ORAL ARGUMENT SCHEDULED FOR NOVEMBER 21, 2014

No. 13-1311

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,
v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,

and

EXELON GENERATION COMPANY, LLC,
Intervenor.

On Petition for Review of an Order by the United States Nuclear Regulatory Commission

FINAL BRIEF OF FEDERAL RESPONDENTS

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October 9, 2014

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), respondents United States Nuclear Regulatory Commission and the United States of America ("Respondents") submit this Certificate as to parties, rulings and related cases.

(A) Parties, Intervenors and *Amici*

The petitioner is Natural Resources Defense Council, Inc. (NRDC). The respondents are the United States Nuclear Regulatory Commission and the United States of America. Intervenor on behalf of respondents is Exelon Generation Company, LLC. There are no *amici.*

(B) Rulings Under Review

NRDC has petitioned for review of *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199 (2013).

(C) Related Cases

There are no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

*Cases principally relied upon.

*Cases principally relied upon.

*Cases principally relied upon.

*Cases principally relied upon.

STATUTES

Administrative Procedure Act

Hobbs Act

Atomic Energy Act

National Environmental Policy Act

ADMINISTRATIVE AUTHORITIES

Regulations

NRC ADJUDICATORY DECISIONS

Commission Decisions

Atomic Safety and Licensing Board Decisions

FEDERAL REGISTER NOTICES

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

MISCELLANEOUS

GLOSSARY

EIS	Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NRDC	National Resources Defense Council

JURISDICTIONAL STATEMENT

Petitioner Natural Resources Defense Council ("NRDC") impermissibly seeks review of an interlocutory NRC decision in a licensing proceeding that does not represent a final order for which judicial review is authorized by law. The sole NRC decision of which NRDC seeks review is *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199 (2013). That decision does not resolve all of the NRDC's contentions in the proceeding below and, if accepted for review, would result in piecemeal litigation, the primary scenario that the "final order" requirement of the Hobbs Act is designed to prevent.

Pursuant to the Hobbs Act's jurisdictional provision, 28 U.S.C. § 2342(4), the agency must issue a "final order" before the Court may exercise jurisdiction. This Court has repeatedly held that the "final order" in an NRC licensing proceeding is the order granting or denying the license. In the argument below, *see infra* at 27-35, respondents U.S. Nuclear Regulatory Commission and the United States of America demonstrate why the petition for review should be dismissed for lack of jurisdiction. We also explain that, inasmuch as NRDC challenges a separate Commission decision, *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377 (2012), this Court lacks jurisdiction to entertain its arguments not only because that decision is interlocutory but also

because the arguments are beyond the scope of its Petition for Review (which does not mention CLI-12-19).

Further, this case is not ripe for review because the agency has not concluded proceedings relevant to NRDC's contentions before the Commission. First, NRC is about to issue its Final Supplemental Environmental Impact Statement ("EIS") for the license renewal of the plants at issue, which will, at the Commission's specific direction in CLI-13-07, include a discussion of the very information that forms the basis of NRDC's claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq.,* and that NRDC contends has not been appropriately considered. Second, NRC is about to issue its Generic EIS regarding the continued storage of spent nuclear fuel following the remand from this Court in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). NRDC currently has a contention pending before the Commission's Atomic Safety and Licensing Board concerning this issue, which NRDC will have an opportunity to amend or resubmit upon publication if it believes that the Commission's analysis is not applicable to the Limerick plants. Because those aspects of the proceeding have not been finally concluded, this case is not ripe for review.[1]

[1] Respondents do not dispute NRDC's claim of standing.

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction over or should not consider the Petition for Review because NRDC has not challenged a "final order" that is reviewable under the Hobbs Act and because the issues it raises, which are the subject of ongoing proceedings before the Commission, are not ripe for review.

2. Whether NRDC's failure to include the Commission's 2012 decision (CLI-12-19) in its Petition for Review precludes this Court's review of that decision at this time.

3. If the Court has jurisdiction to review CLI-12-19, whether NRC reasonably construed 10 C.F.R. § 51.53(c)(3)(ii)(L) to bar NRDC's proposed contention concerning severe accident mitigation alternatives where such an analysis had already been performed when the plant was initially licensed and NRC has determined through the rulemaking process that, in such circumstances, no additional analysis is required.

4. If the Court has jurisdiction to review the Commission's 2013 decision (CLI-13-07), whether NRC reasonably denied NRDC's request to waive the bar of 10 C.F.R. § 51.53(c)(3)(ii)(L) to its proposed contention, given NRC's finding that the waiver request could apply to any similarly situated license renewal applicant and would therefore "swallow the rule" for which waiver was sought.

STATEMENT OF THE CASE

I. Nature of the Case

On June 22, 2011, Exelon Generation Company, LLC ("Exelon") filed an application to renew the operating licenses for Limerick Generating Station, Units 1 and 2 ("Limerick") for an additional 20 years from their current expiration dates of October 26, 2024, and June 22, 2029, respectively.[2] NRDC has sought to intervene in the proceedings asserting, among other things, that the environmental analysis associated with the application fails to comply with NEPA. In this Petition for Review, it challenges NRC's denial of its request for a hearing with respect to one of its environmental contentions.

II. NRC's consideration of severe accident mitigation alternatives in the initial licensing of the Limerick plants.

At issue in this case is how NRC considers "severe accident mitigation alternatives" in certain license renewal proceedings. NRC has defined a severe accident mitigation alternatives analysis as "a cost-benefit analysis that addresses whether the expense of implementing a mitigation measure not mandated by NRC is

[2] *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 NRC 539, 544 (2012)(JA101-02).

outweighed by the expected reduction in environmental cost it would provide in a core damage event."[3]

In 1989, in reviewing NRC's grant of an initial operating license for Limerick Unit 1, the United States Court of Appeals for the Third Circuit ruled that NRC's generic Policy Statement on severe accidents did not satisfy NRC's duty under NEPA to give severe accident mitigation alternatives a "hard look." *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 741 (3d Cir. 1989). NRC subsequently issued a Final EIS for Limerick Units 1 and 2 that examined mitigation alternatives from two general sources: (1) those alternatives previously evaluated as part of NRC's Containment Improvement Program to determine potential failure modes and related plant improvements as well as the cost-effectiveness of those improvements; and (2) potential improvements identified through licensee risk analyses for individual plant vulnerabilities to severe accidents.[4]

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[3] *Massachusetts v. NRC,* 708 F.3d 63, 68 (1st Cir. 2013). In some of the cited materials, severe accident mitigation alternatives are referred to as "SAMAs" or, alternately, when referencing a certain subset of these alternatives related to plant design, "SAMDAs" ("severe accident mitigation design alternatives").

[4] *See* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,480-81 (June 5, 1996)("Final Rule")(JA580-81).

The same underlying risk assessments have since been performed for all operating plants in the United States, and many have completed mitigation alternatives analyses, either at the initial licensing or license renewal phase. These assessments include individual plant examinations to identify "plant vulnerabilities to internally initiated events and . . . externally initiated events" and to "consider potential improvements to reduce the frequency or consequences of severe accidents on a plant-specific basis," and therefore "essentially constitute a broad search for severe accident mitigation alternatives."[5]

For Limerick and three other plants, NRC performed the severe accident mitigation analysis required by *Limerick Ecology* when the plants were licensed initially, and these analyses determined that no physical modifications to the plants would be cost-beneficial. As the Commission subsequently explained:

> [A]n NRC staff consideration of [severe accident mitigation design alternatives] was specifically included in the Final Environmental Impact Statement for the Limerick 1 and 2 and Comanche Peak 1 and 2 operating license reviews, and in the Watts Bar Supplemental Final Environmental Statement for an operating license. The alternatives evaluated in these analyses included the items previously evaluated as part of the [Containment Improvement] Program, as well as improvements identified through other risk studies and analyses. *No physical plant modifications were found to be cost-beneficial in any of*

[5] *Id.* at 28,480 (JA580).

> *these severe accident mitigation considerations.* Only plant procedural changes were identified as being cost-beneficial.[6]

Among other things, NRC's "no cost-beneficial-mitigation" conclusion took into account that Limerick is "a high-population site."[7]

III. NRC amends its regulations in 1996 to codify its analysis of environmental impacts in licensing renewal, including treatment of severe accident mitigation alternatives.

In 1996, NRC amended its environmental regulations governing operating license renewal "[w]ith the goal of increasing efficiency in [its] review of license renewal applications."[8] Some impacts of license renewal under this new approach were categorized as generic (Category 1), while other impacts were deemed not susceptible to generic evaluation, requiring additional plant-specific review (Category 2).[9] This categorical treatment was codified at 10 C.F.R. Part 51, Appendix B to Subpart A, which adopts NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG-1437 (May 1996).[10]

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[6] *Id.* at 28,481 (emphasis added)(JA581).

[7] *Id.*

[8] *Limerick,* CLI-12-19, 76 NRC at 381 (JA188).

[9] Of the 92 impact issues in the rule, 68 issues could be adequately addressed generically, thus not requiring a plant-specific review. Final Rule, 61 Fed. Reg. at 28,468 (JA568).

[10] *See generally Massachusetts v. NRC,* 708 F.3d 63, 67-68 (1st Cir. 2013); *New*

(. . . continued)

The adoption of this framework directly affects the manner in which information concerning the environmental impacts of license renewal is obtained and considered. By regulation, each applicant for license renewal must submit an Environmental Report to assist NRC Staff in preparing a Supplemental EIS for license renewal. Applicants need not discuss Category 1 issues in their Environmental Report, and NRC Staff may incorporate generic Category 1 findings into the Supplemental EIS for each plant seeking license renewal.[11]

The 1996 rulemaking devoted substantial consideration to the categorization of severe accident impacts as well as the treatment of severe accident mitigation alternatives. NRC determined that the software programs it used to evaluate severe accident risk had produced "predictions of risk that are adequate to illustrate the general magnitude and types of risks that may occur from reactor accidents."[12] Accordingly, in the rule, NRC generically determined that "[t]he probability-weighted consequences of atmospheric releases, fallout onto open bodies of water,

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Jersey Dep't of Envtl. Prot. v. *NRC,* 561 F.3d 132, 134-35 (3d Cir. 2009).

[11] *See* 10 C.F.R. §§ 51.53(c)(3), 51.95(c).

[12] Final Rule, 61 Fed. Reg. at 28,480 (JA580).

releases to groundwater, and societal and economic impacts from severe accidents are small for all plants."[13]

Despite the "small" impact determination, NRC did not categorize severe accidents as a Category 1 (generic) impact because it found that it could not treat severe accident mitigation alternatives generically.[14] Rather, severe accidents were placed in Category 2, obliging NRC, as a general matter, to consider alternatives to mitigate severe accidents in each license renewal EIS. Importantly, however, the Commission made clear that this rule (*i.e.,* the obligation to consider mitigation alternatives on a site-specific basis) applied *only* to those plants "that have not considered such alternatives."[15] The Commission stated:

> The Commission has determined that a site-specific consideration of alternatives to mitigate severe accidents will be required at the time of license renewal *unless a previous consideration of such alternatives regarding plant operation has been included in a final environmental impact statement or a related supplement*."[16]

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[13] *See* 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1 (Postulated Accidents/Severe Accidents).

[14] Final Rule, 61 Fed. Reg. at 28,481 (JA581).

[15] *Id.* at 28,481, 28,494.

[16] *Id.* at 28,480 (emphasis added)(JA580); *see also* CLI-12-19, 76 NRC at 381-82 (NRC designated severe accident mitigation alternatives analysis as a "Category 2" issue, but created an exception in section 51.53(c)(3)(ii) (L) for plants for which the Staff already had conducted a mitigation analysis)(JA188-89).

