

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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)	)	
	)	March 25, 2014

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**APPLICANT’S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER, INC.  
PETITION FOR REVIEW OF BOARD DECISION REGARDING CONTENTION  
CW-EC-3A (ENVIRONMENTAL JUSTICE)**

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CW-EC-3A (ENVIRONMENTAL JUSTICE)**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.341(b)(3), Entergy Nuclear Operations, Inc. (“Entergy”) hereby submits this answer opposing the February 14, 2014 petition for review (“Petition”)<sup>1</sup> filed by Hudson River Sloop Clearwater, Inc. (“Clearwater”) in the license renewal proceeding for Indian Point Nuclear Generating Units 2 and 3 (“Indian Point”). Clearwater challenges the Atomic Safety and Licensing Board’s (“Board”) resolution of Contention CW-EC-3A, which relates to the Environmental Justice (“EJ”) analysis for Indian Point license renewal, in the Board’s First Partial Initial Decision (LBP-13-13), issued on November 27, 2013.<sup>2</sup>

Clearwater’s Petition is narrow. It does not challenge the Board’s conclusion in LBP-13-13 that a severe accident that could impact the EJ population is “improbable” with a “small” risk,<sup>3</sup> which is consistent with the Commission’s determination in license renewal regulations and guidance that the probability-weighted severe accident impacts (or risks) are SMALL for all

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<sup>1</sup> Hudson River Sloop Clearwater, Inc. Petition for Review (Feb. 14, 2014) (“Petition”).

<sup>2</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-13-13, 77 NRC \_\_, slip op. (Nov. 27, 2013).

<sup>3</sup> *Id.* at 382, 387.



plants.<sup>4</sup> Instead, Clearwater challenges the Board’s decision to supplement the Indian Point Final Supplemental Environmental Impact Statement (“FSEIS”) with LBP-13-13 and the adjudicatory record for this contention, rather than remand the FSEIS to the Nuclear Regulatory Commission (“NRC”) Staff for “further development of the environmental justice discussion and analysis.”<sup>5</sup> Clearwater also challenges the Board’s decision for failing to further evaluate and discuss “necessary mitigation measures to address the EJ disparity and adverse impacts.”<sup>6</sup>

The Commission should reject Clearwater’s Petition for multiple reasons. As a preliminary matter, Entergy’s own February 14, 2014 petition for review of CW-EC-3A demonstrates that the Board never should have admitted this contention, and in any event should have reached the conclusion that there are no disproportionate adverse impacts on EJ populations associated with the Indian Point license renewal.<sup>7</sup> Entergy explains in that petition that the Board erred because, among other things, CW-EC-3A is an improper challenge to the Indian Point offsite emergency plans and further EJ analysis is inappropriate given that the emergency plans protect all populations.<sup>8</sup> If the Commission grants the relief requested by Entergy, then the issues raised by Clearwater’s Petition are moot—and the Petition should be rejected as such.

In the event the Commission must consider Clearwater’s Petition, it should deny that Petition on one or more of several grounds, because Clearwater’s Petition fails to satisfy the Commission’s standards in 10 C.F.R. § 2.341. As explained below, the Board did not err, and

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<sup>4</sup> See 10 C.F.R. Pt. 51, Subpt. A, App. B, Tbl. B-1 (Postulated Accidents; Severe accidents); NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants at 5-115 (June 2013) (“GEIS”) (NYS00131C).

<sup>5</sup> Petition at 4.

<sup>6</sup> *Id.*

<sup>7</sup> Applicant’s Petition for Review of Board Decisions Regarding Contentions NYS-8 (Electrical Transformers), CW-EC-3A (Environmental Justice), and NYS-35/36 (SAMA Cost Estimates), at 2-3, 34-43 (Feb. 14, 2014) (“Entergy Petition”).

<sup>8</sup> *Id.*

fully satisfied the National Environmental Policy Act's ("NEPA") rule of reason, when it declined to return the FSEIS to the NRC Staff for further consideration of EJ impacts, because: (1) there is no need to further supplement the record given the SMALL severe accident impacts; (2) there is no need to supplement the record to address issues that are outside the scope of license renewal; (3) the current environmental record on EJ issues fully satisfies NEPA; and (4) assuming the FSEIS needed supplementing, the Board's actions to supplement the FSEIS with the adjudicatory record are consistent with long-standing Commission case law.

Moreover, as further explained below, the Board did not err by failing to require any further consideration of mitigation in the FSEIS (either directly or through supplementing the record), because: (1) the FSEIS need not discuss mitigation for SMALL severe accident impacts; (2) the FSEIS need not discuss mitigation that would require changes to emergency plans; and (3) the FSEIS already addresses any required severe accident mitigation.

For these many reasons, the Commission should reject Clearwater's Petition regarding the Board's resolution of CW-EC-3A.

## **II. STATEMENT OF THE CASE**

### **A. Background and Procedural History**

This proceeding concerns the license renewal application ("LRA") for Indian Point, as originally submitted by Entergy on April 23, 2007, and subsequently amended or supplemented. The procedural history of this proceeding is provided in detail in LBP-13-13. What follows focuses only on the most pertinent background related to CW-EC-3A.

Entergy's LRA includes an environmental report ("ER") that determined that there would be no disproportionately high and adverse impacts on members of minority and low-income

populations from the proposed action.<sup>9</sup> CW-EC-3, as originally proposed, challenged Entergy's EJ analysis.<sup>10</sup> Entergy opposed the admission of CW-EC-3, arguing that emergency planning and the environmental impacts of severe accidents are outside the scope of this license renewal proceeding and that Clearwater failed to provide evidence of any significant and disproportionate adverse impact.<sup>11</sup> The NRC Staff opposed the contention's admission for similar reasons.<sup>12</sup> The Board admitted CW-EC-3 only with respect to Clearwater's claim that Entergy's EJ evaluation failed to address potential disparate severe accident impacts on minority and low-income populations.<sup>13</sup>

Like the ER, the Staff's FSEIS identified minority and low-income populations within a 50-mile radius of Indian Point, and concluded that license renewal would not disproportionately and adversely impact such populations.<sup>14</sup> Clearwater submitted amended CW-EC-3A, requesting that CW-EC-3 also apply to the FSEIS analysis of EJ populations.<sup>15</sup> Entergy and the NRC Staff opposed Clearwater's proposed amendments to CW-EC-3, again on the grounds that they raised issues beyond the limited scope of license renewal and otherwise failed to meet the

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<sup>9</sup> Indian Point Energy Center License Renewal Application, App. E, Applicant's Environmental Report, Operating License Renewal Stage, Indian Point Energy Center §§ 2.6.2, 4.22 (ENT00015B).

