Section 161 of the Atomic Energy Act of 1954, as amended, to require Licensees and CP holders to take action in order to protect health and safety and common defense and security" (Ibid, 5) and "that the public health, safety, and interest require that this Order be made immediately effective." (Ibid, 7)

Equally important, the NRC explains in the Orders that they are exempted from the Backfit Rule because, as is the case in these Orders, "new information may reveal that additional requirements are warranted. In such situations, the Commission may act in accordance with its statutory authority under Section 161 of the Atomic Energy Act of 1954, as amended, to require Licenses and CP holders to take action in order to protect health and safety and common defense and security." (Orders at 5) In other words the NRC justified issuing these Orders because public health, safety and security now are not assured now based on the real-world experience of Fukushima.

2. **The Orders Do Not Satisfy the NRC's Statutory Obligations, and the Factual Basis for the Orders is wrong**

The Orders do not consider quite obvious problems that must be addressed if the public health and safety is to be adequately protected, and their factual assumption that what the Orders require will do so is wrong. PW's Requests for Hearing repeatedly said and showed that the Orders were "not sufficient

to protect public health, safety and property.[9]" The exact wording in the contentions themselves said so;[10] and the bases provided factual support.

For example, the assumption in EA-12-050 that the public health and safety will be protected simply by providing what it calls "a reliable hardened vent" fails to protect public health, safety and property because licensees are not required to do anything to insure that a release from such a "hardened" DTV does not contain radioactive materials that would clearly have an adverse effect on the public health in the event that it is necessary to release; and to assure that operators follow orders to open the vent. As in Japan, even properly trained operators here are likely to decide not to open the vent when they should because they fear the effects offsite of significant unfiltered release and onsite on workers capability to perform operations resulting in containment failure and significant releases.

[9] PW Pleadings EA-12-050 stating and showing that order does not protect public health and safety: Request for Hearing, 2-3; 7, Section C; 8, Section E; 24. PW Pleadings EA-12-051 stating and showing that order does not protect public health and safety: 1-5; 11; 14; 19; attachments chronicle public health & safety risks densely packed pool, example Exh. 1: Report to The Massachusetts Attorney General On The Potential Consequences Of A Spent Fuel Pool Fire At The Pilgrim Or Vermont Yankee Nuclear Plant, Jan Beyea, PhD., May 25, 2006. Pilgrim Watch Reply To Answers To Pilgrim Watch Requests For Hearing, May 4, 2012,(April 27, 2012), subsection EA-12-050 & EA-12-057- Common Adverse Effects- backfitting & socio-psychological factors, pgs., 6-7.

[10] EA-12-050 Request Contentions at 3: "Based on new and significant information from Fukushima, the Order Modifying Licenses With Regard To Reliable Hardened Containment Vents issued March 12, 2012 (EA-12-050) is *insufficient to protect public health, safety and property* because it lacks a requirement for licensees to install filters in the direct torus vents (DTVs); (2) Based on new and significant information from Fukushima, the Order Modifying Licenses With Regard To Reliable Hardened Containment Vents issued March 12, 2012 (EA-12-050) is *insufficient to protect public health, safety and property* because it does not require the hardened DTV to be passively actuated by means of a rupture disc, so that neither water nor electrical supply is needed and operator intervention is not necessary to actuate the system." (Emphasis added).
EA-12-051 Request Contention at 1:" Based on new and significant information from Fukushima, the Order To Modify Licenses With Regard To Reliable Spent Fuel Pool Instrumentation issued March 12, 2012 (EA-12-051) is *insufficient to protect public health, safety and property bec*ause it lacks a requirement for licensees to re-equip their spent fuel pools to low-density, open-frame design and storage of assemblies >5 years removed from the reactor core placed in dry casks." (Emphasis added)

The Order also fails adequately to protect the public health and safety because it does nothing to insure that that operator intervention is not needed to actuate a DTV. Vents can fail to open due, for example, to human error, equipment failure and high radiation fields; resulting in containment failure. During the NRC May 2, 2012 Public Meeting Order EA-12-050 Mary Lampert asked the technical staff another very straightforward question, whether they saw any downside to rupture discs, qualified as paired with filters. Robert Dennig, Branch Chief Technical Staff Containment and Vent Branch NRR, responded, "No." [11] One possible solution to this problem is suggested in PW's request: a DTV that is passively actuated by means of rupture disc, so that neither water nor electrical supply is needed and operator intervention is not necessary to actuate the system."[12]