As a result, in requiring a licensee's Environmental Report to include a site-specific review for mitigation alternatives, the new rule applied *only* to those plants that had not considered mitigation alternatives when the plant had been licensed:

> If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided. [10 C.F.R. § 51.53(c)(3)(ii)(L)]

Thus, for plants like Limerick to which this proviso applies, section 51.53(c)(3)(ii)(L) acts as "the functional equivalent of a Category 1" designation,[17] based upon the Commission's determination during the rulemaking process that "additional plant specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation."[18]

NRC determined that only a single mitigation alternatives analysis was necessary to satisfy its "NEPA obligation to mitigate both the risk and the environmental impacts of severe accidents" because of its conclusion, based upon its technical judgment, that a single analysis "would uncover most cost-beneficial measures to mitigate both the risk and effects of severe accidents."[19] The

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[17] *Limerick,* CLI-12-19, 76 NRC at 386 (JA196).

[18] *Id.* at 381-82 n.17 (JA188).

[19] *Limerick,* CLI-13-7, 78 NRC at 210 (citing Final Rule, 61 Fed. Reg. at 28,481)(JA357).

consequence of this determination is that, for the few plants like Limerick for which a mitigation alternatives analysis was performed during initial licensing, that issue has been "resolved by rule" in 10 C.F.R. § 51.53(c)(3)(ii)(L), and, absent a waiver of the rule, "the issue has been carved out from adjudication."[20]

IV. NRDC's contentions relating to consideration of severe accident mitigation alternatives in the Limerick license renewal proceeding.

Given the carve-out from the general rule for plants that previously conducted such an analysis, Exelon's Environmental Report supporting its Limerick license application renewal did not contain a new analysis of mitigation alternatives under NEPA and instead noted that such an analysis had been completed for the initial operating licenses. To support this approach in its Environmental Report, Exelon cited section 51.53(c)(3)(ii)(L) and the specific exclusion of Limerick from further analysis in rulemaking statements.[21] However, to comply with its obligation to consider "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware,"[22] Exelon's Environmental Report also included a detailed consideration of whether it had discovered "information indicating a potential change in the

[20] *Id.* at 211-12 (JA359).

[21] Environmental Report at 4-49 (JA606).

[22] *See* 10 C.F.R. § 51.53(c)(3)(iv).

consequences of severe accidents" from the analyses that had previously been performed, and determined that it had not.[23]

Following Exelon's submission of its license renewal application, and in response to notice of opportunity to request a hearing,[24] NRDC filed a Petition to Intervene in the Limerick license renewal proceeding.[25] NRDC proposed four NEPA-related "contentions."[26] Three contentions challenged the Environmental Report's treatment of severe accident mitigation alternatives, and one challenged its

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[23] Environmental Report at 5-3 ("The assessment described in Section 5.1 found no new and significant information that would change the small impact determination for severe accidents set forth in the GEIS. Also, no new and significant information has been found that would change the generic conclusion codified by the NRC that [Limerick] need not reassess severe accident mitigation alternatives for license renewal [10 C.F.R. § 51.53(c)(3)(ii)(L).]" (citations omitted))(JA609).

[24] *See* Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing, 76 Fed. Reg. 52,992 (Aug. 24, 2011)(JA642).

[25] NRDC Petition to Intervene (Nov. 22, 2011)(JA22).

[26] *See Limerick*, LBP-12-8, 75 NRC 539, 545 (2012)(JA103-04). Any interested person may participate in an NRC proceeding upon a showing of standing and submission of at least one contention that meets NRC admissibility requirements. 10 C.F.R. § 2.309(a), (f); *New Jersey Envtl. Fed'n v. NRC*, 645 F.3d 220, 228-29 (3d Cir. 2011). Environmental contentions are submitted based on an applicant's Environmental Report. 10 C.F.R. § 2.309(f)(2); *see Beyond Nuclear v. NRC,* 704 F.3d 12, 15 (1st Cir. 2013). Those contentions "migrate" to the EIS prepared by the NRC. *See Louisiana Energy Serv., L.P.* (Claiborne Enrichment Center), CLI-98-3. 47 NRC 77, 84 (1988) (contentions based on Environmental Report "deemed" challenges to the EIS).

consideration of the "no-action" alternative to the proposed action.[27] NRC Staff and Exelon opposed these contentions as not meeting NRC's requirements for contention admissibility. (JA104).

The presiding Atomic Safety and Licensing Board ("Board") granted NRDC's request for a hearing and petition to intervene.[28] The Board denied admission of one of NRDC's mitigation alternatives contentions (Contention 2-E) in its entirety because "it [was] a direct attack on the 1989 [mitigation alternatives analysis]" prepared for Limerick, which analysis was "not a part of the Limerick license renewal [Environmental Report]."[29] The Board denied admission of another of NRDC's mitigation alternatives contentions (Contention 3-E) because it erroneously claimed that the exception in 10 C.F.R § 51.53(c)(3)(ii)(L) did not apply to Limerick.[30] The Board also denied admission of NRDC's "no-action alternative" contention because it was inadequately supported.[31]

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[27] *Limerick,* LBP-12-8, 75 NRC at 545 (JA103-04).

[28] *Id.* at 544 (JA102).

[29] *Id.* at 564 (JA130).

[30] *Id*. at 566 (JA133-34).

[31] *Id.* at 569-70 (citing 10 C.F.R. § 2.309(f)(1)(v))(JA138-39).

However, the Board admitted portions of NRDC's Contention 1-E, which contended that Exelon had ignored "new and significant information" relating to its analysis of mitigation alternatives:

> Applicant's Environmental Report (§ 5.3) erroneously concludes that new information related to its severe accident mitigation design alternatives ("SAMDA") analysis is not significant, in violation of 10 C.F.R. § 51.53(c)(3)(iv), and thus the [Environmental Report] fails to present a legally sufficient analysis in that:
>
> 1. Exelon has omitted from its [Environmental Report] a required analysis of new and significant information regarding potential new severe accident mitigation alternatives previously considered for other [Boiling Water Reactor] Mark II Containment reactors.
>
> 2. Exelon's reliance on data from [Three Mile Island] in its analysis of the significance of new information regarding economic cost risk constitutes an inadequate analysis of new and significant information.[32]

[32] *Id*. at 561-62, 570-71 (JA127, JA140).

V. Commission review of NRDC's Contention 1-E and subsequent agency proceedings on that contention.

A. The Commission finds that admission of Contention 1-E is barred by regulation, but remands for NRDC to seek a waiver.

NRC Staff and Exelon appealed the Board's admission of Contention 1-E to the Commission, asserting that the contention impermissibly challenged Limerick's exemption from the obligation to consider mitigation alternatives during licensing renewal per 10 C.F.R. § 51.53(c)(3)(ii)(L). In its 2012 decision, CLI-12-19, the Commission agreed, concluding the rule did not require Exelon to include in its Environmental Report consideration of site-specific mitigation alternatives during license renewal because NRC had previously considered them before issuing the Limerick operating licenses for an initial 40-year term.[33]

The Commission held that the issue "has been resolved by rule." Among other things, the Commission observed that "Limerick is specifically named in the Statement of Considerations [of the rule] as a plant for which [mitigation alternatives] 'need not be reconsidered . . . for license renewal.'"[34] Noting the resolution of mitigation analysis by rule, the Commission reasoned that the admitted contention, "reduced to its simplest terms, amount[ed] to a challenge" to

[33] *Limerick*, CLI-12-19, 76 NRC at 386 (JA195-96).

[34] *Id.* at 386 & n.53 (JA196).

10 C.F.R. § 51.53(c)(3)(ii)(L).[35] Because under 10 C.F.R. § 2.335, no party to a hearing may challenge an NRC regulation,[36] the Commission concluded that the contention was not admissible.[37]

The Commission recognized, however, that section 2.335 does permit a party to seek a waiver of a Commission regulation. Thus, the Commission explained that "the proper procedural avenue for NRDC to raise its concerns is to seek a waiver of the relevant provision in section 51.53(c)(3)(ii)(L)."[38] Accordingly, the Commission found that, in the absence of a waiver, the Board erred in admitting Contention 1-E relating to analysis of mitigation alternatives and reversed the Board's decision granting NRDC's intervention petition.[39] The Commission remanded to the Board to afford NRDC an opportunity to seek a waiver of the rule per 10 C.F.R. § 2.335.[40]

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[35] *Id.* at 386 (JA195).

[36] "Unless a party obtains a waiver from the NRC, regulations are not 'subject to attack' during adjudications. [10 C.F.R.] § 2.335(a)." *New Jersey Dep't. of Envtl. Prot.* v. *NRC,* 561 F.3d 132, 135 (3d Cir. 2009)*; see also Bullcreek v. NRC*, 359 F.3d 536, 539 (D.C. Cir. 2004).

[37] *Limerick*, CLI-12-19, 76 at 386 (JA196).

[38] *Id.*

[39] *Id.* at 388-89 (JA200).

[40] *Id.* at 389 (JA200).

B. NRC's consideration of NRDC's waiver petition.

On remand to the Board, NRDC petitioned to waive the rule. The Board found that section 51.53(c)(3)(ii)(L) could not be waived and referred its ruling to the Commission.[41] In its 2013 decision, CLI-13-07, the Commission affirmed the Board's denial of NRDC's waiver petition on different grounds, ruling that the rule was waivable but that NRDC had not met its waiver standard, which is "stringent by design."[42]

In particular, the Commission found NRDC's waiver petition insufficient because NRDC did not demonstrate that its claims were unique to Limerick. Rather, the Commission concluded, NRDC's waiver petition "amount[ed] to a general claim that could apply to any license renewal applicant for whom [mitigation alternatives] already were considered."[43] The waiver sought by NRDC would "swallow the rule," the Commission reasoned, because "NRDC offer[ed] little to show how the information it provide[d] set[] Limerick apart from other plants undergoing license renewal."[44]

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[41] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57 (2013)(JA271).

[42] *Limerick*, CLI-13-07, 78 NRC at 207 (JA352).

[43] *Id.* at 214 (JA362).

[44] *Id.* at 215 (JA363-64).

Nevertheless, the Commission acknowledged its duty under NEPA to take a hard look at potentially new and significant information under NEPA and directed its staff "to review the significance of any new [mitigation alternative]-related information in its environmental review of Exelon's license renewal application, including the information presented in NRDC's waiver petition, and to discuss its review in the final supplemental EIS."[45] Preparation of the Final Supplemental EIS for Limerick remains ongoing, and it is scheduled to be released, with a discussion of the information that NRDC contends to be new and significant, in the near future.

VI. NRDC's proposed "Waste Confidence" contention.

After NRDC had been admitted to the proceeding, but before the Commission ruled that NRDC's Contention 1-E relating to mitigation alternatives impermissibly challenged NRC regulations, NRDC moved the Board to admit a new contention based on this Court's remand to NRC in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). That decision invalidated NRC's 2010 Waste Confidence Decision Update and Rule, which analyzed the environmental impacts of storing spent nuclear fuel after the licensed life of nuclear power reactors.

[45] *Id.* at 217 (JA367). The Commission must issue a final supplemental EIS prior to renewing the Limerick operating licenses. *See* 10 C.F.R. § 51.94 (final EIS, "together with any comments and any supplement, will accompany the application . . . through, and be considered in, the Commission's decisionmaking process").

NRDC's proposed contention tracked the issues remanded to the agency by this Court in *New York*.[46]

The admissibility of NRDC's proposed Waste Confidence contention has not yet been decided by the Commission. Instead, the Commission has directed in each adjudicatory proceeding that all proposed Waste Confidence contentions be held in abeyance while the Commission prepared a new NEPA analysis of the impacts of storing spent fuel: "[A]s an exercise of our inherent supervisory authority over adjudications, we direct that these contentions – and any related contentions that may be filed in the near term – be held in abeyance pending our further order."[47] In response, the Board in *Limerick* ordered that NRDC's proposed Waste Confidence contention be held in abeyance pending further Commission instruction.[48]

To comply with the Court's remand in *New York*, the Commission determined that it would prepare a Generic EIS analyzing the environmental impacts of continued storage of spent fuel after the licensed life of nuclear power

[46] *Limerick,* LBP-13-1, 77 NRC at 69 n.46 (JA284).