<sup>10</sup> Hudson River Sloop Clearwater, Inc.'s Petition to Intervene and Request for Hearing (Dec. 10, 2007), *available at* ADAMS Accession No. ML073520042.

<sup>11</sup> Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc.'s Petition to Intervene and Request for Hearing at 61, 66-67 (Jan. 22, 2008), *available at* ADAMS Accession No. ML080300053.

<sup>12</sup> NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County, at 98-99 (Jan. 22, 2008), *available at* ADAMS Accession No. ML080230543.

<sup>13</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 200-01 (2008).

<sup>14</sup> NUREG-1437, Supp. 38, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Units Nos. 2 and 3, Final Report at 4-53 (Dec. 2010) ("FSEIS") (NYS00133B).

<sup>15</sup> Motion for Leave to Amend and Extend Contention EC-3 Regarding Environmental Justice and Petition to Do So (Feb. 3, 2011), *available at* ADAMS Accession No. ML110410369.

Commission's admissibility requirements.<sup>16</sup> The Board admitted CW-EC-3A, in part, expanding it to challenge whether the FSEIS adequately assessed whether EJ populations would suffer disproportionate impacts in the event of a severe accident.<sup>17</sup>

On December 22, 2011, Clearwater submitted its Statement of Position,<sup>18</sup> written direct testimony, and supporting exhibits on CW-EC-3A. On March 29, 2012, Entergy filed its Statement of Position,<sup>19</sup> written testimony, and supporting exhibits. On March 30, 2012, the NRC Staff filed its Statement of Position,<sup>20</sup> written testimony, and supporting exhibits. On June 28, 2012, Clearwater filed its revised statement of position,<sup>21</sup> written rebuttal testimony, and several new exhibits. The Board held the CW-EC-3A oral evidentiary hearing on October 23, 2012.<sup>22</sup> On March 22, 2013 and May 3, 2013, the parties submitted proposed, and then reply, findings of fact and conclusions of law. On November 27, 2013, the Board issued LBP-13-13. Entergy and Clearwater filed their petitions for review on February 14, 2014.

## **B. Summary of Board Decision (LBP-13-13)**

In LBP-13-13, the Board found the FSEIS analysis of EJ to be flawed on the basis that the Staff did not take the requisite "hard look" at the environmental impacts of license renewal

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<sup>16</sup> Applicant's Answer to Hudson River Sloop Clearwater, Inc.'s Amended Environmental Justice Contention at 2-3, 10 (Mar. 7, 2011), *available at* ADAMS Accession No. ML110770579; NRC Staff's Answer to Amended and New Contention (EC-3) Filed by Hudson River Sloop Clearwater, Inc. Concerning the Final Supplemental Environmental Impact Statement at 2, 8-18 (Mar. 7, 2011), *available at* ADAMS Accession No. ML110670293.

<sup>17</sup> Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56, 59-60 (July 6, 2011) (unpublished) (finding that other than those portions of the contention updated to refer to the FSEIS rather than the ER, the rest was inadmissible).

<sup>18</sup> Initial Statement of Position for Clearwater's Contention EC-3A Regarding Environmental Justice (Dec. 22, 2011) (CLE000002).

<sup>19</sup> Entergy's Statement of Position on Contention CW-EC-3A (Environmental Justice) (Mar. 29, 2012) (ENT000257).

<sup>20</sup> NRC Staff Initial Statement of Position Regarding Contention CW-EC-3A (Environmental Justice) (Mar. 30, 2012) (NRC000062).

<sup>21</sup> Hudson River Sloop Clearwater, Inc. Rebuttal Statement Supporting Contention EC-3A Regarding Environmental Justice (June 28, 2012) ("Clearwater Rebuttal Position Statement") (CLE000045).

<sup>22</sup> Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 2722 (Oct. 23, 2012) ("Oct. 23, 2012 Tr.").

on the EJ population.<sup>23</sup> Specifically, the Board found that the Staff failed to: (1) determine whether the EJ population would suffer disproportionate and adverse effects during the period of extended operation in comparison to the general population; and (2) determine whether members of the low-income population who cannot afford to, or do not have the freedom to, self-evacuate or effectively shelter-in-place due to substandard housing would be disparately and adversely impacted in comparison to those who have the freedom, financial means, and readily-available modes of transportation to self-evacuate or access adequate shelter.<sup>24</sup>

The Board further found that Clearwater’s witnesses had presented testimony that “sufficiently illustrated the potentially disproportionate and adverse impacts on the EJ population surrounding Indian Point in the event of a severe accident.”<sup>25</sup> Significantly, while the Board acknowledged that “the risk to both the EJ and non-EJ populations [from a severe accident] is small,” it nonetheless concluded, based on testimony from Clearwater witnesses, that there is a higher risk to the EJ population that warranted discussion in the FSEIS.<sup>26</sup>

In the end, the Board concluded that because the record of the proceeding included this evidence and would therefore adequately ensure informed decision-making, the Commission, without additional Staff action to revise or supplement the FSEIS, could make an informed decision on whether to grant the requested renewed licenses.<sup>27</sup> The Board therefore ruled that, despite the foregoing perceived deficiencies in the FSEIS, the agency had met its obligations under NEPA, and resolved the contention in the Staff’s favor.

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<sup>23</sup> *Indian Point*, LBP-13-13, slip op. at 384, 385.

<sup>24</sup> *Id.* at 383-84. The Board, however, found that the NRC Staff used a reasonable method for identifying minority and low-income populations within the 50-mile radius around Indian Point. *Id.* at 382.

<sup>25</sup> *Id.* at 387.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 388.

**C. Summary of Clearwater's Petition for Review**

Clearwater characterizes its February 14, 2014 Petition as seeking review of a “narrow issue concerning the Licensing Board’s resolution of a substantively flawed FSEIS environmental justice analysis.”<sup>28</sup> Clearwater does not challenge the Board’s finding that a severe accident that could impact the EJ population is “improbable” with a “small” risk.<sup>29</sup> Instead, Clearwater objects to the Board’s decision for the following reasons.

