

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
	)	December 23, 2013

**ENTERGY’S ANSWER OPPOSING STATE OF NEW YORK MOTION TO REOPEN
THE RECORD AND FOR RECONSIDERATION OF CONTENTION NYS-12C**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.323(c), 2.326 and 2.345(b), Entergy Nuclear Operations, Inc. (“Entergy”) files this Answer opposing the State of New York’s (“New York”) Motion to Reopen the Record and For Reconsideration of Contention NYS-12C (“Motion”), dated December 7, 2013.¹ Therein, New York requests that the Atomic Safety and Licensing Board (“Board”) take the extraordinary action to reopen the record and reconsider a portion of its partial initial decision on Track 1 contentions,² which resolved New York’s challenge to the accuracy of certain elements of the severe accident mitigation alternatives (“SAMA”) analysis for Indian Point Energy Center (“IPEC”)³ in favor of the Nuclear Regulatory Commission (“NRC or Commission”) Staff.⁴ The sole basis for New York’s Motion is purported new evidence, namely, the NRC Staff’s use of a 365-day value for the decontamination time (“TIMDEC”) input to the

¹ Notwithstanding the 10-page limit for responses to motions for reconsideration specified in 10 C.F.R. § 2.323(e), the Board has stated that all motions and answers to motions in this proceeding are subject to a 25-page limit. *See* Scheduling Order, slip op. at 6 (July 1, 2010) (unpublished). In addition, New York’s reconsideration request is embedded in a motion to reopen. Accordingly, Entergy submits that its Answer does not exceed applicable page limitations.

² *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-13-13, 77 NRC ___, slip. op. (Nov. 27, 2013) (“LBP-13-13”).

³ *See id.* at 260-293.

⁴ Motion at 1, 7.

MELCOR Accident Consequence Code System Version 2 (“MACCS2”) analysis conducted as part of a post-Fukushima action item (the “Spent Fuel Consequence Study”).⁵

As demonstrated below, the Motion is untimely in that the cited information was publicly available beginning in June 2013—months before the recent Board decision and closure of the record on Track 1 contentions. Thus, it is far too late for New York to now seek to reopen the record on NYS-12C. Moreover, the TIMDEC input value used in the Spent Fuel Consequence Study is irrelevant and immaterial to the Board’s merits ruling on Contention NYS-12C and more broadly to SAMA analyses prepared for license renewal under the National Environmental Policy Act (“NEPA”) and the Commission’s regulations at 10 C.F.R. § 51.53(c)(3)(ii)(L). As the Commission has repeatedly held, the reference to SAMAs in Part 51 of the NRC’s regulations applies to reactor accidents and not spent fuel pool accidents.⁶ Accordingly, New York has failed to satisfy the very high standards for either reopening the record or reconsideration of the portions of LBP-13-13 related to Contention NYS-12C, and the Board should deny the Motion in its entirety.

⁵ See Draft Report, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor at 160 (June 2013), *available at* ADAMS Accession No. ML13133A132; NRC Staff SECY-13-0112, Enclosure 1, Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor at 160 (Oct. 9, 2013), *available at* ADAMS Accession No. ML13256A339. The draft and final Spent Fuel Consequence Study were added to the NRC’s ADAMS document management system on June 24, 2013 and October 23, 2013, respectively.

⁶ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 21-22 (2001) (holding that 10 C.F.R. Part 51’s reference to “severe accident mitigation alternatives” applies to nuclear reactor accidents, not spent fuel storage accidents and rejecting a contention requesting consideration of mitigation alternatives on the issue of onsite fuel storage at the license renewal stage); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 21 (2007), *aff’d on other grounds sub nom., Mass. v. U.S.*, 522 F.3d 115 (2008) (“As we explained in *Turkey Point*, it is not necessary to discuss mitigation alternatives when the [Generic Environmental Impact Statement] has already determined that, due to existing regulatory requirements, the probability of a spent fuel pool accident causing significant harm is remote.”); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 312 (2010) (stating that claim that “SAMA analysis is deficient for failing to address potential spent fuel pool accidents” falls “beyond the scope of NRC SAMA analysis and impermissibly challenges [Commission] regulations”), *petition for recons. denied*, CLI-10-15, 71 NRC 479 (2010); see also *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC 534, 570 (2011), *rev’d on other grounds*, CLI-12-8, 75 NRC 393 (2012) (rejecting arguments regarding spent fuel risks as outside the scope of SAMA analyses).