[47] *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

[48] *Limerick,* LBP-13-1, 77 NRC at 69 n.46 (JA284); CLI-13-7, 78 NRC at 202 n.3, 212 n.68 (JA346).

reactors.[49] The Commission expects to issue a final Generic EIS, along with a rule that incorporates the Commission's impact determinations into its NEPA analyses for relevant licensing actions, in the near future.

NRDC filed lengthy comments in the Waste Confidence rulemaking.[50] Although we do not purport to speak for NRDC or other intervenors, NRC anticipates that, in light of the comments the Commission has received, contentions like NRDC's in *Limerick* will be amended or supplemented with new contentions challenging, or seeking a waiver of, the Generic EIS's conclusions due to site-specific considerations. At a minimum, such an opportunity will exist. Thus, NRC's ultimate decision on the admissibility of NRDC's proposed Waste Confidence contention – or any new or amended contentions relating to this issue – will not be issued until a Final Generic EIS related to Waste Confidence is released and additional agency proceedings with respect to this issue, if any, have been completed.

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[49] *See generally* Waste Confidence – Continued Storage of Spent Nuclear Fuel; Proposed Rule, 78 Fed. Reg. 56,776 (Sept. 13, 2013).

[50] These comments focused considerably on the appropriateness of site-specific review as opposed to a generic analysis. *See* ML13360A365, available online at the NRC's Agencywide Documents Access & Management System.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over NRDC's Petition for Review because NRDC does not seek review of a final NRC order granting or denying license, but, rather, review of an interlocutory order (CLI-13-07) denying waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), which barred admission of NRDC's proposed Contention 1-E on severe accident mitigation alternatives. Because of the pendency of its Waste Confidence contention, NRDC has not been denied party status altogether, and the mere fact that it has not "yet" obtained party status does not satisfy the Hobbs Act's jurisdictional requirement of either a final order granting or denying a license or an outright denial of the right to participate in a contested hearing. Further, even if jurisdiction exists to review CLI-13-07, NRDC has not sought review of the Commission's earlier decision in CLI-12-19, in which NRC held that NRDC's contention was in fact barred by 10 C.F.R. § 51.53(c)(3)(ii)(L), thus requiring the waiver sought by NRDC and denied by the Commission in CLI-13-07. Finally, the pendency of agency proceedings that directly affect NRDC's proposed contentions and offer NRDC an opportunity to propose new contentions – including the imminent release of both a Supplemental EIS for Limerick that addresses NRDC's allegedly new and significant information and the Waste Confidence Generic EIS – renders NRDC's Petition unripe for review.

If this Court should nonetheless reach the merits of those two decisions, it should affirm them as a reasonable exercise of NRC discretion in deciding the admissibility of proposed contentions in its adjudicatory hearings. NRC has reasonably applied the rule at 10 C.F.R. § 51.53(c)(3)(ii)(L) to determine that the mitigation alternatives offered by NRDC for hearing in Contention 1-E as new and significant information have been decided generically for plants like Limerick through the rulemaking process. The Commission also reasonably determined that NRDC had not met the requirements of 10 C.F.R. § 2.335 for a waiver of section 51.53(c)(3)(ii)(L) in this hearing. Both the contention-denial decision in CLI-12-19 and waiver-denial decision in CLI-13-07 are amply supported by NRC precedent, a carefully analyzed rationale, and the technical administrative record upon which the NRC's decisions were based. In any event, NRC is considering NRDC's mitigation alternatives concerns in a soon-to-released Supplemental EIS for Limerick.

Generic rules such as section 51.53(c)(3)(ii)(L) have been repeatedly approved and, in fact, encouraged, by the courts as appropriate for NEPA compliance. Here, NRC has determined by rule, issued after notice and comment, that a second analysis is unlikely to result in the identification of cost-beneficial mitigation alternatives. If NRDC's new and significant information warrants re-examination of this generic conclusion, it is entirely reasonable to channel that

information through rulemaking, as that process appropriately considers the input of all parties affected by the rule.

Finally, NRDC's arguments are based on flawed reading of cases entitling it to an *opportunity* for hearing in compliance with NRC's contention-admission rules, not an absolute right to hearing. Relying directly on Supreme Court precedent, this Court has held that reliance upon an NRC generic rule governing issues material to licensing does not deprive a party of its right to a hearing. NRDC's contention in effect challenged the generic resolution by rule of mitigation alternatives analysis for plants like Limerick, and the Commission properly required NRDC to show its entitlement to a waiver of that rule before admitting its contention based on new and significant information. The waiver requirement under those circumstances is no different than other threshold pleading requirements NRC imposes on all hearing participants, the validity of which has been uniformly upheld.

ARGUMENT

I. Standard of Review

1. Whether this Court has jurisdiction over the Petition for Review (including whether the Petition seeks review of CLI-12-19) under the plain terms of 28 U.S.C. § 2344, whose provisions are both mandatory and jurisdictional, and whether this case is ripe for review are questions of law for this Court to determine *de novo*. *Blue Ridge Envtl. Defense League v. NRC,* 668 F.3d 747, 753 (D.C. Cir. 2012); *Kootenai Elec. Corp. v. FERC*, 192 F.3d 144, 147-48 (D.C. Cir. 1999).

2. If this Court considers the merits of NRC's orders in CLI-12-19 and CLI-13-7, such review is considered pursuant to the Administrative Procedure Act, under which those agency orders may not be set aside unless found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Blue Ridge Envtl. Defense League v. NRC,* 716 F.3d 183, 195 (D.C. Cir. 2013); *Massachusetts v. NRC,* 708 F.3d 63, 73 (1st Cir. 2013); *New Jersey Envtl. Fed'n,* 645 F.3d at 228, 233; *Rockland County v. NRC*, 709 F.3d 766, 776 (2d Cir. 1983). This is a narrow standard of review and, given agency expertise, a reviewing court may not substitute its judgment for that of the agency. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *Duke Power Co. v. NRC,* 770 F.2d 386, 389-90 (4th Cir. 1985). Rather, the Court owes deference to

NRC's decision on how best to comply with NEPA unless it finds a clear error of judgment. *Blue Ridge Envtl. Defense League,* 716 F.3d at 195.

Congress has entrusted NRC with discretion to administer hearings, and the agency's reading of its own regulations should be upheld if reasonable. *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009); *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984); *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO,* 367 U.S. 396, 408 (1961). An agency's interpretation of its regulations warrants substantial deference unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Blue Ridge Envtl. Defense League,* 716 F.3d at 195 (given "controlling weight"); *Massachusetts v. NRC,* 708 F.3d at 73. [51]

[51] Contrary to NRDC's assertions (NRDC Br. 31-32), neither *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) nor *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) supports the proposition that deference is not warranted here. In *Adams Fruit*, the Supreme Court held that *Chevron* deference was not warranted with respect to an issue that implicated federal court jurisdiction where the courts, and not an agency, were responsible for administering the private right of action at issue. 494 U.S. at 649-50. This lack of delegation stands in stark contrast to the hearing structure, including a right of appeal pursuant to the Hobbs Act, created by the AEA. In *NetCoalition*, this Court held that deference was not warranted with respect to an agency's interpretation of a provision expressly governing what types of agency action were reviewable under the Administrative Procedure Act. 715 F.3d at 348-49. In no way did this Court suggest that an agency's determination of whether a party was entitled to a hearing *under its own regulations* was not entitled to judicial deference.

Similarly, respecting issues related to the Atomic Energy Act's "hearing" provision in section 189a, 42 U.S.C. § 2239(a), NRC's interpretation is entitled to judicial deference unless it is "precluded" by the statutory text or is "otherwise unreasonable." *See Ames Constr. Co. v. FMSHRC,* 676 F.3d 1109, 1112 (D.C. Cir. 2012) (citing *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 (1984)).

Formal agency decisions such as CLI-12-19 and CLI-13-07, issued in adjudications after full briefing, are entitled to substantial deference. *See Blue Ridge Envtl. Defense League,* 716 F.3d at 195; *Deukmejian v. NRC,* 751 F.2d 1287, 1294 (D.C. Cir. 1984). Indeed, heightened deference is owed here, given NRC's "expertise both in [nuclear] safety and in deciding the most efficient way to administer its licensing . . . procedures." *Collins v. Nat'l Transp. Safety Bd.,* 351 F.3d 1246, 1253 (D.C. Cir. 2003); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54-55 (D.C. Cir. 1990). When reviewing NRC technical judgment, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. NRDC, Inc*., 462 U.S. 87, 103 (1983); *Blue Ridge Envtl. Defense League,* 716 F.3d at 195; *Massachusetts v. NRC,* 708 F.3d at 73 (judicial deference is "particularly marked" for NRC actions); *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1276 (D.C. Cir. 2004). In NRC cases, courts are "particularly reluctant to second-guess agency choices involving scientific disputes

that are in the agency's province of expertise." *New Jersey Envtl. Fed'n,* 645 F.3d at 230 (quoting *New York v. NRC,* 589 F.3d 551, 555 (2d Cir. 2009)).

II. The Court lacks jurisdiction over NRDC's petition for review because it is incurably premature.

A. Generally, under the Hobbs Act, only a final order granting or denying a license may be reviewed.

Under established precedents of this Court, the "final order" here would be an NRC order granting or denying Exelon's license renewal application, which has not yet been issued. NRDC has a firmly established right under the Hobbs Act to seek judicial review of a final NRC order in the license renewal proceeding for Limerick, which would include review of all interlocutory orders such as CLI-12-19 (the contention-denial decision) and CLI-13-07 (the waiver-denial decision). Premature review in this Court is not necessary to protect NRDC's right ultimately to seek review of those interlocutory orders, or any other order, once a final decision on license renewal has been issued, and, for this reason, review of these decisions now is inappropriate.

Under the Hobbs Act, this Court's jurisdiction is limited to review of "final orders." 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b). When an agency issues a final order, a 60-day "window" commences during which petitions for review must be filed. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988).

The Hobbs Act's finality requirement must be "narrowly construed." *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982). Thus, "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks and citation omitted).

Applying these principles to NRC licensing proceedings, this Court has repeatedly held that "it is the *order granting or denying the license* that is ordinarily the final order." *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (emphasis added); *Massachusetts v. NRC,* 924 F.2d 311, 322 (D.C. Cir. 1991); *NRDC v. NRC*, 680 F.2d at 815-16 & n. 11; *accord Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258, 260 (6th Cir. 1986); *Ecology Action v. AEC*, 492 F.2d 998, 1000-01 (2d Cir. 1974). As this Court has explained, permitting judicial review of non-final orders "would make unclear the point at which agency orders become final," *City of Benton*, 136 F.3d at 826, and would "disrupt the orderly process of adjudication," *Alaska v. FERC*, 980 F.2d 761, 765 (D.C. Cir. 1992)(internal quotation marks and citation omitted).

These principles make practical sense. If the agency proceeding is incomplete, future developments could render the dispute "moot or insignificant," resulting in "a waste of judicial time and effort." *Alaska*, 980 F.2d at 764. In

addition, interlocutory judicial review can often delay the final outcome of the proceeding below and thereby "needlessly intrude" on its conduct. *Id.*

Here, the Commission has not yet decided whether to grant the 20-year license renewal requested by Exelon, and hence there is no "final order" for NRDC to appeal. Critically, however, NRDC's right to seek review of a final NRC licensing order is protected. Once an order granting or denying the renewed licenses is issued, NRDC may challenge any or all of the Commission's interlocutory orders, including (1) the denial of NRDC's mitigation alternatives Contention 1-E in CLI-12-19; (2) the waiver denial in CLI-13-07; (3) the rejection of NRDC's "no-action alternative" Contention 4-E; (4) a decision on NRDC's pending (or any amended or new) Waste Confidence contentions; and (5) a decision with respect to any other contention. *See City of Benton,* 136 F.3d at 86 (interlocutory finding reviewable upon license issuance); *Alaska,* 980 F.2d at 763 (challenge to partial summary disposition and "any past or future Commission ruling" after a final order).

