



NUCLEAR REGULATORY COMMISSION

[NRC-2012-0265]

In the Matter of)	
)	
ENERGY NUCLEAR OPERATIONS, INC.)	
)	
ENERGY NUCLEAR INDIAN POINT 2, LLC)	
)	
ENERGY NUCLEAR INDIAN POINT 3, LLC)	
)	
Indian Point Nuclear Generating,)	Dockets No. 50-003, 50-247,
Units 1, 2, and 3)	and 50-286
)	License Nos. DPR-5, DPR-26,
)	and DPR-64
)	

Director's Decision

I. Introduction

By electronic transmission dated March 28, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML110890871), Eric T. Schneiderman, Attorney General for the State of New York, the Petitioner, submitted a petition under section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Requests for Action under This Subpart," to Mr. R. W. Borchardt, Executive Director for Operations, U.S. Nuclear Regulatory Commission (NRC, or the Commission). The Petitioner requested that the NRC take enforcement action to correct alleged noncompliance with fire protection regulations at Indian Point Nuclear Generating, Units 1, 2, and 3.

Actions Requested

The Petitioner asked the NRC to take immediate action and issue an Order requiring the following actions regarding Indian Point Nuclear Generating, Units 1, 2, and 3:

- Identify the violations of paragraphs F and G of Section III of Appendix R, "Fire Protection Program for Nuclear Power Facilities Operating Prior to January 1, 1979," to 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," which exist as of the date of the petition (March 28, 2011) at Indian Point Units 1, 2, and 3.
- Compel Entergy Nuclear Operations, Inc. (Entergy, or the licensee), and its affiliates to comply on or before September 20, 2011, with the requirements in paragraphs F and G for all fire zones in Indian Point Units 2 and 3, and any Indian Point Unit 1 fire zone or system, structure, or component that Indian Point Units 2 and 3 rely upon.
- Convene an evidentiary hearing before the Commission to adjudicate the violation of paragraphs F and G at Indian Point Units 1, 2, and 3, by Entergy and its affiliates.

As the basis for the request, the Petitioner stated, in part, the following:

- The Petitioner noted that the NRC's fire safety regulations found in 10 CFR 50.48(b) and Appendix R to 10 CFR Part 50 have been in effect since 1980 and the Indian Point reactors still do not comply with the prescriptive requirements.
- The Petitioner cited the population centers adjacent to the Indian Point facility and the associated consequences of a major fire and radiological release at Indian Point. According to the Petitioner, more than 17 million people live within 50 miles of the Indian Point site, which has the highest surrounding population of any operating reactor site in the country. The Petitioner also notes that Indian Point is located within 5 miles of the

New Croton Reservoir in Westchester County, which provides drinking water for New York City.

- The Petitioner noted that Indian Point was built before the NRC or its predecessor, the Atomic Energy Commission, developed siting criteria. The Petitioner questioned if the Commission would approve a reactor facility at this site today.
- The Petitioner opined that approximately half of the core damage risk at operating reactors results from accident sequences initiating from fires.
- The Petitioner described past investigations on fire barriers, specifically Thermo-Lag and Hemyc, by both the NRC's Office of the Inspector General and the Government Accountability Office. The Petitioner observed that both products failed to meet their endurance ratings during extended testing. The Petitioner stated that the NRC staff has not been aggressive in resolving fire barrier issues or in taking meaningful enforcement action against the Indian Point facility.
- The Petitioner focused on the proposed exemptions to Appendix R to 10 CFR Part 50 submitted by the licensee on March 6, 2009. These exemption requests would require NRC approval of operator manual actions (OMAs) in many fire areas at Indian Point. The Petitioner stated that NRC regulations do not authorize OMAs as a way to protect a redundant system from fire, and it recommended that the NRC deny the OMAs.
- The Petitioner referred to the accident at the Fukushima Dai-ichi Nuclear Power Plant that resulted from the March 11, 2011, Great Tōhoku Earthquake and subsequent tsunami. The Petitioner questioned whether plant operators at Indian Point would be capable of performing the necessary manual actions during a similar disaster.
- In conclusion, the Petitioner stated that (1) the NRC should reserve exemptions for extraordinary circumstances, (2) the NRC should not approve the licensee's proposed

exemptions, and (3) Entergy had not made a serious effort to comply with Federal regulations.

Representatives of the Petitioner met with the Office of Nuclear Reactor Regulation's (NRR's) Petition Review Board (PRB) on May 9, 2011, to clarify the bases for the petition. The transcript of this meeting, included in the meeting summary dated June 8, 2011 (ADAMS Accession Nos. ML111520459 and ML111520469), has been added as a supplement to the petition and is available for inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1-F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by sending an e-mail to PDR.Resource@nrc.gov.