The assumption in EA-12-051, that the public health and safety will be protected with respect to spent fuel pools simply by providing what it calls "reliable instrumentation" to measure the water level in the pool, similarly "is insufficient to protect public health, safety and property." The Order does nothing to require licensees to take any steps to reduce the density of spent fuel assemblies to, e.g., their original open frame, low density design. The Order's focus only on spent fuel pool instrumentation fails to address the real problem.

PW provided expert reports that showed: the vulnerability of spent fuel pools, especially in reactors with crowded, elevated pools inside reactor buildings; potential causes of water loss; likely barriers to supply sufficient water to prevent a pool fire; and consequences. The Massachusetts Attorney General's Consequence analysis of a spent fuel pool fire at Pilgrim (provided in PW's April 2 Request for Hearing, Exhibit 1, as an example) estimated up to $488 billion dollars in damages and 24,000 latent cancers from the release of Cesium-137. A highly

[11] Pilgrim Watch Reply to Answers to Pilgrim Watch Requests for Hearing (April 27, 2012), May 4, 2012 at 3-4
[12] Ibid at 16, Basis (Section B, 16-24)

significant real-world lesson from Fukushima showed that despite a severe earthquake, tsunami and total loss of electric power, the dry casks did just fine - no adverse effects. However, fear of a spent fuel pool fire prompted the U.S. government to recommend U.S. citizens within 50 miles of Fukushima to evacuate.

PW's request said that one potential way to approach this problem would be to require licensees to re-equip their spent fuel pools to low-density, open-frame design and to store assemblies >5 years removed from the reactor core in dry casks. The NRC might come up with some other solution, but EA-12-051's only requirement is spent fuel pool instrumentation to provide information about the pool's water level. This does not come close to providing the required assurance. Requiring operable fuel and oil gauges in automobiles may help you know that disaster is about to happen, but just as there is no guarantee that there are always service stations along the route when the gauge reads empty there is no reasonable assurance that the over-crowded pool can be refilled when the proposed "reliable" gauges show that the water level has dropped. (PW Request Hearing, 14-17)[13]

The NRC admits that the status quo does not adequately protect the public health and safety. Unless the NRC requires licensees such as Pilgrim to do more than the Orders require, that will continue to be the case.

[13] The Union of Concerned Scientists identified another problem with the NRC's apparent plan simply to add water to spent fuel pools in beyond-design events in boiling water reactors with Mark I and Mark II containment designs if the instrumentation showed that the water level had dropped: "At these facilities, the spent fuel pool is located within the reactor building, and all the emergency pumps that protect the reactor core from overheating are located in this building's basement. Water evaporating from a boiling spent fuel pool would, after condensing, drain to that basement. In addition, if the rate at which water was sprayed into a spent fuel pool exceeded the rate at which water was draining from it, the pool would overflow and drain to the basement as well. Such an artificial tsunami could wreak as much havoc as did the natural tsunami at Fukushima by submerging and thus disabling vital emergency equipment. In other words, the operators could be forced to choose between two evils: (1) turn on the water sprays to save the spent fuel, but risk losing the reactor core; or (2) save the reactor core by not turning on the water sprays, but risk losing the spent fuel. The operators have to be provided with better options than picking which irradiated fuel to sacrifice."

C. PW is a "Person Whose Interest Is Adversely Affected"

Although the Decision did not address whether PW is a "person who interest is adversely affected" as stated in the Orders, PW anticipates that the NRC Staff and Entergy, incorrectly, will argue that PW was not. They may also argue that PW did not meet the requirements of 10 CFR 2.309.