B. Judicial review of interlocutory agency decisions has been permitted only in limited circumstances that do not exist here.

1. NRDC's right to participate in the Limerick license renewal hearing has not been finally denied.

The general principle that a party must await the final agency decision before seeking judicial review of an interlocutory order does not apply where NRC

has denied altogether a request for a hearing or intervention by refusing to admit *any* of a petitioner's proposed contentions. Under the Hobbs Act, complete denial of a hearing petitioner's contentions, and hence its right to intervene and participate in the requested hearing, has always resulted in a right to seek review immediately. *See Alaska*, 980 F.2d at 763. As shown below, however, that is not the situation here.

The reason for allowing immediate judicial review of a hearing petition denial is that, having failed to achieve formal "party" status in the litigation by having any of its contentions admitted, a putative intervenor cannot later seek review of the agency's final decision on the merits. *Alaska*, 980 F.2d at 763 (citing *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 524 (1947)); *see also Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970). This is so because, under the Hobbs Act, only a "*party* aggrieved" by an agency order may challenge it in the court of appeals. 28 U.S.C. § 2342(4) (emphasis added). Hence, allowing judicial review in the case of outright intervention-petition denials preserves the right of review that would otherwise be lost. *Alaska*, 980 F.2d at 763.[52]

[52] The Seventh Circuit has allowed interlocutory review, prior to issuance of a license, for an entity that has been admitted as a party to an ongoing licensing proceeding, but only if *all* of that party's contentions have been decided against it (. . . continued)

Here, however, NRC has not yet determined in the Limerick license renewal proceeding whether NRDC's proposed Waste Confidence contention (or a new or amended contention based on the soon-to-be issued Waste Confidence Generic EIS) will be admitted and, hence, whether NRDC's petition for intervention as a party will be granted. NRDC's concession that its pending Waste Confidence could result in party status (NRDC Br. 30) dooms its claim of jurisdiction because, under NRC procedures, a single admissible contention will support party intervention.[53] As noted (*supra* at 19 & note 48), the Commission's order declining to admit Contention 1-E[54] did not address NRDC's Waste Confidence proposed contention, which remains in abeyance in *Limerick* pending issuance of the final rule and Generic EIS. The pendency of this contention alone renders NRDC's Petition for Review incurably premature under the Hobbs Act and requires dismissal.

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on the merits. *See Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 680-81 (7th Cir. 2006) (summary judgment against intervenor "concluded the intervention"). But this Court has not expanded Hobbs Act judicial review beyond an interlocutory order denying admission of all contentions and thus denying party status to a putative intervenor. Moreover, the Seventh Circuit's rationale applies only if the agency order decides *all* the party's contentions against it, which is not the case here.

[53] *See* 10 C.F.R. § 2.309(a) (requiring "at least one admissible contention").

[54] *Limerick,* CLI-12-19, 76 NRC at 389 (JA200).

Moreover, the Commission has not reviewed the Board's denial of NRDC's "no-action alternative" contention and explicitly disclaimed doing so, and NRDC could pursue appeal of that issue before the Commission.[55] Additionally, NRDC may propose new or amended contentions,[56] including environmental contentions, when NRC Staff issues its Final Supplemental EIS for Limerick, and NRDC may seek Commission review of any or all of the Board's decision on its contentions when the proceeding concludes.[57] Piecemeal review of these issues would fly in the face of the Hobbs Act requirement of finality.

2. NRDC's arguments to the contrary lack merit.

NRDC attempts to cast itself as a party excluded from the proceedings and thus entitled to seek review of the Commission's interlocutory orders. It claims a right to review because it has *not yet been granted* party status (NRDC Br.at 28-29), but that characterization is of no consequence. As NRDC concedes, the cases allowing Hobbs Act review without party status are an "exception" to the "party aggrieved" requirement of the Hobbs Act that applies only "where a party has been *denied party status altogether*." (NRDC Br. 28; emphasis added). Final denial of

[55] *Limerick,* CLI-13-07, 78 NRC at 204 n.13 (JA348).

[56] *See* 10 C.F.R. § 2.309(c); *New Jersey Envtl. Fed'n,* 645 F.3d at 229.

[57] *See* 10 C.F.R. § 2.341(b)(1).

party status is far different from not *yet* being granted (or denied) party status. It is true that CLI-13-07 denied party status "to pursue [severe accident mitigation alternative] contentions" (NRDC Br. 29), but the Commission did not rule on NRDC's pending Waste Confidence contention, which remains pending. As noted above (*supra* at 31-32), NRDC retains the right to seek Commission review of the denial of its no-action alternative contention, as well as any decisions on any new or amended contentions it may file. Accordingly, the cases relied upon by NRDC (NRDC Br. 28) concerning the "denial" of party status are inapposite.[58]

NRDC asserts that its pending Waste Confidence contention is irrelevant to this Court's jurisdiction because the mitigation alternatives and Waste Confidence contentions "are wholly distinct" (NRDC Br. 29). But the authorities it cites to bolster its "distinctness" theory do not support its arguments. In *Vermont Dep't of*

[58] This Court acknowledged in *Thermal Ecology Must Be Preserved v. AEC,* 433 F.2d 524 (D.C. Cir. 1970), that an "order *denying* intervention would be reviewable," NRDC Br. at 26 (emphasis added), but no such order *denying* intervention has issued here. Likewise, "the order *denying* intervention represent[ed] the end of the line" in *Alaska,* 980 F.2d at 763 (emphasis added), certainly not the case here.

Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1025 (D.C. Cir. 1976) and *Fund for Animals, Inc. v. Norton,* 322 F.3d 728 (D.C. Cir. 2003) (*see* NRDC Br. 28) are not even Hobbs Act cases. *Community Broadcasting* involved a "collateral order" exception to the finality rule. 546 F.2d at 1028. *Fund for Animals* involved application of Fed. R. Civ. P. 24, and in any event, there has been no "conclusive" determination of NRDC's party rights by the NRC. 322 F.3d at 732.

Public Service v. United States, 684 F.3d 149 (D.C. Cir. 2012), the petitioners did not, as here, seek review of NRC's ruling on a proposed hearing contention. In fact, the Court recognized that all hearing contentions had been resolved by the final order of the Commission, thus terminating the adjudicatory proceeding.[59] Rather, petitioners there sought review of a Clean Water Act water quality certification that was not part of the contested hearing before NRC. Hence, timeliness of review of the certification issue was controlled by the date the license renewal was issued.[60]

NRDC also cites *Blue Ridge Environmental Defense League v. NRC,* 668 F.3d 747, 757 (D.C. Cir. 2012), claiming that this Court held that the petition for review was premature because "other contentions on the *same issue* remained pending before the Commission" (NRDC Br. 29-30; emphasis in original). By inference, NRDC contends that review here is not premature because the remaining issues pending before the Commission are different. But NRDC misreads *Blue Ridge*. That case involved potentially dispositive legal contentions decided against petitioners as well as undecided fact-based contentions. This Court ruled that it lacked jurisdiction to review the Commission's legal rulings

[59] 684 F.3d at 156.

[60] *Id.* n.8.

because the Commission had not decided petitioner's non-legal contentions. The Court found it "axiomatic" that the NRC opinion deciding the legal contentions did not dispose of all of the issues as to all of the parties and was therefore a "nonfinal, interlocutory order." *Id.* at 757. Precisely the same situation exists here.

Accordingly, NRDC's claims that the Commission's waiver denial decision in CLI-13-07 "denied NRDC's petition for a hearing" (NRDC Br. 1) are inaccurate. NRDC has at least one contention currently pending before the Commission. Regardless of whether the pending contention is related or unrelated to the one the Commission has rejected, NRDC will have a full and fair opportunity to seek review of the Commission's determinations when this contention (and any others) are finally resolved.

C. NRDC's claims are not ripe for review.

The current posture of this case also renders this dispute unripe, which independently counsels against the Court's review at this time. Ripeness is a justiciability doctrine that draws upon Article III limitations on judicial power as well as prudential reasons for refusing to exercise jurisdiction prematurely. *See In re Aiken County*, 645 F.3d 428, 433 (D.C. Cir. 2011). Under the constraints of Article III, "federal courts may exercise power only in the last resort, and as a necessity." *Id.* at 433. Prudentially, the doctrine enables the courts to avoid "entangling themselves in abstract disagreements over administrative policies." *Id.*

at 434. This serves "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 433 (internal quotations marks omitted) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49 (1967)).

Here, though rejecting NRDC's waiver petition in CLI-13-07, the Commission has referred it "to the Staff as additional comments on the Limerick draft supplemental EIS for the Staff's consideration and response."[61] Thus, NRDC's concerns might be resolved by NRC Staff actions without further litigation. Or NRDC might choose to file new or amended contentions. Likewise, issuance of the Waste Confidence Generic EIS and rule, a prerequisite to deciding pending Waste Confidence contentions, might also moot the pending contention or result in new or amended contentions.

As this Court recently reiterated, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. . . . We have noted that it is sometimes true that if we do not decide a case prematurely, we may never need to decide it." *Aiken County*, 645 F.3d at

[61] *Limerick,* CLI-13-07, 78 NRC at 216-17 (JA366). As the Commission noted, NRDC has commented on the draft Supplemental EIS for the Limerick license renewal. *Id.* at 212 n.68 (JA360). All such comments will be considered in preparing the Final Supplemental EIS. *Id.* at 216 n.96 (JA366).

434 (internal quotation marks omitted). These principles are squarely applicable here.

III. NRDC may not challenge the validity of CLI-12-19 because it was not mentioned in its Petition for Review.

NRDC's Petition for Review (Dec. 24, 2013) states that it seeks review of CLI-13-07 (Oct. 31, 2013)(JA345), the NRC's decision denying its waiver request. The Petition identifies no other order for which review is sought. Indeed, the opening sentence of NRDC's brief correctly acknowledges that review is sought only of CLI-13-07 (NRDC Br. 1), as does its Rule 26.1 Disclosure Statement. Inasmuch as NRDC has not sought review of CLI-12-19 (the contention-denial decision), this Court should not review the validity of that decision and should ignore those portions of the NRDC's brief challenging it.

Fed. R. App. P. 15(a)(2)(C) states that the petition for review *must* specify each order for which review is sought. "[T]he plain terms of the [rule] settle the issue." *Byers v. Commissioner,* 740 F.3d 668, 676 (D.C. Cir. 2014). Because NRDC has not sought review of CLI-12-19, which is the order finding the mitigation alternatives contention barred by 10 C.F.R. § 51.53(c)(3)(ii)(L), NRDC cannot now raise the validity of CLI-12-19. *See Sinclair Broad. Group, Inc. v. FCC,* 284 F.3d 148, 158 (D.C. Cir. 2002) (requiring "clear indication to the agency of petitioners' intent to appeal the underlying agency order that was not named in the petition for review"); *City of Benton v. NRC,* 136 F.3d 824, 826 (D.C.

Cir.1998) (per curiam); *accord Wyoming v. Dep't of Interior,* 587 F.3d 1245, 1251 n.2 (10th Cir. 2009).

Nor can NRDC maintain that the contention-admissibility decision in CLI-12-19 is somehow subsumed within the waiver-denying decision in CLI-13-07. Each of these two NRC decisions stands on its own, completely independent of the other. NRDC makes a subtle but transparent attempt to link the two,[62] but the decisions are plainly separate and independent of each other for purposes of judicial review. Regardless of its reason for taking issue only with CLI-13-07, it was up to NRDC to specify each decision it seeks to challenge. Accordingly, NRDC is bound by the text of its Petition for Review limiting review to CLI-13-07 alone, and the validity of CLI-12-19 may not be considered.