II. BACKGROUND

A. The Board's Ruling in LBP-13-13

Entergy submitted its license renewal application for IPEC Units 2 and 3 on April 23, 2007.⁷ In October and December 2012, the Board held evidentiary hearings on Track 1 contentions. At the December 13, 2012 hearing, the Board stated that it would keep the record open following the hearings on Track 1 contentions in the event that parties would seek to supplement or correct the record with additional evidence.⁸ On November 27, 2013, the Board issued LBP-13-13 wherein it, *inter alia*, resolved Contention NYS-12C in favor of the NRC Staff and closed the record.⁹

The critical issue examined by the Board, which is relevant to the instant Motion, is whether the adoption of NUREG-1150 values (*i.e.*, 60 days and 120 days for dose reduction factors of 3 and 5, respectively) for TIMDEC inputs to the MACCS2 code used in the IPEC license renewal SAMA analysis was reasonable under NEPA.¹⁰ In that regard, based on the testimony of both the NRC Staff's and Entergy's expert witnesses, the Board concluded that such values were reasonable for two primary reasons. First, the Board found that the NRC has examined decontamination times for more than 37 years, and thus it was not unreasonable for Entergy to rely on the NUREG-1150 values given the extent of that review.¹¹ Second, the Board determined that the ultimate source of the 60- and 120-day values (NUREG/CR-3673) was based

⁷ Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁸ See Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 4484-85 (Judge McDade) (Dec. 13, 2012), *available at* ADAMS Accession No. ML12356A412.

⁹ *Indian Point*, LBP-13-13, slip op. at 260-293, 389.

¹⁰ *Id.* at 272-273, 283-288.

¹¹ *Id.* at 285-288, 293.

on an average over a wide spectrum of severe accident scenarios, not solely worst case scenarios.¹² By contrast, the Board rejected New York's argument that the NUREG-1150 values were unrealistic based on an analysis of the decontamination times involved in the Chernobyl accident, as a single scenario of an extreme case.¹³ In concluding that utilization of the NUREG-1150 values for TIMDEC inputs was reasonable under NEPA, the Board emphasized that the goal of a license renewal SAMA analysis is to examine the mean annual consequences of numerous postulated accident scenarios for the entire 50-mile radius surrounding a plant.¹⁴

B. The Spent Fuel Consequence Study

As part of NRC Staff's response to the 2011 Fukushima nuclear accident, the NRC Staff conducted the Spent Fuel Consequence Study.¹⁵ The narrow purpose of that study was to determine if the accelerated transfer of spent fuel from the spent fuel pool at a reference plant to dry cask storage significantly reduces risks to public health and safety.¹⁶ Specifically, the Spent Fuel Consequence Study compares the effects of a beyond-design-basis earthquake on a nearly full spent fuel pool at the Peach Bottom reactor site versus the same pool in which fuel that has sufficiently cooled has been removed.¹⁷ Although the NRC Staff used the MACCS2 code to develop the Spent Fuel Consequence Study,¹⁸ it was *not* prepared for purposes of license renewal or a SAMA analysis.

¹² *Id.* at 285-288.

¹³ *Id.* at 285.

¹⁴ *Id.* at 283-284, 287.

¹⁵ See Draft Report; Request for Comment, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor, 78 Fed. Reg. 39,781 (Jul. 2, 2013).

¹⁶ *Id.* at 39,781-82.

¹⁷ See Spent Fuel Consequence Study at iii.

¹⁸ See, e.g., Official Transcript of Proceedings, Japan Lessons Learned Project Directorate, Public Meeting at 90-91 (Sheron) (Sept. 18, 2013), *available at* ADAMS Accession No. 13277A215.

On June 24, 2013, the NRC Staff publicly released a draft of its Spent Fuel Consequence Study (“June 2013 Draft Report”), which explicitly stated that “[t]wo levels of decontamination (a decontamination factor of 3 and 15) are each assumed to take *one year*.”¹⁹ New York cites to this draft of the study in its Motion and also referenced the June 2013 Draft Report during consultation on the Motion.²⁰ New York also submitted comments objecting to certain elements of the MACCS2 code used in the June 2013 Draft Report on August 1, 2013.²¹ Further, as New York notes, its counsel attended the Commission’s September 18, 2013 public meeting on the June 2013 Draft Report and queried the NRC Staff on various aspects of its study, including the MACCS2 analysis.²² On October 23, 2013, the final Spent Fuel Consequence Study was publicly released.²³ That same day, the NRC Staff notified New York that the input and output files for the MACCS2 computer model used in the Spent Fuel Consequence Study were available in portable document format (“PDF”) on the NRC ADAMS document management system.²⁴

Despite knowing that the NRC used a one-year decontamination time value in the Spent Fuel Consequence Study since at least early July 2013, New York did not file the instant motion until December 7, 2013—after the Board had issued its final decision on Track 1 contentions and closed the record.

¹⁹ June 2013 Draft Report at 160 (emphasis added).

²⁰ See Motion at 1, Attachment 3.

²¹ See Comment (12) of John Sipos on Behalf of the State of New York, Office of the Attorney General on Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor at 3 (Aug. 1, 2013), *available at* ADAMS Accession No. ML13217A134.