In a letter dated June 30, 2011 (ADAMS Accession No. ML111520393), the NRC informed the Petitioner that the agency denied the request for immediate action. The NRC informed the Petitioner that the agency identified no safety concerns when considering compensatory measures in place. Therefore, the NRC had no basis for taking immediate actions. Finally, the NRC informed the Petitioner that the agency was referring the issues in the petition to NRR for appropriate action.

On July 2, 2012, the NRC issued the proposed Director's Decision (ADAMS Accession No. ML120880203) and requested comments from the Petitioner (ADAMS Accession No. ML120880169) and Entergy (ADAMS Accession No. ML120880186). On August 1, 2012,

the NRC received comments from both the Petitioner (ADAMS Accession No. ML12222A134) and Entergy (ADAMS Accession No. ML12219A307). Additional comments were received from the Petitioner by letter dated September 19, 2012 (ADAMS Accession No. ML12272A287). The attachment to this final Director's Decision addresses these comments. Finally, the NRC modified its proposed Director's Decision based on the points raised in the comments.

II. Discussion

Plants licensed to operate before January 1, 1979, must meet the fire safety regulations in Section III.G of Appendix R to 10 CFR Part 50. Indian Point Nuclear Generating Unit 1 was permanently shut down on October 31, 1974, and it has remained in safe storage (SAFSTOR) status. The NRC does not review Unit 1 for compliance with Appendix R because fuel has been permanently removed from the reactor vessel. The NRC's program for overseeing the safe operation of a nuclear power reactor that has been permanently shut down is described in Inspection Manual Chapter 2561, "Decommissioning Power Reactor Inspection Program." On January 31, 1996, Amendment No. 45 revised the Indian Point Unit 1 license to possession-only status and revised the technical specifications. Technical Specification 2.11, "Fire Protection," states that Units 1 and 2 share a common fire protection program, which is addressed in Appendix A to the Indian Point Unit 2 Facility Operating License No. DPR-26. Therefore, any system, structure, or component located at Unit 1 that supports the fire protection program at Unit 2, will be documented in Unit 2 inspection activities.

The Unit 2 station blackout diesel generator, which also supports alternative shutdown capability for Appendix R requirements, is located in a Unit 1 structure. However, neither the

diesel generator fire zone nor any OMAs related to the Unit 2 station blackout diesel generator were included in the licensee's request for exemptions. As a result, the agency does not consider systems, structures, and components at Unit 1 applicable to this petition.

Indian Point Nuclear Generating, Units 2 and 3, were licensed before January 1, 1979, and must meet the established level of protection as intended by Section III.G of Appendix R to 10 CFR Part 50. The NRC reviewed inspection reports issued from January 1, 2010, to the present and found that there were no violations of fire protection requirements at Indian Point Units 2 and 3, effective on March 28, 2011, the date of the petition. The Triennial Fire Protection Inspection Report at Unit 2 issued on May 7, 2010 (ADAMS Accession No. ML101270240), identified two Green (very low safety significance) non-cited violations (NCVs). The Triennial Fire Protection Inspection for Unit 3, issued on July 11, 2011 (ADAMS Accession No. ML111920339), identified a Green NCV. Most recently, the inspection report dated August 16, 2012 (ADAMS Accession No. ML12229A128), which the Director's Decision will discuss further, identified violations at both operating units for reliance on unapproved OMAs.

The underlying purpose of Section III.G of Appendix R to 10 CFR Part 50 is to ensure that the ability to achieve and maintain safe shutdown is preserved following a fire event. Section II of Appendix R to 10 CFR Part 50 states that a licensee's fire protection program shall extend the concept of defense-in-depth to fire protection with the following objectives:

- to prevent fires from starting;
- to rapidly detect, control, and promptly extinguish fires that do occur; and
- to provide protection for structures, systems, and components important-to-safety so

that a fire not promptly extinguished by the fire suppression activities will not prevent the safe shutdown of the plant.

Paragraph III.G.2 of Appendix R to 10 CFR Part 50 requires one of the following means to ensure that a redundant train of safe-shutdown cables and equipment is free of fire damage in instances in which redundant trains are located in the same fire area outside of primary containment:

- a. separation of cables and equipment by a fire barrier having a 3-hour rating;
- b. separation of cables and equipment by a horizontal distance of more than 20 feet with no intervening combustibles or fire hazards and with fire detectors and an automatic fire suppression system installed in the fire area; and
- c. enclosure of cables and equipment of one redundant train in a fire barrier having a 1-hour rating and with fire detectors and an automatic fire suppression system installed in the fire area.