IV. The Commission's decision not to admit NRDC Contention 1-E was a reasonable exercise of agency discretion.

A. The Commission reasonably determined that NRDC's proposed severe accident mitigation alternatives contention was barred by regulation and therefore inadmissible.

Even if the contention-denial decision in CLI-12-19 is reviewable at this juncture of the NRC's license proceeding for Limerick, the Commission

[62] NRDC defines CLI-12-19 as the "Waiver Decision" (NRDC Br. 2), although that NRC order did not decide NRDC's waiver request. CLI-12-19 would be accurately described as the "contention-denial decision." The waiver request was denied a year later in CLI-13-07.

reasonably denied admission of NRDC's proposed severe accident mitigation Contention 1-E as barred by NRC regulations. While, generally speaking, a party may challenge the adequacy of what the licensee has designated or failed to designate as new and significant information in its Environment Report,[63] section 51.53(c)(3)(ii)(L) expressly provides that a supplemental mitigation alternatives analysis "need not be performed" for plants like Limerick.[64] The Commission's contention-denial decision in CLI-12-19 reasonably determined that, to plead new and significant information in a contention challenging Limerick's mitigation alternatives analysis, NRDC must first obtain a waiver of the regulation barring the contention. The Commission's decision concerning this threshold pleading requirement, like other interpretations of contention admissibility rules, is entitled to judicial deference. *See Blue Ridge Envtl. Defense League,* 716 F.3d at 195; *Massachusetts v. NRC,* 708 F.3d at 73.

After the Licensing Board admitted a modified version of NRDC Contention 1-E, the Commission accepted review and reversed the Board's admission of the contention. Asked to decide whether the admitted contention was barred by 10 C.F.R. § 51.53(c)(3)(ii)(L), the Commission recognized the competing interests in

[63] *See* 10 C.F.R. § 51.53(c)(3)(iv).

[64] *Limerick,* CLI-12-19, 76 NRC at 386 (JA196).

considering new and significant information and the Commission's objectives in adopting the regulation in 1996. The Commission determined that NRDC's mitigation alternatives contention, "reduced to its simplest terms, amounts to a challenge to Section 51.53(c)(3)(ii)(L)," and reasonably concluded that, under these circumstances, the appropriate way to balance the competing circumstances was to require NRDC to demonstrate special circumstances warranting waiver of the rule.[65]

The Commission's determination is logically compelling. As it explained, the "assumption underlying" NRDC's contention is that the Limerick mitigation alternatives analysis "is out-of-date."[66] By contrast, the very purpose of section 51.53(c)(3)(ii)(L) is to "reflect the Commission's view," based upon its considered judgment reached during the rulemaking process concerning the likelihood of discovering cost-beneficial mitigation measures in a subsequent analysis, "that one [mitigation alternatives] analysis, as a general matter, satisfies [the Commission's] NEPA obligation to consider measures to mitigate both the risks and the

[65] *Limerick,* CLI-13-07, 78 NRC at 211 (JA359).

[66] CLI-12-19, 76 NRC at 386 (JA195).

environmental impacts of severe accidents."[67] Insistence upon a waiver in these circumstances reflects a careful consideration of the competing interests involved.

Undoubtedly, NRDC *could* request by rulemaking petition that the Commission change its conclusion concerning the efficacy of a second mitigation alternatives analysis and could rely on precisely the information it now contends is new and significant in order to secure this result. Indeed, the Commission's regulations specifically contemplate not only that interested persons can file a petition for a rulemaking seeking to change an existing regulation,[68] but also that participants in an ongoing licensing proceeding may seek to suspend the proceeding while such a petition is considered.[69]

But until then, the Commission has spoken to precisely the issue that NRDC has proposed to litigate through a notice-and-comment generic rule concerning a matter squarely within the agency's technical expertise. As a result, the Commission reasonably discerned that (absent waiver of that rule), NRDC's

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[67] CLI-13-07, 78 NRC at 210 (citing Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,480-81 (June 5, 1996) ("The Commission believes it unlikely that any site-specific consideration of [severe accident mitigation alternatives] for license renewal will identify major plant design changes or modifications that will prove to be cost-beneficial for reducing severe accident frequency or consequences.")))(JA357).

[68] *See* 10 C.F.R. § 2.802.

[69] *Id.* § 2.802(d)

contention was a backdoor challenge to the agency's rulemaking judgment.[70] It is entirely reasonable for the Commission to reach generic conclusions through the rulemaking process in connection with the performance of its NEPA obligations.[71] The Commission therefore reasonably determined that NRDC's contention flew squarely in the face of the generic conclusion NRC had previously reached – that a second mitigation alternatives analysis is not warranted for plants like Limerick.

Moreover, the denial of NRDC's mitigation alternatives contention conforms to earlier Commission rulings discussed in CLI-12-19.[72] In those cases, contentions filed in license renewal proceedings for the Vermont Yankee and Pilgrim plants asserted that new and significant information overcame the designation of spent fuel storage impacts as a Category 1 issue and hence its exclusion from the proceeding by rule.[73] The Commission rejected this argument, holding that, absent a showing of unique circumstances, allowing litigation of a Category 1 issue site-by-site merely upon the basis of a claim of new and

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[70] "[R]educed to its simplest terms, [NRDC's Contention 1-E] amounts to a challenge to Section 51.53(c)(3)(ii)(L)." CLI-12-19, 76 NRC at 386 (JA195).

[71] *See, e.g.*, *New York*, 681 F.3d at 480 (citing *Baltimore Gas & Elec. Co. v. NRC*, 462 U.S. 87, 100 (1983)).

[72] Agencies might act arbitrarily when they ignore their own relevant precedent. *BB&L, Inc. v. NLRB,* 52 F.3d 366, 369 (D.C. Cir. 1995).

[73] *Limerick,* CLI-12-19, 76 NRC at 384 (JA192).

significant information "would defeat the purpose of resolving generic issues in a [generic EIS]."[74] Here, reasoning logically that the generic conclusion in section 51.53(c)(3)(ii)(L) "is the functional equivalent of a Category 1 issue," the Commission applied its holding in the Vermont Yankee and Pilgrim proceedings to NRDC's contention.[75] Accordingly, the Commission appropriately rejected NRDC's arguments as an improper challenge to the determination the Commission reached when it promulgated section 51.53(c)(3)(ii)(L). As in *Beyond Nuclear v. NRC,* 704 F.3d 12, 21 (1st Cir. 2013), this was a properly rejected "backdoor challenge" to NRC's rulemaking.

B. NRDC does not challenge the Commission's rationale denying Contention 1-E as barred by regulation, but claims an absolute right to a hearing anyway.

1. The *Union of Concerned Scientists* decisions support NRC's discretion in interpreting its rules to require a waiver as a threshold requirement.

NRDC does not quarrel with – and actually ignores – the Commission's reasoning in denying admission of Contention 1-E. Instead, NRDC's challenge to the Commission's ruling focuses on the materiality of a mitigation alternatives analysis to license renewal. In doing so, NRDC tries to bring itself within the

[74] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20-21 (2007).

[75] *Limerick,* CLI-12-19, 76 NRC at 386 (JA196).

reach of *Union of Concerned Scientists v. NRC,* 735 F.2d 1437 (D.C. Cir. 1984) ("*Union of Concerned Scientists I")*, wherein this Court ruled that participants in NRC proceedings are entitled to an opportunity for hearing on any issue material to a licensing decision. NRDC repeatedly notes that "the Commission itself has determined [that mitigation alternatives] are material to the proceedings." (NRDC Br. 25, 31, 33, 37-38). But NRC does not dispute the materiality of mitigation alternatives analyses to licensing decisions. Indeed, the Third Circuit determined the materiality of such analyses 25 years ago. *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 741 (3d Cir. 1989).

And materiality alone does not guarantee a hearing under the Commission's rules. An intervenor must meet *all* of NRC's requirements for hearing contention admissibility, including obtaining a waiver for any regulation challenged by the proposed contention. That is so because no party to a hearing may challenge an NRC regulation absent a waiver.[76] Thus, the issue is not the materiality of mitigation alternatives to licensing in general, but whether the Commission reasonably interpreted its regulations to bar NRDC's Contention 1-E.

On that point, NRDC's brief is silent. Instead, NRDC focuses solely on hearing rights as an abstract proposition, complaining that the Commission

[76] *See* page 16 & note 36, *supra.*

improperly distinguished between the agency's duties under NEPA and the right to participate in a hearing on NEPA issues (NRDC Br. 21), and further asserting that NRC "must provide a hearing" on a NEPA-related issue material to licensing (NRDC Br. 31) (NRDC Br. 47 ("NRDC is entitled to a waiver if one is necessary to obtain a hearing")).

This simply is not so. Section 189a of the Atomic Energy Act, as interpreted by this Court in *Union of Concerned Scientists v. NRC,* 735 F.2d 1437 (D.C. Cir. 1984), merely guarantees an *opportunity* for hearing. This Court observed:

> [W]e believe the core question is whether the NRC . . . may *eliminate* a material public safety-related factor in its decision from the licensing hearing. . . . When a statute requires a "hearing" in an adjudicatory matter, such as licensing, the agency must generally provide an *opportunity* for submission and challenge of evidence as to any and all issues of material fact.[77]

As this Court concluded, "The only central requirement is that there be an *opportunity* to dispute issues raised by the exercises."[78]

Here, NRC has not categorically "eliminated" an opportunity for intervenors to challenge mitigation alternatives analysis during the licensing process. Challenges to mitigation alternatives analyses are permitted in hearings for every plant, albeit only once – either at initial licensing or license renewal. Thus, unlike

[77] 735 F.2d at 1444 (emphasis added).

[78] *Id.* at 1448 (emphasis added).

the NRC rule that unlawfully extracted emergency planning drill results from licensing hearings in *Union of Concerned Scientists*, 735 F.2d at 1441, NRC's mitigation alternatives analysis rule has not removed from the hearing process any issue material to licensing.

The mitigation alternatives analysis at issue here was conducted to satisfy the agency's obligation to comply with NEPA, which permits NRC to resolve such issues generically or in site-specific proceedings. NRC generically resolved mitigation alternatives for the Limerick license renewal in the 1996 rulemaking supporting 10 C.F.R. § 51.53(c)(3)(ii)(L), which was open to public comment and subject to judicial review. The finding underlying 10 C.F.R. § 51.53(c)(3)(ii)(L) constitutes a generic NEPA determination, which applies only to a defined set of plants that have previously undergone a mitigation alternatives analysis. NRC requires claims of new and significant information with respect to that NEPA finding to comply with its ordered process for reevaluating its NEPA determinations. If the claim is of unique relevance to a specific licensing proceeding, NRC permits petitioners to file waiver petitions; but if the claim is generic in nature, NRC reasonably and fairly requires petitioners to use the rulemaking process, which affords potentially impacted parties an opportunity to participate in the resolution of the environmental issue.

Union of Concerned Scientists I is thus inapposite because, rather than removing a material issue from the licensing process altogether, NRC has maintained reasonable avenues to challenge the appropriateness of the rule under site-specific circumstances or, alternatively, to contribute to the enhancement of the rule's generic provisions by renewed rulemaking. Channeling NRDC's arguments into appropriate procedural vehicles in which all affected persons can participate is a far cry from eliminating an issue from the licensing process altogether.