Taking the latter first, there can be no serious doubt that PW has satisfied (and met) the standing requirements of 2.309(d).[14] Mary Lampert is PW's director and pro se representative. Her primary residence is approximately 6 miles from Pilgrim across open water. The reactor is visible from the Petitioners' property. The Petitioner also owns two secondary properties in Boston, approximately 37 miles from the reactor and about the same from Seabrook NPP. Any significant accident at either would "adversely affect" her in the extreme, and she is indisputably at risk because the NRC has not met its statutory obligations. It could not be clearer from the Orders themselves that their only reason for being is the consequences of the "release of radioactive materials" (77 Fed. Reg. 10683, 16092, 16100); and there can be no question that an accident at an operating nuclear reactor with a spent fuel pool and a Mark I or Mark II containment is likely to cause off-site consequences to PW's representative, and others within and beyond 50 miles of any such reactor.

The Commission decisions following *Bellotti* and cited by the Board say that the "test" of whether a party such as PW is "adversely affected" within the meaning of the Orders is whether it would be better off without the order. *Maine Yankee,* 59 NRC 56, 60: "Would the state be better off if the order was vacated"; *Fermi (Detroit Edison),* CLI-10-03, 5: "Petitioner must

[14] Neither of the Orders referred to any other provision of 2.309. The Staff's argument to the Board that it simply forgot to include the rest of 2.309 when it wrote the orders, and that the Board should rewrite the orders to include what the Staff "forgot,"(Trans., NRC Staff Ms. Safford, 13) approaches the ludicrous. The Orders are what they are.

provide factual support for the claim .... that they would be better off if the order were vacated"; *Alaska Department of Transportation* CLI-04-26, 7: "To decide whether the order should be upheld, the pertinent time contrast is between the petitioner's position with and without the order in question." See also Trans 17, NRC attorney: "would the petitioner be better off if the order is vacated."

Once again, the decisions on which the Board relied are inapplicable here - and again for a very simple reason. In each of the cases cited by the Board, the petitioner would not have been "better off" of the order was not sustained. If the Board had not sustained the order(s) in question there would be no benefit to the petitioner. In each case the NRC could choose, within its essentially unreviewable discretion, to do nothing at all (See, e.g., *Alaska,* CLI-04-46, 11, 13: "The NRC Staff has considerable latitude in choosing enforcement weapons." "The precise enforcement sanction to impose is within the Staff's sound discretion.") The Supreme Court decision in *Heckler v. Chaney,* 470 U.S. 821 (1985) might provide justification for the decisions in which no statute (or indeed any NRC regulation) required the NRC to do more than the original order at issue; it provides no justification for the Decision here.

Here, if the Orders are not sustained, the NRC Staff might have some latitude in choosing what "weapons" are required adequately to protect the public health and safety, but as said above it would have to meet its mandatory non-discretionary duty adequately actually do so. If the Board finds, as it should, that the present Orders do not protect the public health and safety and does not sustain them, the NRC will have only two options: under the law it must either shut the reactors down or go back to the drawing board and order "fixes" that will meet its statutory obligations. (Roisman Trans., 102) Whether or not the "baby steps" that the Orders propose might marginally create a better situation than what exists today is not important. The NRC is

not meeting its statutory obligations today, and those "baby steps" do not meet the NRC's statutory requirements either. No matter which of its statutorily obligated paths the NRC takes - shut it down or do its job and actually fix the core problems learned from the real-world experience at Fukushima - PW will be better off without these Orders than with them.

If this Board sustains these Orders, there is no reasonable assurance that the NRC will do anything more to protect the public health and safety, at least in the two areas that these Orders address. Entergy and the Staff may argue that the NRC will get there eventually. But an undefined step-wise process, that might incrementally add unknown and unspecified fixes over time, does not protect public health and safety because it leaves PW without the required protection of public health and safety as required for too long. (Webster, Trans., 63, 80)

B. BELLOTTI AND ITS PROGENY DO NOT GOVERN THIS CASE

Nothing in *Bellotti* or its progeny required the Board to deny PW a hearing on the issue of whether the Orders should be sustained. As said above, the circumstances here are quite unlike, and raise issues quite unlike, anything in *Bellotti* or any other case of which PW is aware. PW knows of no case in which the NRC admitted that the status quo did not adequately protect the public health and safety, and the issue was whether to sustain an order that did not meet the statutory requirement either.