However, as a result of safe-shutdown-focused inspections conducted in 2000, the NRC identified that, in lieu of the methods specified in Paragraph III.G.2, some licensees, including Indian Point, were crediting OMAs to achieve and maintain safe shutdown in the event of a fire affecting areas in which both trains of a safe-shutdown system or component are co-located. On June 30, 2006, the NRC issued Regulatory Issue Summary (RIS) 2006-10, "Regulatory Expectations with Appendix R Paragraph III.G.2 Operator Manual Actions," (ADAMS Accession No. ML061650389), which stated that the use of OMAs in lieu of the protection methods specified in Paragraph III.G.2 of Appendix R to 10 CFR Part 50, is not consistent with the regulations and that plants need regulatory approval for each specific OMA proposed.

On June 30, 2007, the NRC issued Enforcement Guidance Memorandum (EGM) 07-004, "Enforcement Discretion for Post-Fire Manual Actions Used as Compensatory Measures for Fire Induced Circuit Failures" (ADAMS Accession No. ML071830345). EGM 07-004 established March 6, 2009, as the date by which licensees must complete

corrective actions for OMA noncompliances to qualify for enforcement discretion for those violations. As per EGM 07-004, available licensee corrective actions included submission of exemption requests. In accordance with EGM 07-004, enforcement discretion continues for the duration of the NRC staff review of licensing actions, including exemption requests.

On March 6, 2009, Entergy submitted requests for exemptions from the requirements of Section III.G of Appendix R to 10 CFR Part 50, consistent with information provided in Regulatory Issue Summary (RIS) 2006-10 and EGM 07-004, for Indian Point Nuclear Generating Units 2 and 3 (ADAMS Accession Nos. ML090770151 and ML090760993). The exemptions proposed OMAs as a permanent resolution for credited safe-shutdown components that could be rendered incapable of performing their safety function if either the component or supporting electrical cables were damaged by fire in a fire area. Since EGM 07-004 provided enforcement discretion, NRC inspectors did not cite violations for these potential noncompliances during the staff's review.

As previously discussed, the Petitioner focused on the NRC staff review of the licensee's proposed exemptions that would rely on OMAs. In addition, the Petitioner requested that the NRC identify all violations from Sections III.F and III.G of Appendix R to 10 CFR Part 50. However, the licensee did not request any exemptions from Section III.F of Appendix R to 10 CFR Part 50. Section III.F requires that fire detection systems shall be automatic and capable of operating with or without offsite power. The licensee requested exemptions from the safe shutdown requirements of Section III.G of Appendix R to 10 CFR Part 50. Furthermore, the staff guidance documents (i.e., RIS 2006-10 and EGM 07-004) only address Section III.G and not III.F. There were no violations associated with Section III.F and, as a result, this Director's Decision does not address violations with respect to Section III.F of Appendix R to 10 CFR Part 50.

In May 2011, NRC regional inspection staff performed an inspection at Indian Point in accordance with Inspection Procedure 71111.05T, "Fire Protection (Triennial)." In the ensuing inspection report dated July 11, 2011 (ADAMS Accession No. ML111920339), NRC inspectors reviewed the licensee's proposed OMAs in accordance with the inspection procedure.

By letters dated February 1, 2012 (ADAMS Accession Nos. ML112140509 and ML112200442), the NRC completed its review, approving some exemption requests but denying others at Indian Point Nuclear Generating, Units 2 and 3. By separate letter, also dated February 1, 2012 (ADAMS Accession No. ML12031A176), the NRC informed the licensee that the period of enforcement discretion for noncompliance with NRC fire protection requirements ended with the issuance of these letters. It also notified the licensee that the OMAs not approved represented potential noncompliances with 10 CFR 50.48(b) and Section III.G of Appendix R to 10 CFR Part 50, pending completion of inspections by NRC Region I inspectors. The NRC directed that, within 30 days, the licensee provide its schedule and plans to achieve and verify compliance with the requirements of Section III.G of Appendix R to 10 CFR Part 50, for those areas in which the NRC denied the licensee's request for an exemption. The NRC informed the licensee that, following receipt and review of the licensee's response, the NRC would complete appropriate inspection activities relating to this issue and then inform the licensee of its enforcement decisions.