As a threshold matter, Clearwater objects to the Board’s supplementing of the FSEIS with LBP-13-13 and the adjudicatory record.<sup>30</sup> Clearwater claims that NEPA has not been satisfied, and that the FSEIS should be sent back to the NRC Staff for further discussion, analysis, and public involvement regarding EJ issues.<sup>31</sup> In particular, Clearwater argues that the record does not include a detailed enough EJ evaluation on certain topics, such as prisons and evacuation, because the record includes information that only “illustrate[s]” the EJ concerns.<sup>32</sup>

In addition, Clearwater argues that the Board erred by not requiring further discussion of possible mitigation measures.<sup>33</sup> It claims that, in order to comply with NEPA, the Board must remand this issue to the NRC Staff for further evaluation and a detailed discussion of undefined mitigation measures.<sup>34</sup>

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<sup>28</sup> Petition at 3.

<sup>29</sup> *Indian Point*, LBP-13-13, slip op. at 382, 387.

<sup>30</sup> Petition at 3-4.

<sup>31</sup> *Id.* at 4, 7-11, 13.

<sup>32</sup> *Id.* at 7-11.

<sup>33</sup> *Id.* at 4, 11-13.

<sup>34</sup> *Id.* at 11-13.

### III. LEGAL STANDARDS

#### A. Standard for Petitions for Review

Section 2.341(b)(1) provides for discretionary review of certain decisions. It provides that the Commission will consider a petition for review if it raises a “substantial question” with respect to the following considerations: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest.<sup>35</sup>

The Commission reviews legal or policy questions *de novo*.<sup>36</sup> The Commission will “reverse a licensing board’s legal rulings if they are ‘a departure from, or contrary to, established law.’”<sup>37</sup> The Commission has the authority to review factual findings *de novo*, but typically defers to a licensing board’s findings of fact as long as the “Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.”<sup>38</sup> The Commission, however, may intercede “to correct ‘clearly erroneous’ findings—that is, findings ‘not even

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<sup>35</sup> See 10 C.F.R. § 2.341(b)(4).

<sup>36</sup> *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

<sup>37</sup> See *id.* (citation omitted).

<sup>38</sup> *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 98-99 (2010) (citation omitted).

plausible in light of the record viewed in its entirety”<sup>39</sup>—where there “is strong reason to believe that . . . a board has overlooked or misunderstood important evidence.”<sup>40</sup>

## **B. NEPA Requirements**

Under 10 C.F.R. Part 51, the NRC Staff completes a NEPA-based environmental review of license renewal applications, focusing on the potential impacts from operating for 20 additional years. NEPA is a procedural statute that does not mandate particular substantive results.<sup>41</sup> Rather, it is designed “to insure a fully informed and well-considered decision,” including examining the proposed agency action’s potential environmental impacts.<sup>42</sup> NEPA “merely prohibits uninformed—rather than unwise—agency action.”<sup>43</sup>

“Environmental justice” for the purposes of this proceeding refers to the federal policy established in 1994 by Executive Order 12898 under which each federal agency identifies and addresses, as appropriate, potentially disproportionately high adverse human health or environmental effects on minority or low-income populations.<sup>44</sup> In 1997, the Council on Environmental Quality (“CEQ”) issued guidance to assist agencies in identifying and addressing EJ issues through NEPA’s procedures.<sup>45</sup> Using CEQ’s guidelines as a model, the NRC Staff issued its own EJ guidance in 2004 in LIC-203, “Procedural Guidance for Preparing

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<sup>39</sup> *La. Energy Servs. L.P.* (Nat’l Enrichment Facility), CLI-06-22, 64 NRC 37, 40 (2006) (some internal quotation marks omitted) (citing *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, N.M. 87313), CLI-06-01, 63 NRC 1, 2 (2006); *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003)).

<sup>40</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259 (citing *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005)).

<sup>41</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

<sup>42</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

<sup>43</sup> *Robertson*, 490 U.S. at 351.

<sup>44</sup> Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629, 7631 (Feb. 11, 1994) (“Executive Order 12898”) (ENT000259).

<sup>45</sup> Council on Environmental Quality, Environmental Justice, Guidance Under the National Environmental Policy Act at 1 (Dec. 10, 1997) (ENT000266) (“CEQ Guidance”).



Environmental Assessments and Considering Environmental Issues.”<sup>46</sup> Later in 2004, the Commission issued a “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,” which endorses and incorporates LIC-203’s EJ guidance.<sup>47</sup>

The Commission’s Environmental Justice Policy Statement makes clear that neither it nor Executive Order 12898 establishes any new substantive or procedural requirements applicable to NRC regulatory or licensing activities.<sup>48</sup> In *North Anna*, the Commission drew a distinction between the Staff’s analysis of EJ issues and the Staff’s explanation of that analysis in the FSEIS, noting that the “FEIS is necessarily more concise than the underlying pre-FEIS analysis, as the explanation is intended to summarize the analysis in a manner both concise and understandable to the public.”<sup>49</sup> For this reason, the EJ discussion in an FSEIS “need not be elaborate or lengthy.”<sup>50</sup>

Indeed, the Commission has observed that “[o]ne can always flyspeck an FEIS[’s discussion] to come up with more specifics and more areas of discussion that conceivably could have been included.”<sup>51</sup> Instead, the Commission has determined that the methods and form of the Staff’s review are “best left to the informed discretion of the Staff.”<sup>52</sup> Further, in the EJ

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<sup>46</sup> LIC-203, Rev. 1, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues, App. D at D-1 (May 24, 2004) (ENT000261).

<sup>47</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,041, 52,046 (“NRC Environmental Justice Policy Statement”) (Aug. 24, 2004) (ENT000260).

<sup>48</sup> See Executive Order 12898, 59 Fed. Reg. at 7632-33 (ENT000259); NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,046 (ENT000260).

<sup>49</sup> *Dominion Nuclear N. Anna* (Early Site Permit for N. Anna ESP Site), CLI-07-27, 66 NRC 215, 241 (2007).

<sup>50</sup> *Id.* (internal quotation marks omitted).

<sup>51</sup> *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001); see also CEQ Guidance at 8 (ENT000266) (“There is not a standard formula for how environmental justice issues should be identified or addressed.”).