²² Declaration of Assistant Attorney General John Sipos in Support of State of New York’s Motion to Reopen the Record and for Reconsideration of Board Ruling LBP-13-13 on Contention NYS-12C at ¶¶2-3 (Dec. 7, 2013) (“Sipos Decl.”), *available at* ADAMS Accession No. ML13341A003.

²³ See note 5, *supra*.

²⁴ See Sipos Decl. at ¶4 (citing Motion, Attachment 5).

III. LEGAL STANDARDS

A. Motion to Reopen

To reopen the record of this closed proceeding, New York must show that its Motion is timely; that it addresses a significant safety or environmental issue; and that a materially different result would be or would have been likely had the newly-proffered evidence been considered initially.²⁵ As the Commission has recognized, these reopening requirements pose a “stiff test” for parties seeking to reopen closed adjudicatory records.²⁶ The burden is on the moving party to meet *all* of the requirements for reopening.²⁷ The moving party has an “elevated burden to lay a proper foundation for its claim.”²⁸ To satisfy this requirement, the supporting material must possess the attributes set forth in 10 C.F.R. § 2.337(a), which defines admissible evidence as “relevant, material, and reliable.”²⁹ The presiding officer may conclude that the movant has failed to carry this burden by examining the newly-available evidence.³⁰ As explained below, New York’s Motion fails to meet any of these requirements.

²⁵ 10 C.F.R. § 2.326(a).

²⁶ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 25 (2006); *see also* Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,539 (May 30, 1986) (“The purpose of this rule is . . . to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise it is doubtful whether a proceeding could ever be completed.”).

²⁷ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-669 (2008).

²⁸ *Id.* at 668 (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)).

²⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366-67 (1984).

³⁰ *See, e.g., Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 352 (1978), *petition for recons. denied*, ALAB-467, 7 NRC 459 (1978); *Private Fuel Storage*, CLI-05-12, 61 NRC at 353-355 (upholding licensing board’s denial of a motion to reopen, based on the weakness of the evidence proffered by the movant and based on contrary documents relied upon by the respondent).

B. Motion for Reconsideration

The Commission similarly sets a “high bar” for parties seeking reconsideration of Board orders.³¹ The petitioner must demonstrate compelling circumstances such as “the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.”³² The compelling circumstances standard for granting leave to file a motion for reconsideration “is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, *and the claim could not have been raised earlier.*”³³ As described below, New York has not demonstrated compelling circumstances that would warrant reconsideration of the Board’s merits ruling on Contention NYS-12C for the same reasons its request to reopen the record fails.

IV. ARGUMENT

A. New York’s Motion To Reopen The Record In This Proceeding Should Be Rejected

1. New York’s Motion is Untimely

As explained above, the NRC regulations state that a motion to reopen “must be timely.”³⁴ Although 10 C.F.R. §2.326(a) does not provide a specific deadline, the Commission has held that even a delay of four weeks does not satisfy the timeliness requirement.³⁵ New York’s Motion is untimely because it relies upon information that has been available for more than five months.

In an effort to satisfy the timeliness criterion, New York contends that, until very recently (*i.e.*, November 26, 2013), it did not receive the native MACCS2 computer files necessary for it to

³¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

³² 10 C.F.R. § 2.345(b).

³³ Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004) (emphasis added).

³⁴ 10 C.F.R. § 2.326(a)(1).

³⁵ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990); *see also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 342 n.43 (2011) (“We and our Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information.”).

confirm the one-year input value first cited in the June 2013 Draft Report.³⁶ Reliance on the availability of native MACCS2 computer files is misplaced, however, because the substantive information therein was previously and readily available months ago. Indeed, Section 7.1.5 of the June 2013 Draft Report unambiguously states that NRC Staff used a decontamination time of “one year” in the Spent Fuel Consequence Study.³⁷

The Commission has made clear that parties have an obligation to monitor publicly available documents with a view toward raising issues in a timely fashion.³⁸ “For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier.”³⁹ New York fails to do so here. To the contrary, New York was or should have been well aware of the facts underlying the Motion after public release of the June 2013 Draft Report.⁴⁰ The actual computer files obtained on November 26, 2013 do not provide any new material information regarding the one-year TIMDEC input value. Rather, Mr. Mahilrajan simply confirmed that both the native and PDF files of the MACCS2 calculations

³⁶ Motion at 5; Sipos Decl. at ¶¶3-8, 18-19.

³⁷ See June 2013 Draft Report at 160 (“Two levels of decontamination (a decontamination factor of 3 and 15) are each assumed to take *one year*, but the cost of the higher decontamination factor (15) is assumed to be greater, reflecting the greater effort needed to achieve the higher level of decontamination.”) (emphasis added). While the draft report did not use the term TIMDEC, it is clear from the context of the report that the quoted phrase refers to time to decontaminate or TIMDEC.