By letter dated March 1, 2012 (ADAMS Accession No. ML12074A028), the licensee provided its schedule and planned actions for completing corrective actions that will resolve each issue related to protection of redundant safe shutdown trains and thereby comply with the applicable requirements of Paragraph III.G.2 of Appendix R to 10 CFR Part 50, for both Indian Point operating units. Compliance with Section III.G of Appendix R to 10 CFR Part 50, would be without the use of exemptions to justify reliance upon OMAs. The licensee informed the NRC that it will accomplish its planned resolution through a combination of engineering analysis and

plant modifications. The engineering analysis will consist of revisions to the respective post-fire safe-shutdown analysis and methodology. Plant modifications will involve installation of appropriately rated fire barriers, potential rerouting of circuits, and potential modification of circuit protection or control schemes. The licensee informed the NRC that, with few exceptions, it expects to complete all engineering analyses and plant modifications by the end of calendar year 2012. Exceptions to projected completion involve plant modifications for Indian Point Units 3 and 2, which will not be completed until the spring 2013 and 2014 refueling outages, respectively, because those modifications involve activities that require plant outages to install.

In a letter dated March 22, 2012 (ADAMS Accession No. ML120820384), the NRC responded to the licensee's letter of March 1, 2012. The NRC informed the licensee that a near-term inspection would verify that plans for achieving full compliance with fire protection regulations have been entered into the licensee's corrective action program, compensatory measures are appropriate and remain in place, and that the schedule for achieving full compliance will adequately assure public health and safety. The NRC also advised the licensee that the agency would perform additional inspections to monitor progress in completing corrective actions.

In April 2012, NRC inspectors reviewed the ongoing implementation of the licensee's corrective actions to restore full compliance with Paragraph III.G.2 of Appendix R to 10 CFR Part 50 regarding denied exemptions to implement OMAs. The inspection report the NRC issued on August 16, 2012 (ADAMS Accession No. ML12229A128), cited violations at both operating units for use of unapproved OMAs to mitigate safe shutdown equipment malfunctions caused by a fire-induced single spurious actuation in lieu of protecting the equipment in accordance with applicable regulations. The inspection report also included a non-cited violation of Unit 2 for the inappropriate storage of combustible materials. The licensee's letter

dated September 17, 2012 (ADAMS Accession No. ML12268A057), provided its response to the violations and their proposed corrective actions.

III. Conclusion

The Petitioner sought enforcement action to achieve compliance with NRC regulations governing fire protection at Indian Point Nuclear Generating, Units 1, 2, and 3. The Petitioner recommended that the NRC deny exemptions requested by the licensee that relied on OMAs, and that the NRC issue an Order taking enforcement action.

The Petitioner requested that the NRC identify violations of Section III.F and G of Appendix R to 10 CFR Part 50 that exist at Indian Point as of the date of the petition. As previously discussed, there were no violations of fire protection requirements at Indian Point effective on March 28, 2011. Following staff review of the licensee's proposed exemptions, the NRC identified potential areas of noncompliance for which the licensee has provided a schedule for achieving full compliance. The NRC's inspectors have monitored the licensee's corrective actions and recently issued violations consistent with the NRC's ongoing reactor oversight process. Therefore, as specified above, the NRC is granting the Petitioner's request to identify violations of fire protection regulations at Indian Point and to take appropriate enforcement actions as part of planned inspection activities.

The Petitioner further requested the NRC to compel the licensee and its affiliates to comply on or before September 20, 2011, with the requirements in Section III.F and G of Appendix R to 10 CFR Part 50 for all fire zones in Indian Point Units Nos. 2 and 3, and any Indian Point Unit No. 1 fire zone or system, structure, or component relied on by Indian Point Unit Nos. 2 and 3. The NRC's letter of June 30, 2011, which denied the Petitioner's request for

immediate action, had already denied the Petitioner's request to order compliance by September 20, 2011. The licensee has provided its plans and schedules to resolve the denied exemptions. The licensee's schedule currently anticipates full compliance with the Commission's fire protection regulations at both operating units following the spring 2014 refueling outage at Indian Point Unit No. 2. Therefore, as specified above, the NRC is granting the Petitioner's request that the licensee be brought into compliance inasmuch as the licensee's earlier reliance on denied exemptions will be resolved through this schedule for achieving compliance.

The Petitioner requested that the NRC convene an evidentiary hearing to adjudicate the violations by the licensee and its affiliates of Section III.F and G of Appendix R to 10 CFR Part 50 at Indian Point Units 1, 2, and 3. The NRC staff will disposition violations as part of its ongoing reactor oversight process. Evidentiary hearings before the NRC at the request of third parties are not a part of this process. Therefore, the Petitioner's request to convene a hearing before the Commission is denied.

