

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns

In the Matter of)

ENTERGY NUCLEAR FITZPATRICK, LLC &)
ENTERGY NUCLEAR OPERATIONS, INC.)

(James A. FitzPatrick Nuclear Power Plant))

Docket No. 50-333-EA

CLI-17-09

MEMORANDUM AND ORDER

Beyond Nuclear and The Alliance for a Green Economy New York (together, Petitioners) seek a hearing on recent requests filed by Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Operations, Inc. (together, Entergy) for extensions of time to comply with three post-Fukushima orders at the James A. FitzPatrick Nuclear Power Plant.¹ For the reasons discussed below, we deny Petitioners' hearing request.

¹ *[Corrected] Beyond Nuclear & The Alliance for a Green Economy Petition to Request a Hearing and Leave to Intervene on Entergy's Requests for an Extension to Comply with NRC Orders EA-12-049, EA-12-051 and EA-13-109 Requirements for the James A. FitzPatrick Nuclear Power Station* (Nov. 10, 2016) (Hearing Request). On November 21, 2016, Petitioners filed a statement of errata together with a corrected version of their hearing request. We refer here to the corrected request.

I. BACKGROUND

The NRC issued the three orders at issue (EA-12-049, EA-12-051, and EA-13-109) in connection with the agency's lessons-learned initiative following the March 11, 2011, earthquake and tsunami and the resulting accident at the Fukushima Dai-ichi nuclear plant in Japan. EA-12-049 addresses mitigation strategies for certain beyond-design-basis events.² EA-12-051 addresses spent fuel pool instrumentation.³ And EA-13-109, which superseded an earlier post-Fukushima order (EA-12-050), addresses reliable hardened containment vents.⁴ Each order is styled as an "order modifying licenses," and each contains a provision stating that the pertinent NRC office director "may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee . . . of good cause."⁵

Entergy has requested relaxation under the relevant provision of each order. These requests stem from a change in plans regarding whether to continue operating the FitzPatrick plant. In March 2016, Entergy submitted to the NRC a formal certification regarding its plans to close FitzPatrick permanently on January 27, 2017.⁶ Citing this planned permanent closure of

² "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events (Effective Immediately)," EA-12-049 (Mar. 12, 2012) (ADAMS accession no. ML12054A735) (EA-12-049).

³ "Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)," EA-12-051 (Mar. 12, 2012) (ML12056A044) (EA-12-051).

⁴ "Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Effective Immediately)," EA-13-109 (June 6, 2013) (ML13143A321) (EA-13-109).

⁵ EA-12-049 at 9; EA-12-051 at 10; EA-13-109 at 13. The orders also contain provisions setting deadlines for licensees to notify the NRC if they are unable to comply with any requirements of the orders, if compliance would be unnecessary in the licensees' specific circumstances, if implementing an order requirement would result in a violation of another NRC requirement, or if implementing an order requirement would have an adverse safety or security impact. In EA-12-049 and EA-12-051, these deadlines are twenty days after the orders were issued, while in EA-13-109 the deadlines are twenty days after issuance of "interim staff guidance" documents that provide more details on the order's implementation.

⁶ Letter from Brian R. Sullivan, Entergy, to NRC Document Control Desk, "Certification of Permanent Cessation of Power Operations" (Mar. 16, 2016) (ML15322A273). Entergy also

the plant, Entergy submitted an initial request in April 2016 seeking relaxation of EA-12-049 (mitigation strategies) and EA-12-051 (spent fuel pool instrumentation) requirements at FitzPatrick reasoning that the plant's permanent shutdown would be occurring only 27 days after the orders' implementation deadline.⁷

In August 2016, Entergy and Exelon Generation Company, LLC (Exelon) jointly filed an application with the NRC for transfer of the FitzPatrick operating license to Exelon in connection with a planned sale of the plant to Exelon, which would then continue operating the plant rather than shutting it down in January 2017.⁸ On September 8, 2016, given this change in plans, Entergy submitted the two relaxation requests for which Petitioners now seek a hearing.⁹ The

submitted a notice of this planned permanent closure of FitzPatrick to the NRC several months prior to submitting the formal certification. See Letter from John Ventosa, Entergy, to NRC Document Control Desk, "Notification of Permanent Cessation of Power Operations" (Nov. 18, 2015) (ML15322A273).