³⁸ E.g., *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 18 (1986) (quotations omitted); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Cf. *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-90-10, 32 NRC 218, 222 (1990) (noting that absent exceptional circumstances, new concerns opposing a license that are not promptly developed on new information cannot provide an opportunity for a timely reopening motion).

³⁹ *Diablo Canyon*, ALAB-775, 19 NRC at 1366; see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-23, 74 NRC 287, 299-300 (2011) (rejecting, as untimely, petitioner’s attempt to reopen the record based on limitations regarding recriticality in the MACCS2 code that could have been raised earlier), *petition for review denied*, CLI-12-3, 75 NRC 132 (2012).

⁴⁰ During one of the parties’ consultations in accordance with 10 C.F.R. § 2.323(b), New York identified the June 2013 Draft Report as one of the sources of information supporting the Motion and acknowledged that it became aware of such report in early July 2013.

reflect the 365-day value (or one year) for the TIMDEC input originally provided in the June 2013 Draft Report.⁴¹

The Commission recently rejected a motion to reopen based on a more recent NRC document compiling information in a prior inspection report.⁴² There, the movant, like New York, asserted that a subsequent NRC document corroborated many of the concerns in its motion to reopen regarding an earlier inspection report.⁴³ The Commission held that documents containing pre-existing, publicly available information may not support a claim that a motion to reopen (and, in that case, a new contention) is timely.⁴⁴ Here, New York similarly attempts to rely on the receipt and verification of the native MACCS2 files for timeliness, even though, as explained above, those files reflect the very same information available more than five months ago in the June 2013 Draft Report. Therefore, the Motion is untimely.

2. New York Relies Exclusively on Information That is Outside the Scope of License Renewal Environmental Reviews and Therefore Does Not Raise a Significant Environmental Issue

Neither New York nor Mr. Mahilrajan demonstrates the existence of a significant environmental issue, let alone an “exceptionally grave” issue required for untimely motions to reopen.⁴⁵ The Commission has indicated that the standard for when an issue is “significant” in the context of reopening a closed record is the same as the standard for when supplementation of an

⁴¹ Declaration of Timothy Mahilrajan of International Safety Research, Inc. at ¶¶6-9 (Dec. 7, 2013) (“Mahilrajan Decl.”), available at ADAMS Accession No. ML13341A003.

⁴² See *Vt. Yankee*, CLI-11-02, 73 NRC at 344.

⁴³ *Id.* at 339-340.

⁴⁴ *Id.* at 344.

⁴⁵ 10 C.F.R. § 2.326(a)(1). As a threshold matter, Mr. Mahilrajan’s affidavit nowhere mentions the relevant Section 2.326(a) criteria, let alone provides a specific explanation of why New York’s new information raises a significant environmental issue or demonstrates that a materially different result is likely. See generally Mahilrajan Decl. This defect, alone, is sufficient grounds to reject the motion to reopen in its entirety. *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station), CLI-92-12, 36 NRC 62, 76 (1992) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989)); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-11, 75 NRC 731, 739 (2012) (denying motion to reopen where expert did not substantively address the reopening criteria), *petition for review denied*, CLI-12-21, 76 NRC 491 (2012).

environmental impact statement is required—there must be new and significant information that will paint “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”⁴⁶ New York presents no such information. Instead, New York merely claims that the Motion concerns an “important” issue because the TIMDEC input to the MACCS2 code played an important role in the IPEC SAMA analysis.⁴⁷ This argument is flawed for several reasons.

First, in the *Turkey Point* license renewal proceeding, the Commission explicitly articulated the important distinction between reactor accidents and spent fuel accidents,⁴⁸ and explained in great detail why it found that SAMAs do not apply to accidents involving spent fuel pools.⁴⁹ Specifically, the Commission observed that the NRC customarily has studied reactor accidents and spent fuel accidents separately, and for the latter, concluded that the risk of accidents is acceptably small.⁵⁰ Second, the Commission found that accidents involving spent fuel pools or dry casks are more amenable to generic consideration, whereas the events that could lead to a severe reactor accident vary significantly from plant-to-plant.⁵¹ In light of the foregoing precedent, the TIMDEC input values cited in the Spent Fuel Consequence Study are not relevant to the IPEC SAMA analysis for purposes of license renewal.

⁴⁶ *Union Elec. Co., et. al* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167-168 (2011); *see also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC 633, 656-660 (2012) (finding that petitioner’s reopening request failed to present a significant environmental issue because none of the information presented therein indicated that further consultation under the Magnuson-Stevens Fishery Conservation and Management Act could cause any change in the environmental impact of the proposed license renewal with respect to the asserted marine species); *Pilgrim*, LBP-11-23, 74 NRC at 301-303 (rejecting motion to reopen for failure to raise a significant environmental issue because petitioners failed to implicate any alteration in the environmental impacts of the Pilgrim plant if its concerns regarding lessons learned from the Fukushima accident were incorporated into the SAMA analysis).