As provided in 10 CFR 2.206(c), the NRC will file a copy of this Director's Decision with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 24 day of October 2012.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation

COMMENTS RECEIVED FROM THE PETITIONER
STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
LETTER OF AUGUST 1, 2012

Comment 1

The Proposed Director's Decision is not responsive to the Attorney General's request that NRC identify all fire safety violations at Indian Point. The final Director's Decision should identify all Indian Point fire safety violations.

Response:

The U.S. Nuclear Regulatory Commission (NRC) has been responsive to the issues and has handled both the exemption request and your petition in accordance with our processes and with a focus on public health and safety. The petition focused on the NRC staff review of the licensee's proposed exemptions that relied upon operator manual actions (OMAs). The proposed exemptions reflected non-compliance with the Commission's regulations for fire protection; non-compliance is not synonymous with violations. As stated in the proposed Director's Decision, the licensee acted within the enforcement discretion granted to all licensees by EGM 07-004 during the staff's review of the proposed exemptions. Therefore, NRC inspectors did not cite the licensee for violations of fire protection regulations during the staff review.

In response to the request to identify violations of fire protection requirements, a review of NRC inspection reports indicates that the licensee did not violate fire protection requirements at Indian Point Unit Nos. 1, 2, and 3, effective on March 28, 2011, the date of the petition. The only violations of fire protection regulations the NRC identified during the past two years were two non-cited violations (NCVs) of very low safety significance (Green) at Unit No. 2 discussed in the May 7, 2010, Unit No. 2 Triennial Fire Protection Inspection

Report (ADAMS Accession No. ML101270240), one NCV of very low safety significance (Green) at Unit No. 3 discussed in the July 11, 2011, Unit No. 3 Triennial Fire Protection Inspection Report (ADAMS Accession No. ML111920339), and three violations discussed in the most recent August 16, 2012, inspection report (ADAMS Accession No. ML12229A128). The NRC modified the final Director's Decision accordingly.

Comment 1.a

The Proposed Director's Decision provides no rational basis for not addressing fire safety violations at Indian Point Unit 1.

The Proposed Director's Decision refusal to identify Indian Point Unit No. 1 fire safety violations is also arbitrary and capricious because Entergy's schedule for correcting Indian Point Unit No. 2 fire safety violations includes two violations in an Indian Point Unit No. 1 structure. Entergy proposes to correct fire safety violations in the Indian Point Unit 1 Superheater Building at Fire Area J, Zones 25-23 (*so in the original*) and 270.

Response:

On January 31, 1996, Amendment No. 45 revised the Indian Point Unit No. 1 license to possession-only status and revised the technical specifications. Technical Specification 2.11, "Fire Protection," states that Unit Nos. 1 and 2 share a common fire protection program, which is addressed in Appendix A to the Indian Point Unit No. 2 Facility Operating License No. DPR-26. Therefore, any system, structure, or component located at Unit No. 1 that supports the fire protection program at Unit No. 2, will be documented in Unit No. 2 inspection activities.

The NRC conducted a fire inspection at Indian Point in April 2012. The NRC issued the inspection report on August 16, 2012 (ML12229A128). Part of the inspection scope was to

review all OMAs and walk down all circuits that were not protected in accordance with Paragraph III.G.2 of Appendix R to 10 CFR Part 50 requirements. Specifically, for circuits that traversed Unit No. 1 (i.e., Fire Area J, Zone 25, 23 Battery Room), the staff reviewed the circuits associated with OMA No. 12. OMA No. 12 was a manual action to transfer instrument busses 23 and 23A to their emergency power sources.

Although these circuits were in Unit No. 1, if these circuits caused a malfunction of Unit No. 2 safe shutdown systems, structures, or components, this would be a violation of Unit 2's fire protection program license condition, not a violation of Unit No. 1. Upon further review, the staff concluded that the circuits in Unit No. 1 fire zones J/25 and J/270 would not actually cause a maloperation of equipment and, therefore, the instrument busses would automatically swap to their emergency power sources. As a result, the NRC determined this OMA was unnecessary because the automatic operation is not in the fire zones of interest and could be credited to maintain power to the instrument busses. In conclusion, our inspectors did not identify a violation of the Unit No. 2 fire protection program with respect to Paragraph III.G.2 of Appendix R to 10 CFR Part 50 for fire zones J/25 and J/270. A violation of Unit No. 1 was not applicable.

Comment 1.b

The Proposed Director's Decision implies that the fire safety violations Entergy identified in its 2009 exemption requests are the only such violations at Indian Point, but does not make an explicit finding that these are the only such violations.