In *Bellotti,* the petitioner did <u>not</u> ask that the order at issue not be sustained ("the Attorney General would be an affected person only if he opposed issuance of the Order, which he does not"**)**, the Attorney General did not assert that the NRC had not met its statutory duty, and the issue was <u>not</u> whether what the Orders required would meet the statutory standard.

Further, in *Bellotti, Fermi, Alaska Department of Transportation, Maine Yankee* and every other case of which PW is aware, even if the Board had not sustained the order(s) there at issue, the NRC could chose, within its essentially unreviewable discretion, to do nothing at all (See, e.g., ADOT, CLI-04-26: "the precise enforcement sanction to impose is within the Staff's sound discretion") That is the major reason that the petitioners in those cases did not show that "they would be better off in the absence of the Staff Order." (*Fermi,* CLI-10-03, 4) The NRC here has no such discretion. Its nondiscretionary statutory duty is to provide reasonable assurance that public health and safety are protected.

PW, like citizens similarly adversely affected by these generic orders, "is being harmed because it has a right to adequate protection under the order." (Trans, Webster, 62). It is adversely affected because these Orders are not sufficient to cure the NRC's admitted failure to protect the public health and safety. Unlike in *Bellotti, ADOT* or *Fermi,* PW has "provide[d] factual support for their claim that injury could be addressed by a favorable Board ruling; that is that they would be better off if the order were vacated." (*Fermi,* CLI-10-03, 5) If the orders in *Bellotti, ADOT* and *Fermi* were not sustained, the NRC could (and likely did) exercise its discretion and choose to do nothing. Here, choosing to do nothing is not an option. Exactly what steps the NRC would choose to take to provide the protection of the public health and safety that the statutes require would, to be sure, somewhat discretionary. But it has no discretion not to take those steps and actually satisfy its duty to provide adequate protection of the public health and safety. As already said, if these Orders are not sustained, the NRC's only choices are to shut the plants down or take steps necessary to provide what the statutes require. In either event, PW would be better off.

Finally, and most important, nothing in *Bellotti* and its progeny could or should have led the Board to extend those cases as it had to do to deny PW its right to a hearing. As already said, this proceeding requires the NRC to act to meet its nondiscretionary statutory obligations to take actions if these Orders are not sustained.

Section 189(a) of the Atomic Energy Act provides that "[i]n any proceeding …for the issuance of modification or rules dealing with the activities of licensees, … the Commission shall grant a hearing upon the request of any person whose interest may be effected by the proceeding, and shall admit any such person as a party to such proceeding." In *Bellotti,* Judge Bork recognized that "[p]ublic participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare" (*Bellotti,* ¶11); and *none* of the four reasons on which he relied to deny the Attorney General a hearing are applicable here.

First, Judge Bork said that the Attorney General "would be an affected person only if he opposed issuance of the Order, which he does not." PW has made abundantly clear that it does "oppose the issuance of" the Orders and says that they should not be sustained.

Second, Judge Bork (and NRC counsel at the June 7) recognized the NRC's interest allocating its resources (*Bellotti*, ¶8; Stafford, Trans. 35-36); that concern is similarly absent here. The NRC has a statutory mandate to direct its resources to adequately protecting the public health and safety. PW, unlike the petitioners in *Bellotti* and the other cases cited by the Board, is asking only that the NRC do what it is required to do - it does not ask the NRC to allocate any resources to discretionary activities.

Third, Judge Bork (and again NRC counsel at the June 27 hearing) pointed to the potential for "virtually interminable, free-ranging investigations" (*Bellotti,* ¶6, Stafford, Trans. 35, 37); again are not a concern here. PW does not say that anyone should be free to litigate every

possible concern. All PW asks is the right to show that an Order should not be sustained where it fails adequately protects the public health and safety, particularly in circumstances such as those here where the NRC has admitted that the status quo does not do so. Recognizing that PW has a right to a hearing in this situation will not open any floodgates.

Finally, Judge Bork justified his decision on his belief that, because of 10 C.F.R § 2.206, "Petitioner Bellotti is in no sense left without recourse." (*Bellotti,* ¶9) That belief may have been justified in 1983, but subsequent events prove it wrong.