⁷ Letter from Brian R. Sullivan, Entergy, to NRC Document Control Desk, "Request for Relaxation of March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-049 and EA-12-051)" (Apr. 14, 2016) (ML16105A379). Entergy later supplemented its request. Letter from Brian R. Sullivan, Entergy, to NRC Document Control Desk, "Supporting Information for Request for Relaxation of March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-049 and EA-12-051)" (June 16, 2016) (ML16168A452).

⁸ Letter from J. Bradley Fewell, Exelon, and Brian Sullivan, Entergy, to NRC Document Control Desk, "Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment" (Aug. 18, 2016) (ML16235A081). The NRC approved the license transfer earlier this year. See *In the Matter of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Operations, Inc., and Exelon Generation Company, LLC; James A. FitzPatrick Nuclear Power Plant, Order Approving Direct Transfer of License and Approving Conforming Amendment*, 82 Fed. Reg. 13,018 (Mar. 8, 2017).

⁹ Letter from Brian R. Sullivan, Entergy, to NRC Document Control Desk, "Request for Extension to Comply with March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Numbers EA-12-049 and EA-12-051)" (Sept. 8, 2016) (ML16252A477); Letter from Brian R. Sullivan, Entergy, to NRC Document Control Desk, "Request for Extension to Comply with NRC Order EA-13-109, 'Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions'" (Sept. 8, 2016) (ML16252A482); see also *Entergy's Answer Opposing Request for Hearing Regarding FitzPatrick and EA-12-049, EA-12-051, and EA-13-109* (Dec. 5, 2016), at 10

new requests sought extensions of time to comply not only with EA-12-049 and EA-12-051, but also with EA-13-109 on reliable hardened containment vents.¹⁰ With respect to EA-12-049 and EA-12-051, Entergy requested a six-month extension of the compliance deadlines until June 30, 2017.¹¹ For EA-13-109, Entergy requested an extension until June 30, 2018.¹² Given the timing of developments regarding the license transfer and sale to Exelon, Entergy cited an inability to complete all required steps at FitzPatrick prior to the deadlines imposed by the orders.

On November 10, 2016, Petitioners filed the instant hearing request. Petitioners assert that Entergy's requested relaxation of the terms of the orders, which were styled as orders modifying licenses, would necessarily require the NRC to further amend the FitzPatrick operating license and provide an associated hearing opportunity.¹³ Based on that premise,

(Entergy Answer) (characterizing these requests for extensions as relaxation requests filed pursuant to the relaxation provisions in the orders).

¹⁰ Under Entergy's original plan to close FitzPatrick, the first deadline for complying with EA-13-109 requirements would not have occurred until after the plant had shut down permanently. Entergy EA-13-109 Relaxation Request at 2. EA-13-109's reliable hardened containment venting requirements address severe accident risks associated with reactor core damage, which would no longer be a concern at a permanently shut down and defueled reactor.

¹¹ Entergy indicated that if the proposed license transfer and sale to Exelon occurred, FitzPatrick's next refueling outage would occur in January 2017. In the absence of a relaxation, that would yield a deadline of December 31, 2016, for complying with EA-12-049 and EA-12-051 at FitzPatrick.

¹² Although EA-13-109 already provides June 30, 2018, as its default deadline, a plant's refueling outage schedules may produce an earlier deadline under the order's terms. EA-13-109 at 10-11. Based on FitzPatrick's refueling outage plans in the event its sale and license transfer to Exelon occurred, Entergy had a January 2017 deadline for compliance with EA-13-109 "Phase 1" requirements under EA-13-109's terms. Entergy EA-13-109 Relaxation Request at 2.