Response:

The exemption requests submitted by Entergy on March 6, 2009, were within the enforcement discretion granted to all licensees by EGM 07-004 and were handled as non-compliances with Appendix R as opposed to violations. The period of enforcement discretion ended with the issuance of the staff's safety evaluation on February 1, 2012. As stated in item 1 above, there were no violations of 10 CFR Part 50, Appendix R, at Indian Point effective on March 28, 2011. The NRC modified the final Director's Decision accordingly.

Comment 2

The Proposed Director's Decision is unenforceable, but the final Director's Decision should be enforceable.

Response:

This comment misconceives the purpose of requests for enforcement actions under 10 CFR 2.206. Section 2.206 serves as "an effective, equitable, and credible mechanism for the public to prompt Commission investigation and resolution of potential health and safety problems." *Sec. 2.206 Petitions Requesting Institution of a Proceeding to Modify, Suspend or Revoke a License, or for Such Other Action as May Be Proper; Workshop*, 1993 WL 270694, *2 (June 23, 1993) 58 FR 34726-01. Therefore, not every safety concern identified by a petitioner in the 2.206 process necessarily results in a show cause proceeding and issuance of a proposed enforcement order.

Often, as here, measures short of an enforcement order are sufficient. As the comment itself notes, enforcement orders stand atop the hierarchy of NRC's enforcement tools.

Inasmuch as a formal enforcement order requires issuance of a show cause order that triggers the right of the licensee to demand a formal hearing (see *generally* 10 C.F.R. § 2.202), it would be inefficient and inequitable for NRC to conclude every enforcement investigation – including responses to Section 2.206 petitions – with a formal order.

Here, the public health and safety is adequately assured for the reasons explained in the Director's Decision without issuance of a show cause order and conduct of a proceeding. The comment offers no basis for NRC to conclude that the licensee's commitment will not adequately protect public health and safety, or that licensee will not honor its commitments. In short, the Director's Decision describes the issues raised by the Petitioner, discusses the safety significance of the issues, and explains the staff's disposition of and future oversight of those issues. Violations identified during NRC inspections will be handled through the reactor oversight process (ROP).

In NUREG-1649, Revision 4, "Reactor Oversight Process," the NRC describes its established oversight process to inspect, measure, and assess the safety performance of commercial nuclear power plants and to respond to any decline in plant performance. The ROP focuses inspections on areas of greatest risks, applies greater regulatory attention where there are plant performance problems, uses objective measurements of performance, gives the public timely and understandable assessments of plant performance, and provides responses to violations in a predictable and consistent manner that corresponds to the safety significance of the problem.

Comment 3

The Proposed Director's Decision does not contain a target date for full fire safety compliance at Indian Point, but the final Director's Decision should.

Response:

The NRC requested the licensee to describe its plans to restore compliance as part of our inspection planning process. By letter dated March 1, 2012, and later modified by letter dated July 11, 2012, the licensee provided its schedule and planned actions for completing corrective actions that will resolve each issue related to protection of redundant safe shutdown trains and thereby comply with the applicable requirements of Paragraph III.G.2 of Appendix R to 10 CFR Part 50, for both Indian Point operating units. As described in the licensee's letters, a combination of engineering analysis and plant modifications will result with Unit No. 2 being in compliance by the end of the 2014 refueling outage and Unit No. 3 being in compliance by the end of the 2013 refueling outage.

The NRC performed inspections and issued two Notices of Violations (NOVs). Upon receiving the licensee's NOV responses, we will make conclusions regarding the adequacy of the licensee's corrective actions to restore compliance. In determining whether the licensee is making reasonable efforts to complete corrective actions promptly, the NRC will consider safety significance, the effects on operability, the significance of the degradation, and what is necessary to implement the corrective action.

The licensee's commitment management process will track actions to restore compliance to a schedule we conclude is acceptable. The NRC will schedule and complete further inspections using inspection procedure 92702, "Followup on Corrective Actions for

Violations and Deviations.” We will document our inspection findings in future inspection reports. This process will assure that full fire safety compliance is achieved within a time frame necessary for protection of public health and safety. Accordingly, a specific date beyond that described above is not considered necessary.

Comment 4

The Proposed Director’s Decision endorses permanent fire safety exemptions that forego regulatory compliance that would make Indian Point safer.