⁴⁷ Motion at 5.

⁴⁸ New York does not mention this important distinction in the Motion.

⁴⁹ *See Turkey Point*, CLI-01-17, 54 NRC at 21-22.

⁵⁰ *Id.* at 22.

⁵¹ *Id.*

Second, New York did not disclose any of the information related to the Spent Fuel Consequence Study it relies on in its Motion (*i.e.*, Attachments 3-7).⁵² As such, New York either failed to comply with its disclosure obligations, subject to the risk of sanctions under 10 C.F.R. § 2.336(e), or did not consider any of the referenced information relevant to Contention NYS-12C. Under either scenario, New York’s Motion should be rejected. Specifically, if New York did not believe this information was sufficiently relevant or important for its mandatory disclosures, it cannot reasonably argue now that this same information paints a seriously different picture of the environmental impacts of the IPEC license renewal.

Third, New York’s reliance on the *Limerick Ecology Action* decision does not support its position that information important to any component of a SAMA analysis presents a significant environmental issue warranting reopening of the record. At best, such decision only requires an agency to perform a SAMA evaluation regarding reactor accidents.⁵³ Because Entergy performed a SAMA analysis and the NRC Staff reviewed that analysis in the final supplemental environmental impact statement, the NRC satisfied the *Limerick Ecology Action* ruling. To conclude otherwise would mean that any movant who alleges new information related to the MACCS2 code has automatically identified a significant environmental issue sufficient to reopen the record on a license renewal SAMA contention. That is not the correct standard.

In summary, absent relevance to license renewal environmental reviews, let alone Contention NYS-12C, New York cannot credibly claim that TIMDEC values used in a

⁵² As of its most recent supplemental disclosure pursuant to Section 2.336(a)(2) provided to Entergy on November 29, 2013, New York has not identified the Draft Report or any other documents related to the TIMDEC input to the MACCS2 code used in Spent Fuel Consequence Study. *See* Attachment 1 to Entergy’s Answer Opposing State of New York Motion to Reopen the Record and for Reconsideration of Contention NYS-12C (State of New York Supplemental Disclosures – June 2013 to November 2013).

⁵³ *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989) (holding that NRC must consider severe accident mitigation design alternatives (“SAMDA”) in individual operating licensing proceedings, “[b]ecause the action not to consider SAMDAs was promulgated as a policy statement rather than a rule, and because it applies to an issue that [the court] find[s] is unlikely to be treated as generic.”).

Fukushima-driven Spent Fuel Consequence Study will paint a seriously different picture of the environmental impacts of license renewal for IPEC. Therefore, the Motion provides no new information that gives rise to a significant environmental issue, and thus the Board should deny New York's request to reopen the record.

3. New York Failed to Demonstrate That a Materially Different Result Would be Likely

Even if the Board were to overlook the Motion's untimeliness and failure to raise a relevant and significant environmental issue, the Board should deny New York's Motion because it fails to demonstrate that reopening the record would produce a materially different result, as required by 10 C.F.R. § 2.326(a)(3). Specifically, New York must show that the Board's consideration of the new information regarding TIMDEC inputs would lead to reversal of its determination that the use of NUREG-1150 values for TIMDEC inputs to the MACCS2 code for purposes of the IPEC license renewal SAMA analysis is reasonable under NEPA.

According to New York, it has sustained its burden in this regard for two reasons. First, New York argues that the NRC Staff's use of this input value in the Spent Fuel Consequence Study is contrary to the testimony of the NRC Staff's and Entergy's witnesses that the NRC has consistently used and accepted TIMDEC input values of 60 and 120 days for purposes of SAMA analyses.⁵⁴ Second, New York contends that if a TIMDEC value of 365 days had been used in the IPEC SAMA analysis, then at least one additional SAMA candidate could have become cost beneficial.⁵⁵ Both arguments are premised on New York's erroneous assumption that the

⁵⁴ Motion at 5-7; Sipos Decl. at ¶¶18-19.

⁵⁵ Motion at 6; Sipos Decl. at ¶9. In support of this argument, New York's attorney, John Sipos, cites a figure from the SAMA analysis performed by its expert, International Safety Research, Inc. ("ISR"), and asserts that such figure unquestionably demonstrates that the use of a TIMDEC input value of 365 days would double the offsite economic cost risk. *See id.* (citing Revisions to Tables in ISR Report 13014-01-01: Review of Indian Point Severe Accident Off Site Consequence Analysis (21 Dec 2011) at 6 (June 29, 2012) (NYS000430)). However, Entergy's witnesses raised numerous criticisms of the ISR analysis on the record, such as changes made to the MACCS2 source code. *See, e.g.,* Testimony of Entergy Witnesses Lori Potts, Kevin O'Kula, and Grant

existence of an alternative TIMDEC input value is a sufficient ground for the Board to reverse its determination under NEPA.