¹³ Hearing Request at 9 ("The licensee must either achieve compliance as imposed by the Orders in the existing modified license or receive the licensee's request to amend those license conditions which includes properly placing Entergy's requests into the *Federal Register* with notice of the opportunity for a hearing by any adversely impacted parties."); see also *Combined Reply Beyond Nuclear & The Alliance for a Green Economy to Entergy and NRC Staff Answers in Opposition to Petitioners' Request for Hearing and Leave to Intervene in Entergy Corporation Request for Extension to Comply with NRC Orders EA-12-049, EA-12-051 and EA-13-109* (Dec. 12, 2016), at 9-17.

Petitioners have proffered two contentions: one addressing the EA-12-049 and EA-12-051 relaxation request and the other addressing the EA-13-109 relaxation request. In both contentions, Petitioners assert that Entergy's relaxation requests should be denied for failing to follow NRC procedures governing license amendment applications.¹⁴ The proposed contentions also challenge the timeliness of the relaxation requests. The contention addressing the EA-13-109 relaxation request also raises a safety-related challenge.¹⁵

Entergy and the NRC Staff oppose Petitioners' hearing request, arguing that Entergy's relaxation requests are not license amendments and therefore do not trigger hearing opportunities.¹⁶ Entergy and the Staff also argue that Petitioners have not demonstrated standing for purposes of their requested hearing. They further argue that Petitioners' timeliness and safety-related claims would not support admitting the contentions for hearing even if a hearing opportunity did exist.¹⁷

On December 2, 2016, with the instant hearing request still pending, the Staff granted Entergy's request for relaxation of EA-12-049 and EA-12-051.¹⁸ The Staff reasoned that a six-month delay in fully implementing the two orders was acceptable in light of other related

¹⁴ Hearing Request at 18-25, 39-50.

¹⁵ *Id.* at 26-38, 50-54. Petitioners' safety claim regarding relaxation of EA-13-109, briefly summarized, is that the containment venting capabilities upon which Entergy would rely in the interim, prior to coming into full compliance with the order, would not be sufficient to address the risks identified by the NRC's post-Fukushima analyses.

¹⁶ Entergy Answer at 17-19; *NRC Staff's Response to Beyond Nuclear & The Alliance for a Green Economy's Request for Hearing* (Dec. 5, 2016), at 16-19 (Staff Answer).

¹⁷ Entergy Answer at 22-26, 32-36; Staff Answer at 19-22, 23-29.

¹⁸ Letter from William M. Dean, NRC, to Brian R. Sullivan, Entergy, "James A. FitzPatrick Nuclear Power Plant – Relaxation of the Schedule Requirements for Order EA-12-049, 'Issuance of Order to Modify Licenses with Regarding to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events' and Order EA-12-051, 'Reliable Spent Fuel Pool Instrumentation' (CAC Nos. MF1077 and MF1076)" (Dec. 2, 2016) (ML16173A342) (FitzPatrick Relaxation Determination).

capabilities already available at FitzPatrick for responding to severe accidents and the unlikelihood of events that could cause severe accidents.¹⁹ In addition, on January 9, 2017, the Staff granted Entergy's request to relax EA-13-109, citing venting capabilities that would be in place at FitzPatrick in the interim, the low likelihood of events that would require use of venting capabilities, and the fact that the "relaxed" compliance date for FitzPatrick is still "consistent with the ultimate implementation date established by the order."²⁰

II. DISCUSSION

We consider today solely the question of whether Entergy's requests to relax EA-12-049, EA-12-051, and EA-13-109 are, in actuality, requests to amend the FitzPatrick operating license that would trigger hearing opportunities under section 189a.(1)(A) of the Atomic Energy Act of 1954, as amended (AEA).²¹ We conclude that this question is legally indistinguishable from the question we recently answered in response to a hearing request filed by Pilgrim Watch regarding the Pilgrim Nuclear Power Station.²² In *Pilgrim*, Entergy asked the NRC, pursuant to the EA-13-109 relaxation provision, to extend an EA-13-109 compliance deadline until after Pilgrim's permanent closure date. Pilgrim Watch sought a hearing to challenge that request. As Petitioners have done here, Pilgrim Watch argued that the relaxation request amounted to a license amendment request that triggers a hearing opportunity under the AEA.²³

¹⁹ *Id.*

²⁰ Letter from William M. Dean, NRC, to Brian R. Sullivan, Entergy, "James A. FitzPatrick Nuclear Power Plant - Relaxation of the Schedule Requirements for Order EA-13-109: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident conditions (CAC No. MF4464)" (Jan. 9, 2017) (ML16336A754).