Response:

Safety evaluations issued on February 1, 2012, provided justification for approving the exemptions as permanent. The criteria for granting exemptions in 10 CFR 50.12(a) ensures adequate protection of public health and safety and protection of the environment. The NRC determined that the licensee met the regulatory standard and that the authority of the NRC to grant exemptions was upheld in *Brodsky v. NRC*, 783 F.Supp.2d 448, 455-58 (S.D.N.Y. 2011) (appeal pending). The final Director’s Decision will not reopen the staff’s review of the exemptions. Just as the Section 2.206 process may not be used to challenge licensing decisions collaterally. *In re Envirocare of Utah, Inc.*, 45 NRC 63, 68-69 (1997)(“section 2.206 is not a venue for presenting licensing contentions”), Section 2.206 likewise may not be used to challenge grant or denial of an exemption.

Comment 5

Despite 30 years of noncompliance with fire safety regulations at Indian Point, the Proposed Director’s Decision does not propose any financial penalty.

Response:

The NRC enforcement actions for the fire protection violations at Indian Point are in

accordance with the NRC Enforcement Policy and the ROP. Typically, violations assessed under the ROP are not considered for civil penalties. However, civil penalties are considered for violations associated with inspection findings evaluated through the ROP's Significance Determination Process (SDP) that involve actual consequences.

As evaluated under the ROP, the NRC determined the violations at Indian Point Units 2 and 3, regarding OMAs did not involve actual consequences and are of very low safety significance. Therefore, civil penalties were not warranted. If the NRC determines the licensee's actions to restore compliance are not adequate, further enforcement action may be considered in accordance with the NRC Enforcement Policy.

COMMENTS RECEIVED FROM THE PETITIONER

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
LETTER OF SEPTEMBER 19, 2012

Comment 1 Entergy Effort to Recharacterize NRC Enforcement

The proposed Director's Decision concluded that the Petitioner's requests to identify violations of fire protection requirements and bring the licensee into compliance were granted. The licensee's letter of August 1, 2012, objected to concluding that the Petitioner's request was being granted and indicated that the NRC would make similar findings via the reactor oversight process without the impetus of a petition.

The Petitioner's letter of September 19, 2012, is supportive of the original wording and states that Entergy improperly seeks to recharacterize the final Director's Decision.

Response:

As discussed in responding to the licensee's comments, the staff's practice has been to grant the request in a Section 2.206 petition whenever the Petitioner's requests are consistent with the staff's final actions. Therefore, the NRC staff did not revise the original wording of the proposed Director's Decision and concludes that the Petitioner's requests were granted insofar as consistent with the staff's actions.

Comment 2 New York Requested Identification and Correction of All Fire Safety Violations at
Indian Point

The Petitioner objected to an email sent by the NRC staff (ADAMS Accession No. ML122650249) seeking clarification to the original petition regarding violations with respect

to Sections III.F and III.G of Appendix R to 10 CFR Part 50. The Petitioner believed the staff was limiting consideration of violations to the proposed exemptions of March 6, 2009, and was mistakenly omitting violations with respect to Section III.F.

Response:

The NRC staff did not limit its consideration of violations to the proposed exemptions. The staff simply informed the Petitioner by email in advance that the final Director's Decision would not address violations with respect to Section III.F. NRC so informed the Petitioner because (1) Section III.F only requires that fire detection systems shall be automatic and capable of operating with or without offsite power, (2) the licensee did not request any exemptions from Section III.F, and (3) all of the requested exemptions were from the safe shutdown requirements of Section III.G.

The final Director's Decision was modified to clarify the differences between Sections III.F and III.G.

Comment 3 Identification and Correction of All Fire Safety Violations at Indian Point is Needed

The licensee's letter dated July 11, 2012 (ADAMS Accession No. ML12220A006), states that OMAs 20 and 21 were inadvertently omitted from the March 6, 2009, request for exemptions. The Petitioner cites this letter as further justification for a comprehensive identification and correction of Indian Point fire safety violations.

Response:

The NRC staff agrees that the licensee's letter dated July 11, 2012, states that two OMAs that were being relied upon to achieve and maintain safe shutdown were inadvertently omitted from the licensee's request for exemptions dated March 6, 2009. The licensee

further stated that the omitted OMAs would be treated as unapproved or denied OMAs and that additional plant modifications during the Unit No. 2 refueling outage during the Spring of 2014 would be necessary. The licensee's letter did not provide any explanation for the omission nor did it provide an extent of condition for this omission.

As discussed in the NRC inspection report dated August 16, 2012 (ADAMS Accession No. ML12229A128), NRC inspectors identified that the licensee failed to identify OMAs 20 and 21 in their March 6, 2009, request for exemptions (see page 5 of Enclosure 2). As further stated, similar to the OMAs for which exemptions were denied, the licensee committed to resolve the omitted OMAs and establish compliance with Section III.G to Appendix R of 10 CFR part 50.