First, when Judge Bork wrote his decision in *Bellotti*, "Commission denials to institute proceedings under section 2.206 [were] subject to judicial review." (*Bellotti,* ¶9) Today, the decision to grant or deny a 2.206 petition rests with the Staff. The Commission will not review that decision, and as a largely as result of the Supreme Court's 1985 decision in *Heckler v. Cheney,* 470 U.S. 821 (1985), the Courts will not review it either. The Commission's own Practice Manual makes its position clear[15]:

> The decision of the Staff to take or not take enforcement action pursuant to section 2.206 is purely discretionary -- it is not subject to review by the Commission (except on its own motion) or by courts, even for abuse of discretion.

Second, and as discussed in more detail below, the Staff itself has proved that Sec. 2.206 does not provide a viable avenue for relief.

C. 10 C.F.R. § 2.206 - NOT A VIABLE OR APPROPRIATE AVENUE FOR RELIEF

The evidence before the Board showed that, with one possible exception, the NRC has not granted a section 2.206 petitioner the substantive relief it sought for at least 27 years; and the NRC Staff's near 100% rejection rate is exacerbated by the fact that any review of Director's

[15] NUREG-0386, Digest 15, NRC, General Matters, 143

decisions is essentially impossible.[16] The evidence at the Pre-Hearing also showed other reasons that section 2.206 is not a viable option for PW here.

1. The NRC's Record on Section 2.206 Petitions.

On May 17, 2012, Judge Rosenthal issued an order in which he "directed the Staff to provide the Board with a list of those section 2.206 petitions filed with it since January 1975 (the birth of the agency) in which substantive relief had been sought and granted." (Decision, Additional Opinion of Judge Rosenthal, 2, underlining Judge Rosenthal's) The Staff's first response to the Board's Order of May 17 said that the requested substantive relief was granted in only 2 of the 387 Director decisions that the Staff reviewed, but that 140 had been granted in part. (Id.) Judge Rosenthal's "examination of one of the two items that the Staff represented to be the grant of full substantive relief" showed that was not the case in at least one of the two.

In a later filing, Entergy pointed to four petitions as to which Entergy said substantive relief had been granted[17]. PW showed that this was not true in any of the four[18].

PW is at a loss to understand how a majority of the Board found "that the record before the Board falls far short of rebutting the presumption that 10 C.F.R §2.206 is a meaningful avenue for seeking administrative relief." Judge Rosenthal did not understand how either:

> But at least where truly substantive relief is being sought (i.e., some affirmative administrative action taken with respect the license or licensee) there should be no room for a belief on the requester's part that the pursuit of such a [§2.206] course is

[16] Pilgrim Watch Comments On Significance Of Staff Disclosures, July 3, 2012; Pilgrim Watch Motion For Leave To Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012; Pilgrim Watch Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012; Memorandum And Order (Denying Petitions For Hearing), LBP-12-14, July 10, 2012, Additional Comments of Judge Rosenthal

[17] Entergy's Comments on NRC Staff Response to the Board Order Regarding Petitions Under 10 C.F.R § 2.206, July 3, 2012

[18] Pilgrim Watch Motion For Leave To Reply To Entergy's Comments On NRC Staff Response To The Board Order Regarding Petitions Under 10 C.F.R § 2.206 (July 3, 2012), July 10, 2012

> either being encouraged by Commission officialdom or has a fair chance of success. (Id. 7)

Judge Rosenthal was correct. "[T]he question here is ....whether in practice, petitions filed under that section have often, if ever, provided truly substantive relief (i.e., requested action of consequence taken against a licensee or license. On that score the record must speak for itself." (Id.) And that record utterly fails to support, and is in fact directly contrary to, the majority view. On the record, the Commission has no choice but to conclude that any "factual finding" that "§2.206 is a meaningful avenue for seeking administrative relief" is clearly erroneous.

2. A 2.206 petition is about licensee compliance with regulations. (Webster, Trans., 67) It has nothing to do with whether an NRC Order fails to meet the NRC's statutory obligations and corrects the admittedly inadequate current protection of the public health and safety.