As an initial matter and as explained in Section IV.A.2 above, spent fuel accidents are outside the scope of a NEPA-related SAMA analysis at the license renewal stage. Accordingly, the TIMDEC input value used in the Spent Fuel Consequence Study or any other study of spent fuel storage accidents has no bearing on the Board's decision. For this reason alone, any claim by New York that a 365-day value for the TIMDEC input will likely lead to a materially different SAMA result in this proceeding fails.

In any event, like other NEPA evaluations, the SAMA analysis evaluation is governed by the rule of reason.⁵⁶ As the Board correctly explained, the Commission has stressed that the “proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA.”⁵⁷ Simply because alternate inputs could be used that may result in more cost-beneficial SAMAs, as New York argues here, does not demonstrate that the original inputs used were unreasonable.⁵⁸

Contrary to this well-established precedent, New York does not demonstrate how the original TIMDEC inputs used by Entergy and approved by the NRC Staff were *unreasonable* given this purportedly new information. There is no support provided in the Motion or supporting affidavits to indicate that the 365-day value used for a consequence analysis of spent fuel fire accidents during a postulated severe seismic event would be more accurate or more reasonable for purposes of the IPEC SAMA analysis. In his Declaration, Mr. Mahilrajan simply confirmed that

Teagarden on Consolidated Contention NYS-12C (Severe Accident Mitigation Alternatives Analysis) at 73-80 (Mar. 30, 2012) (ENT000450).

⁵⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 724 (2012) (citations omitted).

⁵⁷ LBP-13-13, slip op. at 265 (quoting *NextEra Energy Seabrook, L.L.C.* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 323 (2012)).

⁵⁸ *See Seabrook*, CLI-12-05, 75 NRC at 323.

the native files of the MACCS2 reflect a 365-day input for TIMDEC.⁵⁹ New York does not allege that 365 days represents an average time to complete decontamination efforts over all accident scenarios. Indeed, the NRC Staff emphasized that the narrow scope of its analysis was to study a specific accident scenario (i.e., a beyond-design-basis earthquake) at a specific spent fuel pool.⁶⁰ Likewise, New York does not point to any statements in the Spent Fuel Consequence Study that suggest that the NUREG-1150 values for TIMDEC inputs are no longer appropriate for use in SAMA analyses for purposes of license renewal.

In short, New York does not come close to demonstrating that there would be a materially different result if the record were reopened, particularly give the lack of relevance of the asserted information to Contention NYS-12C and to environmental reviews under NEPA. For this additional reason, the Board should reject the Motion.

B. New York Has Provided No Basis For Reconsideration Of The Board's Resolution Of Contention NYS-12C

Commission case law generally disfavors motions for reconsideration premised on new evidence rather than errors in the existing record.⁶¹ In light of such precedent, the Board need not look beyond such procedural defect to reject New York's reconsideration request.

Furthermore, other than incorporating by reference its unpersuasive and flawed arguments in support of its request for reopening, New York has not attempted to demonstrate that

⁵⁹ See Mahilrajan Decl. at ¶¶3-9.

⁶⁰ See, e.g., Spent Fuel Consequence Study at 19 ("This study represents a limited-scope consequence study as opposed to a probabilistic risk assessment"). Moreover, in its November 18, 2013 cover letter forwarding the requested MACCS2 computer files to New York, the NRC Staff indicated that the enclosed MACCS2 calculations supported analysis of a highly unlikely spent fuel pool accident at a Boiling Water Reactor Mark I nuclear power plant where the spent fuel pool is located outside the containment structure and generally contains several times the source term found in an operating reactor. See Motion, Attachment 5.

⁶¹ See, e.g., *Consumers Energy Co., et al.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 402 (2006)); *Tenn. Valley Auth.* (Hartsville Nuclear Plant Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-22, 60 NRC 379, 380-81, *aff'd*, CLI-04-36, 60 NRC 631, 641, 645 (2004).

compelling circumstances exist.⁶² In rare instances, licensing boards have allowed reconsideration based on new facts not available at the time of the decision in question and relevant to the particular issue under consideration, which clarify information previously relied on and are potentially sufficient to change the result previously reached.⁶³ These decisions, however, are clearly not applicable here because New York fails to show that its proffered information is sufficient to change the SAMA result previously reached by the Board or otherwise renders its decision on Contention NYS-12C invalid.⁶⁴ As explained above, this information is not even relevant to any of the Board's findings and determinations on Contention NYS-12C. In particular, the Spent Fuel Consequence Study addresses spent fuel storage accidents, which are outside the scope of NEPA-related SAMA analyses at the license renewal stage.

Additionally, in order to satisfy the high standard for reconsideration, New York must demonstrate that it could not have made its new argument earlier.⁶⁵ For the same reasons explained in Section IV.A.1 above, New York was aware of the one-year value used in the Spent

⁶² See Motion at 6-7.