By letter dated September 17, 2012 (ADAMS Accession No. ML12268A057), the licensee provided its explanation for the omission of OMAs 20 and 21 in their March 6, 2009, request for exemptions (see page 4 of Attachment 1). The licensee stated that the use of non-standard nomenclature and presentation resulted in the error of omission. The licensee further indicated that it performed an extent of condition review and concluded that the use of non-standard nomenclature did not result in the omission of any additional OMAs. The NRC staff will review the licensee's letter as part of the overall reactor oversight process.

Comment 4 New Indian Point Fire Safety Violations Identified

The Petitioner again cites the licensee's letter of July 11, 2012, as a further example of the need to perform a comprehensive identification and correction of Indian Point fire safety violations. The Petitioner also notes that the NRC apparently discovered the omission of

OMAs 20 and 21 and that the licensee's letter did not provide any explanation for the occurrence.

Response:

See the staff's previous response to comment 3 above. As previously stated, NRC inspectors made this discovery and the licensee has committed to resolve the omitted OMAs and establish compliance with Section III.G to Appendix R of 10 CFR part 50.

Comment 5 Confirmation of Indian Point Unit 1 Involvement in Fire Safety Violations

The licensee's letter dated August 1, 2012, offered clarification for the use of "fire areas" versus "fire zones" in the proposed Director's Decision. The Petitioner cited the licensee's explanation as a further example that fire violations exist at Indian Point Unit No. 1. This is similar to the Petitioner's Comment 1.a in the Petitioner's letter dated August 1, 2012.

Response:

See the staff's response to Comment 1.a from the Petitioner's letter dated August 1, 2012. As previously stated, any system, structure, or component located at Unit No. 1 that supports the fire protection program at Unit No. 2, will be documented in Unit No. 2 inspection activities.

Comment 6 Unjustified Delay in Eliminating Indian Point Fire Safety Violations

The licensee's letter dated August 1, 2012, offered clarification to the proposed Director's Decision for their schedule to restore full compliance with fire safety regulations at Indian Point. The Petitioner objected to the licensee's schedule and explanation that full compliance will not be achieved before the Unit No. 2 refueling outage in the spring of 2014.

Response:

See the staff's response to Comment 3 from the Petitioner's letter dated August 1, 2012. As previously stated, in determining whether the licensee is making reasonable efforts to complete corrective actions promptly, the NRC has considered safety significance, the effects on operability, the significance of the degradation, and what is necessary to implement the corrective action. As a result, the NRC has determined that the public health and safety will be adequately assured in the interim while full compliance is being achieved. These same considerations will continue to guide NRC enforcement discretion during its oversight as the licensee proceeds with its scheduled compliance.

COMMENTS RECEIVED FROM THE LICENSEE
ENTERGY NUCLEAR OPERATIONS, INC.

A. General Comments

Section III, Conclusion, Pages 9 and 10

The letter indicates the NRC is granting the Petitioner's request for identifying violations and taking enforcement actions as well as bringing IPEC [Indian Point Energy Center] into compliance. It is Entergy's belief that the NRC is following the requirements and protocols established in the regulatory oversight process (ROP) as relates to these actions, and is not granting the Petitioner's request. The letter should indicate that the ROP is a mature process that provides guidance to the NRC and licensees. The items identified by NY State were items the NRC staff was well aware of and the actions taken by the NRC would have been taken regardless of the NY State petition.

Response:

The NRC does not disagree with the premise of the licensee's comment. The petition did not present facts previously unknown to the NRC staff, and the staff would likely have reached the same conclusions through the ROP without the impetus of the petition.

Regardless, the staff's practice has been that whenever the Petitioner's requests are consistent with the staff's final actions, whether in whole or in part, they are considered to be granted.

B. Specific Comments – Suggested Changes

[Suggested changes are shown as strikethroughs for [DELETED (deletions)] and underlines for additions.]

1. Section II, Discussion, Page 5

“However, neither the diesel generator fire [DELETED (area)] zone...”

Response:

- Fire zones are subsets of larger fire areas. The suggested change provides a more definitive description of the concern. The NRC modified the final Director's Decision accordingly.

2. Section II, Discussion, Page 8

“Exceptions to projected completion involve plant modifications for Indian Point Units No. 3 and No.2, which will not be completed until the spring 2013 and 2014 refueling outages respectively because those modifications involve [DELETED (access to plant arease accessible only during a plant shutdown)] activities that require plant outages to install said modifications.”

Response:

- The suggested changes provide a more complete description of the planned modifications. The NRC modified the final Director's Decision accordingly.

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