<sup>52</sup> *N. Anna*, CLI-07-27, 66 NRC at 242-43.

context, the Commission has made clear that the rule of reason means that such an analysis need not evaluate “vaguely defined, shifting ‘subgroups’” within low-income and minority communities “because the potential universe of aggrieved individuals and groups is . . . ‘virtually infinite, limited only by one’s imagination.’”<sup>53</sup>

NEPA requires agencies to take a “hard look” at the environmental impacts of a proposed action and reasonable alternatives to that action, including possible mitigation alternatives.<sup>54</sup> However, this “hard look” is “tempered by a practical rule of reason”<sup>55</sup> that must apply in determining whether the NRC Staff took the requisite “hard look” at the proposed action’s environmental impacts.<sup>56</sup> Under the rule of reason, NEPA “does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts.”<sup>57</sup>

### **C. Adjudicatory Supplementation of the NEPA Record**

In determining whether the record is sufficient under NEPA and 10 C.F.R. Part 51, licensing boards consider the record as a whole, including the FSEIS and the evidentiary record for the hearing, as developed by the boards and the parties.<sup>58</sup> As the Commission explained:

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<sup>53</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 155-56 (2002) (“PFS”). Likewise, the Commission has found that there is “no basis for launching an ‘environmental justice’ inquiry into whether some members of a minority community are impoverished when compared to others in the same community.” *Id.* at 156.

<sup>54</sup> *See La. Energy Servs. L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 87-88 (1998) (“LES”); *see also Robertson*, 490 U.S. at 349 (holding that NEPA requires agencies to take a “hard look” at environmental consequences prior to taking major actions).

<sup>55</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (citing *Communities, Inc. v. Busey*, 956 F.2d 619, 626 (6th Cir. 1992)); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316 (2010); *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1184-85 (9th Cir. 2000); *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767-69 (2004) (stating that the rule of reason is inherent in NEPA and its implementing regulations).

<sup>56</sup> *New York v. Kleppe*, 429 U.S. 1307, 1311 (1976); *see also U.S. Dep’t of Transp.*, 541 U.S. at 767-69 (stating that the rule of reason is inherent in NEPA and its implementing regulations).

<sup>57</sup> *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005).

<sup>58</sup> *See, e.g., Nuclear Innovation North America LLC* (South Texas Project, Units 3 & 4), CLI-11-6, 74 NRC 203, 208-09 (2011).

Boards frequently hold hearings on contentions challenging the staff's final environmental review documents. In such cases, "[t]he adjudicatory record and Board decision (and . . . any Commission appellate decisions) become, in effect, part of the FEIS." Put another way, under our longstanding practice, the Staff's review (the FEIS itself) and the adjudicatory record will become part of the environmental record of the decision.<sup>59</sup>

Thus, as explained by the Commission in a recent license renewal proceeding, after a board considers the entire record of a proceeding, the FSEIS is "deemed supplemented" by the board's decisions on NEPA contentions and by any subsequent Commission decision.<sup>60</sup>

Likewise, the NRC's record of decision ultimately will include the board and Commission decisions, which are based on the adjudicatory record.<sup>61</sup>

The Commission and its boards have followed this process routinely and without exception, not only in the relatively-recent decisions cited above, but also in many more cases dating back decades.<sup>62</sup> Under this well-established process, boards may modify environmental impact statement ("EIS") conclusions and, if warranted, remedy an otherwise deficient EIS through an adjudicatory decision.<sup>63</sup> The Commission also may do so on appeal.<sup>64</sup>

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<sup>59</sup> *Id.* (quoting *LES*, CLI-98-3, 47 NRC at 89).

<sup>60</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 61 (2012) (citing *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-05-28, 62 NRC 721, 731 (2005)).

<sup>61</sup> *See, e.g., La. Energy Servs.* (Nat'l Enrichment Facility), CLI-06-15, 63 NRC 687, 707 n.91 (2006) ("Adjudicatory findings on NEPA issues, including our own in this decision, become part of the environmental 'record of decision' and in effect supplement the FEIS."); *LES*, CLI-98-3, 47 NRC at 89.

<sup>62</sup> *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008); *Hydro Res.*, CLI-01-04, 53 NRC at 53 ("[T]he Presiding Officer's incorporation into LBP-99-30 of a staff affidavit on costs and benefits also does not require FEIS supplementation . . . in an adjudicatory hearing, to the extent that any environmental findings by the Presiding Officer (or the Commission) differ from those in the FEIS, the FEIS is deemed modified by the decision."); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 705-07 (1985), *aff'd in part and review otherwise declined*, CLI-86-5, 23 NRC 125 (1986), *remanded in part on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347 (1975).

<sup>63</sup> *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC 613, 733 (2009) ("[T]he record now contains sufficient evidence on dry cooling to support a conclusion that dry cooling would not be preferable to the proposed wet cooling system at the Vogtle site. We thus conclude that the agency's NEPA obligations relative to the discussion of design alternatives have been satisfied with regard to dry cooling, and

#### **IV. THE COMMISSION SHOULD REJECT CLEARWATER'S PETITION**

##### **A. If the Commission Grants the Relief Requested in Entergy's Earlier Petition, then Clearwater's Petition Is Moot**

As noted above, Entergy filed its own petition for review of LBP-13-13 on February 14, 2014, regarding the Board's resolution of CW-EC-3A.<sup>65</sup> Entergy's petition, however, differs significantly from that filed by Clearwater. Clearwater argues that the Board should have remanded the FSEIS to the Staff for further consideration, once it concluded that there were potentially disproportionate and adverse impacts on the EJ population. Entergy, on the other hand, explains why the Board should never have even admitted the contention or reached the conclusion that there are potentially disproportionate and adverse impacts on the EJ population.

Specifically, Entergy has requested that the Commission overturn the Board's rulings on CW-EC-3A for the following reasons:<sup>66</sup>

- Entergy has petitioned the Commission for review of the Board's decisions admitting the original and amended contention (LBP-08-13 and its July 6, 2011 Order) for a number of reasons. Primarily, Entergy has argued that, contrary to 10 C.F.R. § 50.47(a)(1)(i), NEPA, and longstanding Commission precedent, the Board erred in admitting Clearwater's contention that fundamentally challenged the effectiveness of emergency plans for Indian Point.
- Entergy has further petitioned the Commission for review of the Board's decisions denying Entergy's Motions in Limine and admitting extensive evidence and testimony challenging the effectiveness of the Indian Point emergency plans, contrary to 10 C.F.R. § 2.337(a).
- Finally, Entergy also has petitioned the Commission for review of certain aspects of LBP-13-13 regarding CW-EC-3A. The Board ultimately resolved CW-EC-3A in the

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contention EC 1.3 is resolved on the merits in favor of the staff and [Southern Nuclear Operating Company].") (emphasis added).