⁶³ See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-01-17, 53 NRC 398, 403-404 (2001) (declining to deny a motion for reconsideration based on new information on procedural grounds and considering the motion on the merits, essentially as a supplement to a prior motion to reopen); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 72-74 (1998) (granting reconsideration of ruling regarding the validity of a cooperative agreement that provided municipality with law enforcement authority on a reservation where spent fuel facility would be sited based on the board's misapprehension about such municipality's compliance with state statutory requirements and the proffered new information clarified existing facts); *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-21, 38 NRC 143, 145 (1993) (deciding a motion for reconsideration based on new arguments on the merits where no party objected to the nature of the motion and no delay in the proceeding was likely).

⁶⁴ Indeed, the Commission has rejected reconsideration requests for lack of basis where new arguments do not render the earlier decision invalid. See, e.g., *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 481, 482 (2010) (denying motion for reconsideration of the Commission's affirmance of a board ruling on summary disposition because the issues raised in petitioner's motion for reconsideration were outside the scope of the originally admitted SAMA contention); *State of Alaska Dept. of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-38, 60 NRC 652, 654 (2004) (denying motion for reconsideration where alleged factual error was not material to the Commission's decision reversing grant of movant's intervention petition on standing grounds).

⁶⁵ See, e.g., *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 522 (2007) (denying petition for reconsideration as untimely where petition was supported by information regarding proximity of one of organization's members to the site that was previously available); *Millstone*, LBP-04-22, 60 NRC at 381-382 (denying motion for reconsideration based on previously available new material because movant failed to explain why such information was not provided earlier).

Fuel Consequence Study for many months prior to the issuance of LBP-13-13 and therefore its Motion is unjustifiably late. Stated simply, New York has failed to present any new, previously unavailable information that undermines the Board's ruling resolving Contention NYS-12C in favor of the NRC Staff. Thus, New York's arguments in support of reopening the record are also insufficient to demonstrate unanticipated compelling circumstances that justify reconsideration.

V. CONCLUSION

In sum, New York's motion for reopening the record is untimely and is based on information irrelevant and immaterial to the Board's merits ruling on Contention NYS-12C. Additionally, the compelling circumstances that must exist for entertaining a motion for reconsideration are entirely absent from New York's Motion. For the foregoing reasons, Entergy respectfully requests that the Board deny New York's Motion in its entirety.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.,
this 23rd day of December 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos.	50-247-LR and
	)		50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)		
)		
(Indian Point Nuclear Generating Units 2 and 3))		
	)	December 23, 2013	

CERTIFICATION OF COUNSEL

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Executed in accord with 10 C.F.R. § 2.304(d)

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ATTACHMENT 1

TO

**“ENTERGY’S ANSWER OPPOSING STATE OF NEW YORK
MOTION TO REOPEN THE RECORD AND FOR
RECONSIDERATION OF CONTENTION NYS-12C”**

**(State of New York Supplemental Disclosures –
June 2013 to November 2013)**

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1705	Request for Additional Information for the Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application, Set 2013-02 (TAC NOS. MD5407 and MD5408)	U.S. Nuclear Regulatory Commission	6/12/2013	ML13162A606	5

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

July 31, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1706	Letter, Notification and Transmittal of Entergy Letter NL-13-098 (July 24, 2013 Reply to June 12, 2013 "Request for Additional Information for the Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application, SET 2013-02")	Entergy	7/25/2013		5

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

September 3, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1707	NRC Staff's 16th Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	6/3/2013	ML 13154A533	GA
1708	NRC Staff's 17th Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	7/1/2013	ML 13182A731	GA
1709	NRC Staff's 18th Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	8/1/2013	ML 13213A491	GA
1710	Letter, Indian Point Nuclear Generating Unit No. 2 - Action To Be Completed Prior To Entering The Period Of Timely Renewal	NRC to Entergy	8/19/2013	ML 13197A034	GA
1711	Letter, Aqueous Releases Following Severe Accidents at Indian Point Facilities	NYS AG to NRC General Counsel	8/20/2013		GA
1712	Letter, Oversight and Funding of Offsite Decontamination Following a Severe Accident at the Indian Point Facilities	NYS AG to NRC General Counsel	8/20/2013		GA

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

September 30, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1713	NRC Staff's 19th Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	9/3/2013	ML13246A345	GA