In fact, this Court in *Union of Concerned Scientists v. NRC,* 920 F.2d 50 (D.C. Cir. 1990) ("*Union of Concerned Scientists II*"), rejected a syllogism claiming an absolute right to be heard that is directly analogous to that which NRDC proposes here:

> This argument is based on the following syllogism: (1) under Section 189(a), any party has a right to a hearing on any material issue; (2) much material information bearing upon a licensing decision will not be apparent before the [Safety Evaluation Report] and NEPA documents are completed and made public and so cannot be raised in a timely fashion with the specificity the NRC now demands; and therefore (3) by subjecting late-filed contentions incorporating this information to a balancing test for admission, the late-filing rule and [NRC's] interpretation of it illegally place at the NRC's discretion that to which parties have an absolute right under Section 189(a).[79]

[79] 920 F.2d at 54. As this Court observed, it is "rather creative" to draw all this from the word "hearing." *Id.*

Here, NRDC likewise argues that (1) section 189a guarantees a hearing on all issues material to licensing; (2) NRC has conceded the materiality of severe accident mitigation analysis to licensing; and (3) NRDC has a right to a hearing on its contention regarding the sufficiency of the analysis for Limerick. (NRDC Br. 37-38). This Court explained the fallacy both there and here:

> *[Union of Concern Scientists]* does not establish, as UCS contends, that *any* party raising a material issue has a right to intervene. [It] held only that the NRC may not preclude *all* parties from raising a specified material issue. Indeed, we have long recognized that Section 189(a) "does not confer the automatic right of intervention upon anyone." [80]

Conspicuously absent from NRDC's brief is even an acknowledgment of this Court's unequivocal statement in *Nuclear Information Research Service v. NRC,* 969 F.2d 1169, 1174 (D.C. Cir. 1992), that *Union of Concern Scientists* "did not require *every* hearing in the licensing process to encompass *every* material issue of fact." There, the Court explained that *Union of Concern Scientists* could *not* be validly read to require "every material issue to be revisited" at a hearing following rulemaking in light of

[80] *Id.* at 54 (emphasis in original). The Court added that "the [Atomic Energy] Act itself nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." Nor can such a prescription be derived from NEPA. As the First Circuit recognized in *Beyond Nuclear*, "NEPA does not alter the procedures agencies may employ in conducting public hearings." 704 F.3d at 16.

Supreme Court precedent "explicitly permitting agency reliance on prior rulemakings when a 'hearing' is required."[81] Thus, contrary to NRDC's arguments, an "agency may rely on a previously promulgated generic finding" even when the statute . . . plainly calls for individualized hearings and findings."[82] The Court summarized this point by quoting the Supreme Court's own language:

> Time and again, "[t]he Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." . . . "[A] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[83]

These principles render NRC's mitigation alternatives rule and consequent denial of a hearing unassailable.

2. Other cases support NRC's discretion in establishing a reasonable threshold requirement for a challenge to NRC's generic NEPA determinations by regulation.

Courts in two recent cases have rejected challenges by intervenors wishing to challenge NEPA determinations with purported new and significant information

[81] 969 F.2d at 1174 (citing *Heckler v. Campbell*, 461 U.S. 458 (1983)).

[82] *Id.* at 1175 (citing, *inter alia, Baltimore Gas & Elec. Co.*, 462 U.S. at 103 (environmental analysis may be performed generically)).

[83] *Id.* at 1176 (quoting *Mobil Oil Expl. & Prod. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 228 (1991)).

because they did not meet threshold pleading requirements. *Massachusetts v. NRC,* 708 F.3d 63 (1st Cir. 2013), was a license renewal case in which the intervenor tried to raise a "new and significant information" contention that the "existing [mitigation alternatives] analysis in the EIS underestimated core damage frequency by an order of magnitude"[84] and sought a waiver permitting a challenge to NRC's generic treatment of the environmental impacts of spent fuel pools as a Category 1 impact under 10 C.F.R. Part 51, Appendix B to Subpart A.

As to the proposed mitigation alternatives contention in *Massachusetts*, the First Circuit ruled that "[t]o obtain a hearing on [a] claim of new and significant information, requesters must meet certain requirements."[85] The Court reviewed NRC's denial of the contention and upheld its findings against NRC's rules for contention admissibility and reopening the record.[86] It flatly rejected petitioner's argument that its hearing rights to present the new and significant information "were somehow violated."[87] It pointed out this Court's holding in *Union of Concerned Scientists II* that section 189a of the Atomic Energy Act "does not

[84] 708 F.3d at 75.

[85] *Id.* at 69.

[86] *Id.* at 75-78.

[87] *Id.* at 78.

confer the automatic right of intervention upon anyone," adding: "The NRC may certainly impose procedural requirements for obtaining a hearing where the statute provides no additional guidance."[88]

More recently, this Court upheld NRC's rejection of "new and significant information" contentions in *Blue Ridge Environmental Defense League v. NRC,* 716 F.3d 183, 195 (D.C. Cir. 2013). Specifically, this Court ruled that NRC acted reasonably in determining that petitioners "failed to satisfy the contention-specificity requirement of 10 C.F.R. § 2.309(f)(1)."[89] The Court also reaffirmed the validity of NRC's record reopening standards as a threshold requirement,[90] but found it unnecessary to address reopening because contention-admissibility standards were not met.[91]

The *Massachusetts* and *Blue Ridge* cases illustrate that the mere proffer of new and significant information in a contention does not guarantee a hearing. Akin to the agency's judicially approved contention-admissibility and record-reopening rules, the prohibition against challenging a rule in an adjudicatory proceeding at 10

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[88] *Id.* (quoting *Union of Concerned Scientists II,* 920 F.2d at 55).

[89] 716 F.3d at 186, 196-97.

[90] *Id.* at 196.

[91] *Id.* at 188.

C.F.R. § 2.335 is likewise a limitation upon obtaining a hearing – a specialized requirement pertaining to a contention challenging an agency regulation. The reasonableness of such a rule is obvious. The agency invests considerable technical and administrative resources in adopting substantive regulations like 10 C.F.R. § 51.53(c)(3)(ii)(L) and thus does not undertake rulemaking ventures lightly. Fairness and efficiency require that these generic rules be enforced across the board and that exceptions by waiver of the rule be made only for the most compelling reasons.[92]

Accordingly, NRC's insistence upon a waiver for NRDC to challenge 10 C.F.R. § 51.53(c)(3)(ii)(L) was an appropriate limitation upon admission of NRDC's Contention 1-E, just like the threshold contention-admissibility and record-reopening rules that petitioners in *Massachusetts* and *Blue Ridge* had to meet. Hence, the NRC did not deprive NRDC of a hearing opportunity.

3. NRDC's remaining arguments are without merit.

NRDC argues that admission of Contention 1-E is supported by the Commission's commitment during the 1996 rulemaking to consider "new and significant" information in licensing cases as well as the same requirement under

[92] *See also Beyond Nuclear,* 704 F.3d at 16 ("[T]he NRC denies hearings when the party's criticism of a portion of the applicant's environmental report does not meet the requirements of the regulations as to the admission of a contention.").

NEPA and NRC's implementing regulations at 10 C.F.R. Part 51 (NRDC Br. 41-44). But any NEPA requirement to consider "new and significant" information does not obviate compliance with NRC's threshold requirements, approved by the courts, to obtain a hearing. Nowhere does NRDC explain otherwise.

NRDC also quotes from the 1996 license renewal rulemaking to claim that the Commission believed additional severe accident mitigation analysis would be appropriate ten years later (NRDC Br. 41). NRDC argues from this that the Commission "certainly contemplated" that new and significant information would be considered for Limerick license renewal, given the hiatus between initial licensing and license renewal greater than ten years (NRDC Br. 41-42). This claim, however, is based upon a misreading of the rulemaking. The Commission was discussing the need to review its license renewal rule and the supporting Generic EIS, not the need to reconsider mitigation alternatives analyses. The Commission stated:

> After consideration of the changes from the proposed rule to the final rule and further review of the environmental issues, the NRC has concluded that it is adequate *to formally review the rule and the GEIS on a schedule that allows revisions, if required, every 10 years.* The NRC believes that 10 years is a suitable period considering the extent of the review and the limited environmental impacts observed thus far, and given that the changes in the environment around nuclear power

> plants are gradual and predictable with respect to characteristics important to environmental impact analyses.[93]

Nothing in this statement, far removed from the discussion of mitigation alternatives in the rulemaking text, even remotely relates to "additional NEPA review" (NRDC Br. 41) of such analyses.[94]

Finally, NRDC argues that this Court should re-write section 51.53(c)(3)(ii)(L) because of an ambiguity that NRDC has invented (NRDC Br. 39). It agrees that a mitigation alternatives analysis must be performed if not previously performed, but finds the rule not "pellucid" if an analysis was conducted with the initial licensing of the plant (NRDC Br. 39). That NRDC could now claim section 51.53(c)(3)(ii)(L) to be ambiguous is surprising to say the least. No such "ambiguity" was raised below,[95] and the very rulemaking that resulted in section 51.53(c)(3)(ii)(L) specifically *identified* Limerick as an example of a plant

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[93] 61 Fed. Reg. at 28,470-71 (emphasis added)(JA570-71).

[94] The Commission's most recent review of and revision to the license renewal rule and generic EIS was last year; significantly, the Commission did not change the exception in 10 C.F.R. § 51.53(c)(3)(ii)(L). *See* Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,289-90 (June 20, 2013).

[95] Because this assertion "was never presented to the Commission," *Nat'l Whistleblower Ctr.* v. *NRC,* 208 F.3d 256, 265 (D.C. Cir. 2000), NRDC has "waived this argument." *Frank* v. *Colt Indus., Inc.,* 910 F.2d 90, 100 (3d Cir. 1990).

initially licensed with a severe accident mitigation alternatives analysis for which a second analysis at license renewal would be unnecessary. And that is exactly what the regulation unambiguously states.

V. The Commission's denial of NRDC's waiver request was well within its discretion to interpret its own regulations.

A. NRC has a deliberately "stringent" standard for waivers.

Though the Commission in CLI-12-19 denied admission of NRDC Contention 1-E on severe accident mitigation alternatives, it nonetheless offered NRDC an opportunity to present "new and significant" information that would take Contention 1-E out of the categorical bar of 10 C.F.R.§ 51.53(c)(3)(ii)(L) by permitting NRDC to seek a waiver of the regulation.[96] To support its waiver request, NRDC alleged that Exelon's Environmental Report: (1) did not consider mitigation alternatives considered for other Mark II boiling water reactors (the Limerick reactor design); (2) used economic cost information from the 1977 Three Mile Island accident rather than information specific to Limerick; and (3) had not used modern techniques for determining whether newly considered mitigation alternatives are cost-beneficial (*see supra* at 14).

The Commission reviewed NRDC's waiver request against the criteria of 10 C.F.R. § 2.335, which the Commission explained "provides a limited exception to

[96] *Limerick,* CLI-12-19, 76 NRC at 386-89 (JA195-200).

[its] general prohibition against challenges to NRC rules or regulations in adjudicatory proceedings."[97] A waiver is available only upon a showing that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule . . . would not serve the purposes for which . . . [it] was adopted."[98]

In CLI-13-07, the Commission observed that its waiver standard "is stringent by design" because rulemaking, as in adopting 10 C.F.R. § 51.53(c)(3)(ii)(L), carves out issues resolved generically from hearings, requiring a litigant to show "something extraordinary" about the subject matter of its contention "such that the rule should not apply."[99] A hearing litigant seeking a waiver "faces a substantial burden," and must meet "all four" factors[100] adopted by the Commission to satisfy its deliberately stringent waiver standard:

> (i) the rule's strict application would not serve the purposes for which it was adopted;
>
> (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;

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[97] *Limerick,* CLI-13-07, 78 NRC at 206 (JA351).

[98] *Id.* at 206-07 (quoting 10 C.F.R. § 2.335(b); brackets in original)(JA352).

[99] *Id.* at 207 (JA352).

[100] *Id.* at 208 (JA353-54).

(iii) those circumstances are unique to the facility rather than common to a large class of facilities; and

(iv) waiver of the regulation is necessary to reach a significant safety problem.[101]

While the first two factors track the text of 10 C.F.R. § 2.335, the third factor reflects NRC's view that only where a waiver request "rests on issues that are legitimately unique to the proceeding and do not imply broader concerns about the rule's general viability or appropriateness," would it "make sense to resolve the matter through site-specific adjudication."[102] Conversely, an issue common to a large class of facilities should be addressed through rulemaking.[103] The fourth factor – showing a significant safety problem otherwise unaddressed – emphasizes NRC's belief that rulemaking typically years in the works should not be set aside "lightly."[104]

[101] *Id.* at 207-08 (JA353).