<sup>64</sup> See *N. Anna*, CLI-07-27, 66 NRC at 230 ("But *our own* examination of the entire administrative record leads us to conclude that the Staff's underlying review was sufficiently detailed to qualify as 'reasonable' and a 'hard look' under NEPA – even if the Staff's description of that review in the FEIS was not. Our explanation below provides an additional detailed discussion as part of the record on the alternative site review. We direct the Staff to include a similar level of detail in future FEIS analyses of alternative sites.") (citation omitted).

<sup>65</sup> See generally Entergy Petition.

<sup>66</sup> *Id.* at 2-3, 34-43.

NRC Staff's favor, but in doing so, the Board *de facto* reversed the Staff's original finding in the FSEIS that there are no disproportionate adverse impacts on EJ populations associated with Indian Point license renewal. The decision is based on multiple errors of law and fact that could have a substantial impact upon many licensees and the course of many licensing proceedings.

If the Commission grants Entergy's petition, then the question of whether the Board should have remanded the FSEIS for further evaluation is moot—and Clearwater's Petition should be rejected as such. Nevertheless, if the Commission considers Clearwater's Petition, the Petition should be rejected on many grounds, as explained below.

**B. Clearwater Has Not Satisfied the Standards Governing Petitions for Review**

Clearwater argues that because the Board concluded that the EJ evaluation in the FSEIS is deficient, the Board should have remanded the FSEIS to the NRC Staff for further analysis.<sup>67</sup> That is incorrect. Although Entergy disagrees with the Board's conclusion that the EJ evaluation in the FSEIS was deficient, assuming *arguendo* that the Board is correct, the Board's decision to supplement the FSEIS with the adjudicatory record satisfies NEPA and is fully supported by law.

**1. The NEPA Record Adequately Considers EJ Impacts**

***a) Because severe accident impacts are SMALL, there is no need to further supplement the record.***

After reviewing the testimony and arguments of all of the parties, the Board concluded that “the risk to both the EJ and non-EJ population is small” from a severe accident.<sup>68</sup> This conclusion is consistent with the License Renewal GEIS, which addresses severe accident impacts for all plants and concludes that severe accident risks (or impacts) are SMALL.<sup>69</sup> Table B-1, in 10 C.F.R. Part 51, codifies that conclusion. It states that “[t]he probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground

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<sup>67</sup> Petition at 7-13.

<sup>68</sup> *Indian Point*, LBP-13-13, slip op. at 387.

<sup>69</sup> GEIS at 5-115 (NYS00131C).

water, and societal and economic impacts from severe accidents are *small for all plants*.”<sup>70</sup>

Commission precedent establishes that this finding applies to all plants<sup>71</sup> and that “no site-specific severe accident impacts analysis need be done” for license renewal.<sup>72</sup> There is no exception requiring a site-specific severe accident evaluation for EJ populations.

Under binding Commission precedent, an EJ evaluation is only concerned with disproportionately *high and adverse* impacts on low-income and minority populations.<sup>73</sup> As it relates to this contention, because the impacts of a severe accident are not high and adverse for any population, then there are no disproportionately high and adverse impacts on any EJ population, and no further FSEIS evaluation is necessary.<sup>74</sup> In this case, the Board’s decision to supplement the FSEIS with the adjudicatory record, which evaluates the impacts to EJ populations in the event of a severe accident, went well beyond the requirements of NEPA. Therefore, Clearwater’s request to remand the FSEIS to the NRC Staff for *further* evaluation of the severe accident impacts on EJ populations (*e.g.*, further prison-by-prison consideration of severe accident impacts) is contrary to law.

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<sup>70</sup> 10 C.F.R. Pt. 51, Subpt. A, App. B, Tbl. B-1 (Postulated Accidents; Severe accidents) (emphasis added).

<sup>71</sup> *See Pilgrim*, CLI-10-11, 71 NRC at 316 (“Because the GEIS provides a severe accident impacts analysis that envelopes the potential impacts at *all* existing plants, the environmental impacts of severe accidents during the license renewal term already have been addressed generically in bounding fashion.”).

<sup>72</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 709 (2012).

<sup>73</sup> *See Hydro Res.*, CLI-01-4, 53 NRC at 64; *LES*, CLI-98-3, 47 NRC at 100; NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,040 (ENT000260).

<sup>74</sup> Entergy’s Proposed Findings of Fact and Conclusions of Law for Contention CW-EC-3A (Environmental Justice) at 67-68 (¶ 138) (Mar. 22, 2013) (“Entergy Proposed Findings”).

***b) The issues raised by Clearwater are outside the scope of license renewal, thereby further negating the need to supplement the record.***

The Commission has definitively and repeatedly ruled, without exception, that emergency planning issues are not within the scope of license renewal proceedings.<sup>75</sup> In LBP-13-13, the Board made clear that CW-EC-3A does not involve a challenge to emergency plans.<sup>76</sup> Indeed, the Board correctly stated that “[u]nder 10 C.F.R. § 50.47(a)(1)(i) ‘no finding [of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency] is necessary for issuance of a renewed nuclear power reactor operating license.’”<sup>77</sup> As such, a challenge to the scope or effectiveness of emergency plans—even if couched as an EJ-based evaluation of the sufficiency of emergency planning on EJ populations—is prohibited in this proceeding.<sup>78</sup>

Notwithstanding this unambiguous regulatory language and precedent, Clearwater’s Petition focuses on the adequacy of emergency planning issues, primarily pertaining to the adequacy of the EJ review related to sheltering and evacuations in the event of a severe accident.<sup>79</sup> As a result, Clearwater maintains that the Board should have sent the FSEIS back to the NRC Staff to undertake a detailed, building-to-building type analysis of ways to mitigate those alleged emergency planning deficiencies.<sup>80</sup> Because these emergency planning issues are

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<sup>75</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 560-61 (2005); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 640 (2004); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9 (2001).

<sup>76</sup> *Indian Point*, LBP-13-13, slip op. at 382.