3. NRC Staff provided another reason that a 2.206 petition is not an option for PW:

> One of the impediments here and by virtue of the regulation we are in a current adjudicatory proceeding on this matter. So a 2.206 petition could either be held in abeyance or rejected on the grounds that it is currently being adjudicated in another forum…for example, the issue of the filters on the vents. (Safford, Trans., 93-94)

4. Rule Making Petition: A request for rule-making is also not an option either. As Entergy said "we all know how long the NRC … can take with rule-making." (Stenger, Tr. 56)

5. Backfits: The Staff or Entergy may suggest that later "backfits" are a solution. They are not. The Commission's later consideration of filters, rupture discs and low-density, open-frame pool storage as potential backfits are likely to be found not cost effective. This is because the guidelines for how the NRC conducts cost-benefit analyses are rooted in a *pre-Fukushima* way of thinking and assumptions so that there is little chance that any regulatory action based on a post-Fukushima understanding of risk, modeling and offsite consequences

would pass the test. This is because the NRC put on the back burner modifying the currently outdated cost-benefit analysis guidelines to incorporate lessons learned from Fukushima *before* using such an analysis to assess cost and benefits of recommended upgrades to safety requirements until *after* all the other recommendations have been addressed. This has created a pattern of circular reasoning. It further underscores the importance of a full and fair hearing on EA-12-050 and EA-12-051. Absent changes to the orders at this stage, the public's interest is adversely affected and likely to remain so. Here, under the law, the NRC must provide adequate protection of the public health and safety – no matter what any cost-benefit analyses, rooted in a pre-Fukushima way of thinking and assumptions might show.

III. CONCLUSION

The foregoing shows clearly that PW fully met the hearing prerequisites established by these Orders that alone govern the scope of the proceeding, and that nothing in *Bellotti* or its progeny permits or requires this Board to deny PW its right to a hearing; and clearly demonstrated that 10 C.F.R. § 2.206 is not an option for redress of PW's concerns and neither is a rule making petition.

The Board decision effectively makes the entire hearing process a one-way street. Licensees trying to save money can say that less is required adequately to protect the public health and safety, but the public cannot say that the statute requires more. That certainly was not and is not the intent of the AEA.

Under the AEA, and the explicit terms of these Orders, PW has a right to a hearing to prove that the present Orders do not protect the public health and safety and should not be sustained. PW will be better off without these Orders than with them.

The Orders invited us here. There are no other viable options for redress. The Orders do not satisfy NRC's duty; and that neither 2.206, rule change petitions nor backfits are viable options. Also we showed that a step-wise process, incrementally adding fixes over time, does not protect public health and safety because it leaves PW without the required protection of public health and safety as required for too long. (Webster, Trans., 63, 80)

The AEA provides a right to hearing on the issue here - whether Orders that do not satisfy the NRC's mandatory, nondiscretionary, statutory duty should be sustained. The APA provides for review of decisions the leave an agency short of meeting its statutory duty. The NRC must provide the hearing required by the AEA to make the APA review right meaningful.

The NRC cannot hide behind administrative procedures to avoid these AEA and APA statutory requirements. Neither can it hide behind *Bellotti* and its administrative procedures to avoid satisfying its own duty to protect the public health and safety. This is an important and material issue. Fukushima has shown, as the NRC admits, that the NRC is not in compliance with its statutory obligations now. These Orders do not bring it into compliance; and for this reason PW has a right to a hearing to show that the Orders should not be sustained.

Last, we respectfully direct the Commission's attention to what Atomic Safety and Licensing Board Judge Michael Farrar said in his concurring opinion in the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility) June 27, 2008:

> **...** [I]ntervenors' right to a hearing ... is an empty promise unless there is an opportunity to be heard "at a meaningful time and in a meaningful manner. It is in that spirit that this concurrence respectfully suggests a need for Commission directives or policies that would enable agency adjudications to proceed differently when circumstances call for it. Specifically, those adjudications should be conducted in a way that more nearly assures that the agency's hearing process - one of the means by which nuclear safety is promoted and the natural environment protected makes the hearings mandated by the Atomic Energy Act "meaningful."

Petitioners, on behalf of the public interest, trust that Board will see not only that the Board's Decision should be reversed, but also the wisdom in Judge Farrar's analysis.

Respectfully submitted,

(Electronically signed)

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