[102] *Id.* at 208 (JA354).

[103] *Id.*

[104] *Id.*

B. NRC reasonably construed 10 C.F.R. § 51.53(c)(3)(ii)(L) and the waiver factors in denying NRDC's waiver petition.

The Commission reasonably found the third factor of the four-prong waiver standard dispositive on NRDC's waiver claim. NRDC claimed that, absent the information addressed in the contentions barred by section 51.53(c)(3)(ii)(L), the Limerick analysis of mitigation alternatives would be outdated.[105] But, as the Commission determined, that claim was not "unique to Limerick."[106] The Commission observed that, for most if not all reactor licensees, twenty years or more might pass between initial plant licensing and a license renewal application. This 20-year interval "is inherent in [NRC's] regulatory scheme" because a reactor operating license term is 40 years and a license renewal request may not be submitted more than 20 years before expiration of the license.[107]

Consequently, practically *all* plants to which section 51.53(c)(3)(ii)(L) is applicable, including those plants for which a second license renewal is sought, could "face the same criticism" that the passage of time has rendered the severe accident mitigation analysis associated with these plants out-of-date, and that the

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[105] *Id.*

[106] *Id.* at 214 (JA362).

[107] *Id.* at 214 & n.81 (citing, *inter alia*, 10 C.F.R. § 54.17(c))(JA362-63).

licensee's Environmental Report should therefore be amended accordingly.[108] This would also be true, the Commission added, of plants for which the first severe accident mitigation analysis was performed upon license renewal as well as new plants licensed under the relatively new "combined license" provisions of 10 C.F.R. Part 54.[109] The Commission therefore held that, under NRDC's logic, waiver of section 51.53(c)(3)(ii)(L) based on new information alone would create an exception that would "necessarily swallow the rule."[110]

The Commission expressly left open the possibility that new and significant information could justify a waiver of section 51.53(c)(3)(ii)(L) if the information were truly "unique" to the plant at issue. But here, the Commission found that NRDC's proposed mitigation alternatives for Limerick "could be used for any boiling water reactor, not just those [like Limerick] with Mark II containments."[111] Similarly, allowing a waiver to use an allegedly "newer methodology" to determine whether newly considered mitigation alternatives are cost-beneficial would lead to never-ending updating to account for "further developments" in the

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[108] *Id.* at 214 (JA363).

[109] *Id.* at 214-15 & n.83 (JA363).

[110] *Id.* at 215 (internal quotation marks omitted)(JA363-64).

[111] *Id.*

methodology.[112] And finally, new software codes to evaluate economic risk, though allegedly producing materially different results for Limerick, were no more specific to Limerick than other plants.[113]

Here again, NRDC does not dispute the substance of the Commission's reasoning. It merely contends that "uniqueness" should not be or cannot be a waiver standard. (NRDC Br. 46). But NRDC acknowledges, as it must, that the Commission's application of the waiver standard's requirement of "exceptional circumstances" has been explained in NRC case law to mean, *inter alia*, that "those circumstances are unique to the facility rather than common to a large class of facilities."[114] NRC's interpretation of its regulation through adjudication is entitled to judicial deference,[115] and NRDC has not explained why NRC's interpretation should be set aside.

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[112] *Id.*

[113] *Id.* NRDC's complaint (Br. 49-50) that the Commission merely found that this information "could" be employed in connection with other plants is of no moment. The Commission's conclusion was founded upon its determination that the arguments were equally applicable to the vast majority of plants subject to the rule. The fact that these arguments have not yet been raised, either by NRDC or others, does change their lack of uniqueness.

[114] *Id.* at 208 (JA353).

[115] *See* page 25, *supra*.

The Commission's application of the "uniqueness" criterion for waiver was expressly approved in *Massachusetts v. NRC,* 708 F.3d 63 (1st Cir. 2013), wherein petitioner sought a waiver to challenge a Category 1 spent fuel pool issue through adjudication rather than rulemaking.[116] The court's disposition of the waiver claim applies equally here:

> In denying Massachusetts's waiver petition, the NRC permissibly reasoned that Massachusetts did not show that the spent fuel pool issues in its contention were unique to Pilgrim. Rather, they applied to all nuclear power plants and would be more appropriately handled through rulemaking.[117]

Thus, the court in *Massachusetts* ratified the precise reasoning employed in CLI-13-07 to deny NRDC's waiver request, despite NRDC's argument here that the "uniqueness" prong of the waiver standard is unjustified (NRDC Br. 46).

Finally, NRDC errs in arguing that *Limerick Ecology* compels elimination of the "uniqueness" prong (NRDC Br. 51). Contrary to NRDC's assertion, it does not "fly in the face" of *Limerick Ecology* to conclude that the lack of information unique to Limerick precludes a waiver of section 51.53(c)(3)(ii)(L). Indeed, *Limerick Ecology* merely considered the validity of an NRC policy statement excluding mitigation alternatives from consideration in individual licensing cases,

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[116] *Limerick,* CLI-13-07, 78 NRC at 69-71.

[117] *Massachusetts,* 708 F.3d at 74.

and the court determined that the variability among plants that it identified precluded a wholesale conclusion that severe accident mitigation alternatives did not have to be considered on a site-specific basis upon initial licensing.[118] The court's decision did not speak to the entirely separate question that section 51.53(c)(3)(ii)(L) addresses – whether a second mitigation alternatives analysis is likely to result in the identification of cost-beneficial mitigation alternatives. Moreover, unlike *Limerick Ecology*, the Commission answered this question in the course of a rulemaking that conclusively determined this issue and that is entitled to deference.[119] To the extent that NRDC has information that bears on the wisdom of the NRC's determination, including its assertion that the rule should not apply to plants in higher-population sites, its remedy is to petition for a rulemaking. It is not, as NRDC now claims, to claim entitlement to a waiver from a rule based on considerations that the Commission has found apply to a broad swath of licensees.

C. The Commission's finding that the information proffered by NRDC is not "unique" to Limerick demonstrates that a new rulemaking, not waiver of the rule, is appropriate.

The Commission concluded in CLI-13-07 that a waiver of section 51.53(c)(3)(ii)(L) "based on NRDC's proffered new information alone would create

[118] *Limerick Ecology*, 869 F.2d at 739.

[119] *Id.* ("To summarize, the policy statement was not a rulemaking and therefore did not absolve the NRC of the required consideration of the environmental effects.").

an exception to litigate [mitigation alternatives] in the *Limerick* proceeding that would 'necessarily swallow the rule.'"[120] This rule was subjected to exacting scrutiny when promulgated through notice-and-comment rulemaking and the non-Limerick-specific arguments that NRDC raises must, to be addressed fairly, be open to comment by all those affected. Hence, the Commission appropriately concluded that "[t]he rulemaking process, as opposed to a site-specific licensing proceeding, is the appropriate venue for such a far-reaching challenge."[121]

In contesting this conclusion, NRDC eschews any technical discussion to support overturning the Commission's decision. Instead, NRDC relies almost exclusively on the Commission's referral of the information to its Staff for consideration in completing the Supplemental EIS as an admission of significance (NRDC Br. 40) ("[I]f the regulations precluded such consideration, there would be no basis to direct the Staff to consider these issues.").

NRDC's argument is a *non sequitur* and does not, in any event, bear upon the waiver requirement or the denial of NRDC's waiver request. The mere existence of potentially new and significant information does not guarantee a hearing, and the Commission's referral of NRDC's information to the Staff for

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[120] *Limerick,* CLI-13-07, 78 NRC at 215 (JA363-64).

[121] *Id.* at 215 (JA364).

consideration in the Supplemental EIS does not itself create a hearing contention that meets NRC's stringent waiver requirements.[122] In the end, the Commission's finding that NRDC's information "bears consideration in [its] environmental review of Exelon's application" (NRDC Br. 47) only serves to demonstrate the agency's commitment, both within and outside the adjudicatory process, to take a "hard look" at any environmentally relevant information germane to a licensing proceeding, including whether any new and significant information has been generated since its prior analyses were completed.

NRC took the requisite "hard look" at the need to reconsider severe accident mitigation analysis during the license renewal process when it promulgated its rule in 1996 and reviewed it in 2013. NRC further analyzed this question as part of its consideration of whether waiver of the rule it promulgated was appropriate for the Limerick license renewal proceeding, and NRC staff is in the process of considering whether any potentially new and significant information bears upon its analysis during its preparation of a Supplemental EIS for the Limerick plant. And if presented with a petition to change its rule, NRC would again consider whether

[122] We note that NRDC's recitation of the Commission's referral (NRDC Br. 40) omits the important qualifier that the Staff's consideration of NRDC's proffered information is to be performed "outside of the adjudicatory process." *Limerick,* CLI-13-07, 78 NRC at 216 (JA366).

the arguments that NRDC seeks to raise in its contention justify a new rulemaking. Any argument that NRDC has been denied an opportunity to be heard on these issues, either inside or outside the adjudicatory context, is simply incorrect.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction and ripeness. Alternatively, the petition should be denied on the merits.

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CERTIFICATION OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of this Court, the undersigned counsel certifies:

The foregoing brief of Respondents complies with Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,792 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Microsoft Office Word 2010 software program with which the Brief was prepared. The foregoing Brief complies with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14 point Times Roman font using Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2014, the undersigned counsel for Respondent U.S. Nuclear Regulatory Commission filed the attached Final Brief of Federal Respondents with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system. That method is calculated to serve:

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ADDENDUM

STATUTES CITED

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

. . . .

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

. . . .

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S. C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

42 U.S.C. § 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [FN1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for

determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C.A. § 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C.A. § 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

[FN1] So in original. Probably should be “section”.

REGULATIONS CITED

10 C.F.R. § 2.309. Hearing requests, petitions to intervene, requirements for standing, and contentions.

. . . . .

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

. . . . .

10 C.F.R. § 2.335. Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A participant to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception be made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other participant may file a response by counter-affidavit or otherwise.

(c) If, on the basis of the petition, affidavit, and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning participant has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima facie* showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other

provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a participant to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

10 C.F.R. § 2.341 Review of decisions and actions of a presiding officer.

(a)(1) Review of decisions and actions of a presiding officer are treated under this section; provided, however, that no party may request further Commission review of a Commission determination to allow a period of interim operation under § 52.103(c) of this chapter. This section does not apply to appeals under § 2.311 or to appeals in the high-level waste proceeding, which are governed by § 2.1015.

(2) Within 120 days after the date of a decision or action by a presiding officer, or within 120 days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within 25 days after service of a full or partial initial decision by a presiding officer, and within 25 days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within 25 days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than 25 pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning

party may file a reply brief within 10 days of service of any answer. This reply brief may not be longer than 5 pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c)(1) If within 120 days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition is deemed to be denied, unless the Commission, in its discretion, extends the time for its consideration of the petition and any answers to the petition.

(2) If a petition for review is granted, the Commission may issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(3) Unless the Commission orders otherwise, any briefs on review may not exceed 30 pages in length, exclusive of pages containing the table of contents, table of

citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of 10 pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations, and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) Interlocutory review. (1) A ruling referred or question certified to the Commission under §§ 2.319(l) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.802 Petition for rulemaking.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent either by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; by facsimile; by hand delivery to the NRC's offices at 11555 Rockville Pike, Rockville, Maryland; or, where practicable, by electronic submission, for example, via Electronic Information Exchange, e-mail, or CD-ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html*; by e-mail to *MSHD.Resource@nrc.gov*; or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The guidance discusses, among other topics, the formats the NRC can accept, the use of electronic signatures, and the treatment of nonpublic information.