<sup>77</sup> *Id.*

<sup>78</sup> *See Pilgrim*, CLI-10-11, 71 NRC at 302 (ruling that witness statements on “the issue of emergency planning—the need to provide accurate, ‘real time’ projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated” are beyond the scope of a license renewal severe accident mitigation alternative (“SAMA”) review—a NEPA-based review).

<sup>79</sup> *See, e.g.*, Petition at 7-9.

<sup>80</sup> *See id.*

outside the scope of this proceeding, the further supplementation requested by Clearwater is contrary to law.

***c) The current record on EJ issues fully satisfies NEPA.***

In arguing that the Board incorrectly supplemented the FSEIS with the adjudicatory record in this proceeding, Clearwater essentially claims that the NEPA record does not sufficiently consider the EJ issues raised by CW-EC-3A.<sup>81</sup> By way of example, Clearwater claims that the evaluation of prison populations in the FSEIS did not fully analyze all 26 such institutions within the 50-mile radius of Indian Point.<sup>82</sup> Clearwater faults the Board for only focusing on Sing Sing.<sup>83</sup> This argument fails because it ignores the full scope of the Staff's actual NEPA evaluation, which, in combination with the Board's supplement to the NEPA record, more than satisfies NEPA's rule of reason.

As an initial matter, witnesses for both Entergy and the NRC Staff testified that census Block Group data include all people located within that Block Group's geographic bounds, including both institutional and non-institutional populations.<sup>84</sup> As these witnesses explained, Block Group data, through the Group Quarter classification, account for all EJ populations, whether a subgroup or not.<sup>85</sup> This testimony was not contradicted by any of Clearwater's witnesses. Thus, the record already includes information on *all* of the populations.

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<sup>81</sup> *Id.* at 7-11.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> *Id.*

<sup>84</sup> Testimony of Entergy Witnesses Donald P. Cleary, Jerry L. Riggs, and Michael J. Slobodien Regarding Contention CW-EC-3A (Environmental Justice) at 40-41 (Mar. 29, 2012) ("Entergy Testimony") (ENT000258); NRC Staff Testimony of Jeffrey J. Rikhoff and Patricia A. Milligan Regarding Contention CW-EC-3A (Environmental Justice) at 21-22 (Mar. 30, 2012) ("NRC Staff Testimony") (NRC000063). *See also* Oct. 23, 2012 Tr. at 2896:17-18 (Rikhoff) ("Block group data is just as accurate. It includes the block-level data.").

<sup>85</sup> FSEIS at A-119 (NYS00133D). *See also* Oct. 23, 2012 Tr. at 2905:3-11 (Riggs), 2911:11-18 (Rikhoff) (explaining data included in Group Quarter classification).



The Commission’s Environmental Justice Policy Statement provides that EJ “is a tool, within the normal NEPA context, to identify *communities* that might otherwise be overlooked and identify impacts due to their *uniqueness* as part of the NRC’s NEPA review process.”<sup>86</sup> Commission precedent further clarifies that an EJ evaluation does not involve looking at “vaguely defined, shifting ‘subgroups’” within low-income and minority communities “because the potential universe of aggrieved individuals and groups is . . . ‘virtually infinite, limited only by one’s imagination.’”<sup>87</sup>

Clearwater’s insistence on separate, detailed, population subgroup analyses—that look well beyond the detailed community analyses already in the record—runs contrary to this precedent and is a textbook example of what NEPA does *not* require under its rule of reason. Clearwater is seeking to radically expand the Staff’s EJ review beyond the relevant community groups identified on the basis of race and/or income to include virtually infinite subgroups defined by any combination of characteristics, primarily institutionalization status and/or transportation dependencies.<sup>88</sup> This is truly the type of EJ analysis rejected by the Commission as it is “limited only by one’s imagination.”<sup>89</sup> The NRC simply is not required to identify or consider such unique aspects of every single population subgroup, as Clearwater seeks here. Such an exercise also would contradict the Commission’s direction that an FSEIS EJ discussion “need not be elaborate or lengthy.”<sup>90</sup>

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<sup>86</sup> NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,047 (ENT000260) (emphasis added); *see also* Entergy Testimony at 20 (ENT000258).

<sup>87</sup> *PFS*, CLI-02-20, 56 NRC at 155-56.

<sup>88</sup> *See* Petition at 8-10.

<sup>89</sup> *PFS*, CLI-02-20, 56 NRC at 155-56.

<sup>90</sup> *N. Anna*, CLI-07-27, 66 NRC at 241. Additionally, Clearwater erroneously cites the Commission’s *LES* decision to support its allegation that the NRC must further consider impacts to EJ subgroups. *See* Petition at 10 (citing *LES*, CLI-98-3, 47 NRC at 100). According to Clearwater, *LES* demonstrates that an EJ evaluation must identify factors unique to particular subgroups. *See id.* In its *PFS* decision, however, the Commission clarified that *LES* does not hold that EJ analyses must divide populations into subgroups. *PFS*, CLI-02-20, 56

Clearwater also provides no justification for why the analysis of Sing Sing does not already apply to and bound the impacts for other prison populations identified in the record. Indeed, Clearwater's own witness, Dr. Edelstein explained: "Because Sing Sing is closest to Indian Point, is a maximum security prison, and has a large population, I think it would suffer more severe impacts than other prisons in the area."<sup>91</sup> Thus, Clearwater's expert appropriately concedes that the analysis of Sing Sing bounds the impacts on other EJ populations who are incarcerated in the vicinity of Indian Point. The record's focus on Sing Sing provides a sufficient record under NEPA for those prison populations.

***d) Assuming the FSEIS required supplementation, the Board adequately did so in the adjudicatory record.***

As noted above, Entergy has submitted its own petition that would moot Clearwater's Petition if the Commission grants Entergy's requested relief. Nonetheless, if the Commission does not grant Entergy's petition, and considers Clearwater's Petition, the Board was fully authorized by law and Commission precedent to supplement the FSEIS on these EJ issues through LBP-13-13 and the detailed adjudicatory record for CW-EC-3A in this proceeding.

As discussed above in Section III.C, long-standing Commission case law provides that the adjudicatory record and Board decision supplement the Staff's environmental documents and become part of the environmental record. For example, in *LES*, the Commission held that "[t]he adjudicatory record and Board decision (and . . . any Commission appellate decisions) become,

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NRC at 157 n.50. As the Commission explained, *LES* "did not call for breaking up the community into 'subgroups' [such as] car-drivers and pedestrians." *Id.* Thus, *LES* lends no support to Clearwater's argument that the NRC must further analyze EJ community subgroups, and the FSEIS (particularly when supplemented by the Board) reasonably and appropriately identifies EJ populations.