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

October 31, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1714	Letter, Entergy (NL-13-098) Reply to June 12, 2013 Request for Additional Information for the Review of the Indian Point Nuclear Generating Units No. 2 and 3, License Renewal Application, SET 2013-02	Entergy	7/24/2013	ML13211A173	5
1715	Letter, Request for Additional Information for the Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application, SET 2013-05 (TAC Nos. MD5407 and MD5408)	U.S. NRC to Entergy Nuclear Operations, Inc.	9/3/2013	ML13240A076	5
1716	Letter, Entergy (NL-13-132) Reply to September 3, 2013 Request for Additional Information for the Review of the Indian Point Nuclear Generating Units No. 2 and 3, License Renewal Application, SET 2013-05	Entergy	10/3/2013	ML13282AZ140	5
1717	Indian Point Contingency Plan, Final Generic Environmental Impact Statement	NYS Department of Public Service	September 2013	http://documents.dps.ny.gov/public/Comm on/ViewDoc.aspx?DocRefId={1CFCC090-1E99-4A8C-BC0C-56764C8985AD}	37
1718	Notice of Completion of Final Generic Environmental Impact Statement, Case 12-E-0503: Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans	State of NY Public Service Commission	9/19/2013	http://documents.dps.ny.gov/public/Comm on/ViewDoc.aspx?DocRefId={C7DADE88-2CCD-43FF-8EE2-970AB60C7DA4}	37
1719	Order Adopting and Approving Issuance of a Final Generic Environmental Impact Statement, Case 12-E-0503: Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans	State of NY Public Service Commission	9/19/2013	http://documents.dps.ny.gov/public/Comm on/ViewDoc.aspx?DocRefId={F9CA0860-7BEF-4FBC-87D8-49C24926634E}	37

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

October 31, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1720	Press Release, Indian Point Contingency Plans Move Forward: PSC Details Plans to Ensure Grid Reliability and Safeguard Customers	State of NY Public Service Commission	10/17/2013	http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/A0167A43AAA2952585257C07005A9F37/\$File/pr13076.pdf?OpenElement	37
1721	Management Directive, MD 4-5 Contingency Plan for Periods of Lapsed Appropriations (DT-12-01)	U.S. NRC	1/3/2012	ML101530672	GA
1722	Letter, Entergy (NL-13-073) Licensee Event Report # 2013-003-00, "Technical Specification Prohibited Condition Due to Turbine Driven Auxiliary Feedwater Pump Failure to Meet Acceptance Criteria," Indian Point Unit No. 3, Docket No. 50-286, DPR-64	Entergy	6/24/2013	ML13178A223	GA
1723	Letter, Entergy (NL-13-113) Licensee Event Report # 2013-003-00, "Manual Reactor Trip Due to Decreasing Steam Generator Water Levels Due to Loss of Main Feedwater (FW) Flow Caused by a Loss of Instrument Air to the FW Regulating Valves," Indian Point Unit No. 2, Docket No. 50-247, DPR-26	Entergy	8/27/2013	ML13247A173	GA
1724	Email, IPEC License Renewal - Amendment 14 to PRA and IP2 UFSAR Update with attachments: ML-13-131 final.pdf and NL-13-130 UFSAR update.pdf (1:18 PM)	R.M. Waters (Entergy) to K. Green (NRC) and D. Pickett, cc: R.W. Walpole and A.A. Stewart	9/26/2013	ML13269A452	GA
1725	NRC Regulatory Issue Summary 2013-16, Interactions Between the NRC and NRC Stakeholders During a Lapse of Agency Appropriations	U.S. NRC	10/1/2013	ML110550923	GA
1726	NRC Staff's 20th Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	10/1/2013	ML13274A653	GA
1727	Audit Report, Audit of NRC's Oversight of Active Component Aging, OIG-14-A-02	Office of the Inspector General, U.S. Nuclear Regulatory Commission	10/28/2013	ML13301A638	GA

New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2)

November 29, 2013

ID No.	Document Title	Author and/or Organization For Which Produced	Document Date	Public Domain Location	Contention No.
1728	NRC Staff's 21st Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012	NRC Staff	11/1/2013	ML13308B382	GA
1729	Order, Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing, NYS PSC Case 12-E-0503 Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans	New York State Public Service Commission	11/4/2013	http://documents.dps.ny.gov/public/Commission/ViewDoc.aspx?DocRefId={5AFE13E9-181F-40CF-A91C-5AEC0E066AC9}	GA, 37
1730	Letter, <i>Entergy Nuclear Indian Point 2, LLC & Entergy Nuclear Indian Point 3, et al. v. New York State DOS, NYSDEC, et al.</i> , Index No. 5450-12; RJI No. 01-12-ST4009 (New York State Supreme Court, Albany County) attaching Nov. 26, 2013 Notice of Entry and Nov. 20, 2013 Decision and Order/Judgment of the Honorable Michael J. Lynch	State of New York Attorney General	11/26/2013		GA

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
	)	December 23, 2013

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of “Entergy’s Answer Opposing State of New York Motion to Reopen the Record and For Reconsideration of Contention NYS-12C,” including Attachment 1 thereto, “New York Supplemental Disclosures – June 2013 to November 2013,” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Raphael P. Kuyler

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