²¹ 42 U.S.C. § 2239(a)(1)(A).

²² See *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-17-6, 84 NRC __ (Apr. 6, 2017) (slip op.).

²³ *Id.* at __ (slip op. at 5).

Both Pilgrim Watch's and Petitioners' claims that hearing opportunities apply rest, in each case, on the same fundamental premise: that requesting "relaxation" of an order modifying licenses, under such an order's relaxation provision, equates to a license amendment request. We see no material differences between this case and *Pilgrim*: the relaxation provisions in the orders at issue all contain materially identical language; the relaxation requests involved all seek extensions of post-Fukushima order deadlines; and the legal landscape regarding NRC license amendments has not changed in the short time since we issued our *Pilgrim* decision.²⁴

Accordingly, based on the same reasoning we provided in denying Pilgrim Watch's hearing request in *Pilgrim*,²⁵ we deny Petitioners' hearing request. As we explained in *Pilgrim*, order relaxation does not change license terms; rather, it indicates that the licensee has demonstrated sufficient cause, in the NRC Staff's view, to warrant the NRC not enforcing certain terms of the order against the licensee.²⁶ An exercise of discretion not to enforce a particular license term in a particular circumstance does not alter the license. Should the NRC grant a relaxation request but determine later that the request either should not have been granted in the first place or should not be continued, the NRC would not need to engage in any formal process to revoke the relaxation because the pertinent order would still be effectively intact and enforceable at FitzPatrick.²⁷

²⁴ *Id.* at ___ (slip op. at 8-9). Although this hearing request addresses relaxation of two post-Fukushima orders that were not at issue in *Pilgrim*, the parties have not identified a basis to treat the basic legal significance of order relaxation as differing from one post-Fukushima order to the next.

²⁵ *See id.* at ___ (slip op. at 8-15).

²⁶ *Id.* at ___ (slip op. at 8-9).

²⁷ *Id.* at ___ (slip op. at 9-10). We expect that any Staff decision to revoke a previous order relaxation decision would be supported by a reasoned basis. *See, e.g.*, FitzPatrick Relaxation Determination; *see also Pilgrim*, CLI-17-6, 84 NRC at ___ (slip op. at 10 n.41).

As we explained in *Pilgrim*, if a licensee seeks more formal and durable protections against subsequent revocation by the NRC, it remains free to apply for a license amendment instead of requesting order relaxation.²⁸ If a license amendment were sought, the AEA and our implementing regulations would provide for public hearing opportunities in connection with the license amendment proceeding.²⁹ Further, if the license amendment application were granted, any subsequent NRC order that would have the effect of revoking the license amendment would itself trigger a hearing opportunity for the licensee.³⁰ The relaxation process, however, does not alter license terms or trigger hearing opportunities. Accordingly, no hearing opportunity is available with respect to Entergy's relaxation requests.³¹

III. CONCLUSION

For the reasons provided above, we *deny* Petitioners' request for a license amendment hearing on Entergy's requests for relaxation of Commission orders EA-12-049, EA-12-051, and EA-13-109.³²

²⁸ *Pilgrim*, CLI-17-6, 84 NRC at ___ (slip op. at 10).

²⁹ *Id.* at ___ (slip op. at 10 n.42).

³⁰ *Id.* at ___ (slip op. at 10 n.41).

³¹ Given our decision today that no hearing opportunity accompanies Entergy's relaxation requests, we need not reach the other disputed issues raised in the pleadings, such as Entergy's motion to strike certain portions of Petitioners' reply, which addresses matters that are not material to our decision. See *Motion to Strike Portions of December 12, 2016 Reply Filed by Beyond Nuclear and the Alliance for a Green Economy* (Dec. 20, 2016).

³² In denying the hearing request, we take no position on the merits of Entergy's relaxation requests.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-17-09)** have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by Brian Newell _____]
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Dated at Rockville, Maryland
this 9th day of June, 20017