<sup>91</sup> Testimony of Dr. Michael Edelstein in Support of Hudson River Sloop Clearwater Inc's Contention Regarding Environmental Justice at 6 (Dec. 22, 2011) (CLE000003). Clearwater also claims that "Rockland County jail also houses an EJ population that could experience similar or worse problems than the Sing Sing population." Initial Statement of Position for Clearwater's Contention EC-3A Regarding Environmental Justice at 27 (Jan. 5, 2012) (CLER00002).

in effect, part of the FEIS.”<sup>92</sup> The Board appropriately discussed and then followed this precedent in the resolution of CW-EC-3A in LBP-13-13.<sup>93</sup> This approach was particularly proper here given that the Board concluded, without objection from Clearwater, that the risks to EJ populations from a severe accident are SMALL.

The U.S. Courts of Appeals, across multiple circuits, have consistently upheld the NRC’s practice of supplementation as consistent with the Atomic Energy Act (“AEA”)<sup>94</sup> and NEPA.<sup>95</sup> Supplementation through public hearings, moreover, is not confined to the NRC.<sup>96</sup> The rationale for allowing supplementation through the hearing process is straightforward—the NRC’s hearing process allows for *greater* public participation than NEPA otherwise requires.<sup>97</sup>

For these reasons, assuming supplementation was necessary, the Board followed applicable precedent when it used its decision and the adjudicatory record to supplement the FSEIS and resolve the EJ issues raised by CW-EC-3A. This decision was not “a departure from,

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<sup>92</sup> *LES*, CLI-98-3, 47 NRC at 89.

<sup>93</sup> *Indian Point*, LBP-13-13, slip op. at 362-63, 387-88.

<sup>94</sup> *See Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 568 (D.C. Cir. 2007) (holding that supplementing an EIS through the hearing record does not violate the AEA).

<sup>95</sup> *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975) (holding that the “deemed modified” principle did not depart “from either the letter or the spirit” of NEPA); *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974) (holding that omissions from an FEIS can be cured by subsequent consideration of the issue in an agency hearing); *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (having “no trouble finding” that the NRC’s supplementation process satisfies NEPA); *see also Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1 (1978).

<sup>96</sup> *See, e.g., Pacific Alaska LNG Co.*, 9 FERC ¶ 61,334, at 61,709 (1979) (“[T]he CEQ General Counsel suggests that the matter should also be considered in the FEIS because the Commission proceeding does not provide the broad public review and comment required by NEPA. We disagree. Our final decision will address this issue in detail, based on the record in the proceeding. All interested parties have had an opportunity to contribute to that record, and our decision will therefore be based on full information. This procedure fully comports with the letter and spirit of NEPA.”) (citing *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 320-21 (1975); *Citizens For Safe Power, Inc. v. NRC*, 582 F.2d 87 (1st Cir. 1978)).

<sup>97</sup> *Hydro Res.*, CLI-01-04, 53 NRC at 53 (“[T]he hearing process itself ‘allows for additional and *more rigorous* public scrutiny of the FES than does the usual ‘circulation for comment.’”) (quoting *Limerick*, ALAB-819, 22 NRC at 707) (emphasis added)).

or contrary to, established law,” and therefore the Commission should reject Clearwater’s Petition.<sup>98</sup>

## **2. No Further Consideration of Mitigation Is Required**

### ***a) The FSEIS need not discuss mitigation for SMALL severe accident impacts.***

The FSEIS, and thus the record of this proceeding that supplements the FSEIS, need not consider emergency planning improvements or other actions as “mitigation.” A severe accident at Indian Point would result in SMALL probability-weighted impacts to minority and low-income populations. As explained below, NEPA does not require discussion of mitigation for such impacts.

The Commission determined in the GEIS and its corresponding regulations that the probability-weighted severe accident impacts are SMALL (*i.e.*, they are neither high nor significantly adverse) for all plants.<sup>99</sup> “SMALL” is defined in NRC regulations as environmental impacts that “are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource.”<sup>100</sup> The SMALL impact is reiterated in LBP-13-13, in which the Board described a severe accident that could impact the EJ population as “improbable” with a “small” risk.<sup>101</sup> Indeed, the Board never concluded that the EJ populations around Indian Point are subject to a “significant” impact.

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<sup>98</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259.

<sup>99</sup> See GEIS at 5-115 (NYS00131C); Oct. 23, 2012 Tr. at 2757:7-17, 2758:13 (Rikhoff) (“And the probability weighted impact risks associated with severe accidents were also small.”); see also NRC Staff Testimony at 7 (A7) (NRC000063).

<sup>100</sup> 10 C.F.R. Pt. 51, Subpt. A, App. B, Tbl. B-1 § 3; see also Entergy Testimony at 44 (A52) (ENT000258).

<sup>101</sup> *Indian Point*, LBP-13-13, slip op. at 387.

NEPA requires that possible mitigation measures “be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.”<sup>102</sup> Because a severe accident at Indian Point would result in SMALL probability-weighted impacts to minority and low-income populations, there is no need for the FSEIS to consider emergency planning or other “improvements” as additional or alternative mitigation measures for severe accidents, as suggested by Clearwater. As the D.C. Circuit has held, an agency may decline to discuss mitigation measures when it believes an action’s environmental impact will be minor.<sup>103</sup>

The NRC has adopted a similar approach. In its guidance, the NRC states that if the Staff determines that there are no “high and adverse impacts,” then no further analysis is required other than to document its findings.<sup>104</sup> It is only after the Staff identifies “disproportionately high and adverse impacts” to EJ populations that it is necessary to consider mitigation measures.<sup>105</sup> Thus, because the Board did not rule that there are high impacts to EJ populations, NEPA requires no further consideration of severe accident mitigation here.

This conclusion is supported by the Commission’s Environmental Justice Policy Statement, which states that mitigation measures are to be considered if there are “*significant* impacts to the minority or low-income population.”<sup>106</sup> Because there are no *significant* impacts

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<sup>102</sup> *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997); *see also Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426 (2006) (“The purpose of addressing possible mitigation measures in an FEIS is to ensure that the agency has taken a ‘hard look’ at the potential environmental impacts of a proposed action. An EIS therefore must address mitigation measures ‘in sufficient detail to ensure that environmental consequences have been fairly evaluated.’”) (citations omitted).

<sup>103</sup> *See Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 737 (D.C. Cir. 2000) (upholding agency’s decision to “decline to adopt mitigation measures to address a problem that it believed might not even develop”).

<sup>104</sup> Office of Nuclear Reactor Regulation Office Instruction, LIC-203, Rev. 2, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues at C-8 (Feb. 11, 2009) (ENT000264).

<sup>105</sup> *Id.*

<sup>106</sup> NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,042 (ENT000260) (emphasis added).

here to the EJ population, there is no requirement for additional consideration of mitigation. Again, Clearwater's Petition fails as a result.

***b) The FSEIS need not discuss mitigation requiring changes to the emergency plans.***

All of Clearwater's proposed "mitigation" measures amount to assertions that existing emergency planning measures are inadequate. As discussed above, such challenges—even if presented in connection with a NEPA mitigation claim—are prohibited by NRC regulations governing this proceeding's scope; regulations which expressly prohibit using this proceeding to challenge emergency planning.<sup>107</sup> Furthermore, Entergy and NRC Staff witnesses clearly and convincingly demonstrated that Indian Point, New York, and local emergency plans provide reasonable assurance that all populations would be accounted for in the event of a severe accident.<sup>108</sup> Thus, any further consideration of emergency planning improvements as part of this proceeding is not required, and Clearwater's Petition again fails.

***c) The SAMA evaluation already addresses severe accident mitigation.***

In any event, the FSEIS already extensively considers severe accident mitigation in the SAMA evaluation—an evaluation on which Clearwater did not proffer an admissible contention. NEPA requires a reasonably complete discussion of possible mitigation measures,<sup>109</sup> but gives agencies discretion as to how to meet this mandate.<sup>110</sup> In exercising that discretion, the Commission has limited the scope of severe accident mitigation analysis under NEPA to focus on SAMAs—*i.e.*, plant modifications or operational changes that could reduce the already-low

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<sup>107</sup> 10 C.F.R. § 50.47(a)(1)(i); *see also Indian Point*, LBP-08-13, 68 NRC at 149; *see also Pilgrim*, CLI-10-11, 71 NRC at 302.

<sup>108</sup> *See generally* Entergy Proposed Findings at 76-95 (¶¶ 153-194); NRC Staff Proposed Findings of Fact and Conclusions of Law Part 10: Contention CW-EC-3A (Environmental Justice) at 61-88 (¶¶ 10.152 to 10.227) (Mar. 22, 2013).

<sup>109</sup> *Robertson*, 490 U.S. at 352.

<sup>110</sup> *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 & n.16 (D.C. Cir. 1976)).

risk of a severe accident.<sup>111</sup> Accordingly, the FSEIS already considers severe accident mitigation to the extent required by NEPA, and Clearwater's Petition must be rejected as a result.

**d)      *The case law referenced by Clearwater does not support its position.***

Clearwater references a Third Circuit case, *Limerick Ecology*, apparently as an alleged example of when a court required mitigation related to training civilian drivers on evacuation of inmates.<sup>112</sup> However, *Limerick Ecology* did not rule that the training was needed to comply with NEPA, much less EJ requirements. Instead, the training issues related to claims about the adequacy of the emergency plan under the NRC's *safety* regulations.<sup>113</sup> Moreover, the Third Circuit did not impose additional training requirements, as claimed by Clearwater. Instead, the Court simply concluded that the NRC incorrectly rejected a contention.<sup>114</sup> Thus, Clearwater's claims that the "Court found that the Commission . . . violated NEPA" and that "the Commission . . . abused its discretion in failing to consider the training of civilian drivers" are simply incorrect and do not support its arguments.<sup>115</sup>

In summary, no additional discussion of mitigation is needed here, because the SMALL impacts from a severe accident do not require further consideration of mitigation, the FSEIS need not discuss changes to the emergency plans, and the SAMA evaluation already addresses any required severe accident mitigation. The Board's decision to supplement the NEPA record

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<sup>111</sup> See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996) (NYS000127).

<sup>112</sup> Petition at 12 (citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)).

<sup>113</sup> *Limerick Ecology*, 869 F.2d at 747-54.

<sup>114</sup> *Id.* at 750-51.

<sup>115</sup> Clearwater also states that "[t]he Court noted that emergency offsite responses to such nuclear incidents have been 'dominated by an atmosphere of almost total confusion.'" Petition at 12 (citing *Limerick Ecology*, 869 F.2d at 758). Clearwater's reference to this statement does not support its position. The Third Circuit was quoting a statement by the President's Commission on the Accident at Three Mile Island in explaining why the NRC began requiring emergency plans. *Limerick Ecology*, 869 F.2d at 758. Thus, the Court was quoting a statement about circumstances *before* the current requirements for emergency planning. The Court was not justifying the need for mitigation or additional training for civilian drivers, as implied by Clearwater. *Limerick Ecology* provides no support for Clearwater's arguments.

with LBP-13-13 and the adjudicatory record,<sup>116</sup> rather than remand the FSEIS to the Staff for further consideration of mitigation measures, is fully consistent with NEPA's rule of reason. To the extent this is a legal finding, the Board's decision is not "a departure from, or contrary to, established law."<sup>117</sup> To the extent this is a factual finding, the Board's decision not to further discuss mitigation cannot be considered to be "not even plausible in light of the record viewed in its entirety."<sup>118</sup> Therefore, the Commission should reject Clearwater's Petition in its entirety.

## V. CONCLUSION

For the foregoing reasons, the Commission should reject Clearwater's Petition regarding the Board's resolution of CW-EC-3A.

Respectfully submitted,

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

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Dated at Washington, DC  
this 25th day of March 2014

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<sup>116</sup> The need for additional mitigation measures was a significant topic throughout the hearing. When the Board supplemented the FSEIS with the adjudicatory record, that action included the information on mitigation measures.

<sup>117</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 259.

<sup>118</sup> *La. Energy Servs.*, CLI-06-22, 64 NRC at 40.



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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)	)	
	)	March 25, 2014

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of “Applicant’s Answer Opposing Hudson River Sloop Clearwater, Inc. Petition for Review of Board Decision Regarding Contention CW-EC-3A (Environmental Justice)” were served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned proceeding.

*Signed (electronically) by Lance A. Escher*

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