(b) A prospective petitioner may consult with the NRC before filing a petition for rulemaking by writing to the Chief, Rulemaking, Directives, and Editing Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. A prospective petitioner also may telephone the Rulemaking, Directives, and Editing Branch on (301) 415-7163, or toll free on (800) 368-5642, or send e-mail to *NRCREP@nrc.gov*.

(1) In any consultation prior to the filing of a petition for rulemaking, the assistance that may be provided by the NRC staff is limited to—

(i) Describing the procedure and process for filing and responding to a petition for rulemaking;

(ii) Clarifying an existing NRC regulation and the basis for the regulation; and

(iii) Assisting the prospective petitioner to clarify a potential petition so that the Commission is able to understand the nature of the issues of concern to the petitioner.

(2) In any consultation prior to the filing of a petition for rulemaking, in providing the assistance permitted in paragraph (b)(1) of this section, the NRC staff will not draft or develop text or alternative approaches to address matters in the prospective petition for rulemaking.

(c) Each petition filed under this section shall:

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

(3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant pending disposition of the petition for rulemaking.

(e) If it is determined that the petition includes the information required by paragraph (c) of this section and is complete, the Director, Division of Administrative Services, Office of Administration, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC Web site, *http://www.nrc.gov*. Public comment may be requested by publication of a notice of the docketing of the petition in the Federal Register, or, in appropriate cases, may be invited for the first time upon publication in the Federal Register of a proposed rule developed in response to the petition. Publication will be limited by the requirements of Section 181 of the Atomic Energy Act of 1954, as amended, and may be limited by order of the Commission.

(f) If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be made within 30 days from the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete,

the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition.

(g) The Director, Division of Administrative Services, Office of Administration, will prepare on a semiannual basis a summary of petitions for rulemaking before the Commission, including the status of each petition. A copy of the report will be available for public inspection and copying at the NRC Web site, *http://www.nrc.gov,* and/or at the NRC Public Document Room.

10 C.F.R. § 51.53. Postconstruction environmental reports

(a) *General*. Any environmental report prepared under the provisions of this section may incorporate by reference any information contained in a prior environmental report or supplement thereto that relates to the production or utilization facility or site, or any information contained in a final environmental document previously prepared by the NRC staff that relates to the production or utilization facility or site. Documents that may be referenced include, but are not limited to, the final environmental impact statement; supplements to the final environmental impact statement, including supplements prepared at the license renewal stage; NRC staff-prepared final generic environmental impact statements; and environmental assessments and records of decisions prepared in connection with the construction permit, operating license, early site permit, combined license and any license amendment for that facility.

(b) *Operating license stage*. Each applicant for a license to operate a production or utilization facility covered by § 51.20 shall submit with its application a separate document entitled "Supplement to Applicant's Environmental Report—Operating License Stage," which will update "Applicant's Environmental Report--Construction Permit Stage." Unless otherwise required by the Commission, the applicant for an operating license for a nuclear power reactor shall submit this report only in connection with the first licensing action authorizing full-power operation. In this report, the applicant shall discuss the same matters described in §§ 51.45, 51.51, and 51.52, but only to the extent that they differ from those discussed or reflect new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the construction permit. No discussion of need for power, or of alternative energy sources, or of alternative sites for the facility, or of any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b) is required in this report.

(c) *Operating license renewal stage*. (1) Each applicant for renewal of a license to operate a nuclear power plant under part 54 of this chapter shall submit with its application a separate document entitled "Applicant's Environmental Report--Operating License Renewal Stage."

(2) The report must contain a description of the proposed action, including the applicant's plans to modify the facility or its administrative control procedures as described in accordance with § 54.21 of this chapter. This report must describe in detail the affected environment around the plant, the modifications directly

affecting the environment or any plant effluents, and any planned refurbishment activities. In addition, the applicant shall discuss in this report the environmental impacts of alternatives and any other matters described in § 51.45. The report is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives to the proposed action except insofar as such costs and benefits are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. The environmental report need not discuss other issues not related to the environmental effects of the proposed action and the alternatives. In addition, the environmental report need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).

(3) For those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995, the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations:

(i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in Appendix B to subpart A of this part.

(ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in Appendix B to subpart A of this part. The required analyses are as follows:

(A) If the applicant's plant utilizes cooling towers or cooling ponds and withdraws makeup water from a river, an assessment of the impact of the proposed action on water availability and competing water demands, the flow of the river, and related impacts on stream (aquatic) and riparian (terrestrial) ecological communities must be provided. The applicant shall also provide an assessment of the impacts of the withdrawal of water from the river on alluvial aquifers during low flow.

(B) If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant cannot provide these documents, it shall assess the impact of the

proposed action on fish and shellfish resources resulting from thermal changes and impingement and entrainment.

(C) If the applicant's plant pumps more than 100 gallons (total onsite) of groundwater per minute, an assessment of the impact of the proposed action on groundwater must be provided.

(D) If the applicant's plant is located at an inland site and utilizes cooling ponds, an assessment of the impact of the proposed action on groundwater quality must be provided.

(E) All license renewal applicants shall assess the impact of refurbishment, continued operations, and other license renewal-related construction activities on important plant and animal habitats. Additionally, the applicant shall assess the impact of the proposed action on threatened or endangered species in accordance with Federal laws protecting wildlife, including but not limited to, the Endangered Species Act, and essential fish habitat in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

10 C.F.R. § 51.94. Requirement to consider final environmental impact statement.

The final environmental impact statement, together with any comments and any supplement, will accompany the application or petition for rulemaking through, and be considered in, the Commission's decisionmaking process. The final environmental impact statement, together with any comments and any supplement, will be made a part of the record of the appropriate adjudicatory or rulemaking proceeding.

10 C.F.R. § 51.95. Postconstruction environmental impact statements.

(a) *General*. Any supplement to a final environmental impact statement or any environmental assessment prepared under the provisions of this section may incorporate by reference any information contained in a final environmental document previously prepared by the NRC staff that relates to the same production or utilization facility. Documents that may be referenced include, but are not limited to, the final environmental impact statement; supplements to the final environmental impact statement, including supplements prepared at the operating license stage; NRC staff prepared final generic environmental impact statements; environmental assessments and records of decisions prepared in connection with the construction permit, the operating license, the early site permit, or the combined license and any license amendment for that facility. A supplement to a final environmental impact statement will include a request for comments as provided in § 51.73.

(b) *Initial operating license stage*. In connection with the issuance of an operating license for a production or utilization facility, the NRC staff will prepare a supplement to the final environmental impact statement on the construction permit for that facility, which will update the prior environmental review. The supplement will only cover matters that differ from the final environmental impact statement or that reflect significant new information concerning matters discussed in the final environmental impact statement. Unless otherwise determined by the Commission, a supplement on the operation of a nuclear power plant will not include a discussion of need for power, or of alternative energy sources, or of alternative sites, or of any aspect of the storage of spent fuel for the nuclear power plant within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b), and will only be prepared in connection with the first licensing action authorizing full-power operation.

(c) *Operating license renewal stage*. In connection with the renewal of an operating license or combined license for a nuclear power plant under 10 CFR parts 52 or 54 of this chapter, the Commission shall prepare an environmental impact statement, which is a supplement to the Commission's NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (June 2013), which is available in the NRC's Public Document Room, 11555 Rockville Pike, Rockville, Maryland 20852.

(1) The supplemental environmental impact statement for the operating license renewal stage shall address those issues as required by § 51.71. In addition, the

NRC staff must comply with 40 CFR 1506.6(b)(3) in conducting the additional scoping process as required by § 51.71(a).

(2) The supplemental environmental impact statement for license renewal is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives to the proposed action except insofar as such benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. In addition, the supplemental environmental impact statement prepared at the license renewal stage need not discuss other issues not related to the environmental effects of the proposed action and the alternatives, or any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b). The analysis of alternatives in the supplemental environmental impact statement should be limited to the environmental impacts of such alternatives and should otherwise be prepared in accordance with § 51.71 and Appendix A to subpart A of this part.

(3) The supplemental environmental impact statement shall be issued as a final impact statement in accordance with §§ 51.91 and 51.93 after considering any significant new information relevant to the proposed action contained in the supplement or incorporated by reference.

(4) The supplemental environmental impact statement must contain the NRC staff's recommendation regarding the environmental acceptability of the license renewal action. In order to make recommendations and reach a final decision on the proposed action, the NRC staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information. Given this information, the NRC staff, adjudicatory officers, and Commission shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.

(d) *Postoperating license stage*. In connection with the amendment of an operating or combined license authorizing decommissioning activities at a production or utilization facility covered by § 51.20, either for unrestricted use or based on continuing use restrictions applicable to the site, or with the issuance, amendment or renewal of a license to store spent fuel at a nuclear power reactor after expiration of the operating or combined license for the nuclear power reactor, the

NRC staff will prepare a supplemental environmental impact statement for the post operating or post combined license stage or an environmental assessment, as appropriate, which will update the prior environmental documentation prepared by the NRC for compliance with NEPA under the provisions of this part. The supplement or assessment may incorporate by reference any information contained in the final environmental impact statement—for the operating or combined license stage, as appropriate, or in the records of decision prepared in connection with the early site permit, construction permit, operating license, or combined license for that facility. The supplement will include a request for comments as provided in § 51.73. Unless otherwise required by the Commission in accordance with the generic determination in § 51.23(a) and the provisions of § 51.23(b), a supplemental environmental impact statement for the postoperating or post combined license stage or an environmental assessment, as appropriate, will address the environmental impacts of spent fuel storage only for the term of the license, license amendment or license renewal applied for.

10 C.F.R. Part 51, Appendix B to Subpart A—Environmental Effect of Renewing the Operating License of a Nuclear Power Plant

The Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995. Table B–1 summarizes the Commission's findings on the scope and magnitude of environmental impacts of renewing the operating license for a nuclear power plant as required by section 102(2) of the National Environmental Policy Act of 1969, as amended. Table B–1, subject to an evaluation of those issues identified in Category 2 as requiring further analysis and possible significant new information, represents the analysis of the environmental impacts associated with renewal of any operating license and is to be used in accordance with § 51.95(c). On a 10-year cycle, the Commission intends to review the material in this appendix and update it if necessary. A scoping notice must be published in the *Federal Register* indicating the results of the NRC's review and inviting public comments and proposals for other areas that should be updated.

Table B–1.—Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants[1]

Issue	Category[2]	Findings[3]
Land Use		
Onsite land use	1	SMALL. Changes in onsite land use from continued operations and refurbishment associated with license renewal would be a small fraction of the nuclear power plant site and would involve only land that is controlled by the licensee.
Offsite land use	1	SMALL. Offsite land use would not be affected by continued operations and refurbishment associated with license renewal.
Offsite land use in transmission line right-of-ways (ROWs)[4]	1	SMALL. Use of transmission line ROWs from continued operations and refurbishment associated with license

		renewal would continue with no change in land use restrictions.
Visual Resources		
Aesthetic impacts	1	SMALL. No important changes to the visual appearance of plant structures or transmission lines are expected from continued operations and refurbishment associated with license renewal.
Air Quality		
Air quality impacts (all plants)	1	SMALL. Air quality impacts from continued operations and refurbishment associated with license renewal are expected to be small at all plants. Emissions resulting from refurbishment activities at locations in or near air quality nonattainment or maintenance areas would be short-lived and would cease after these refurbishment activities are completed. Operating experience has shown that the scale of refurbishment activities has not resulted in exceedance of the *de minimis* thresholds for criteria pollutants, and best management practices including fugitive dust controls and the imposition of permit conditions in State and local air emissions permits would ensure conformance with applicable State or Tribal Implementation Plans. Emissions from emergency diesel generators and fire pumps and routine operations of boilers used for space heating would not be a concern, even for plants located in or adjacent to nonattainment areas. Impacts from cooling tower particulate emissions even under the worst-case situations have been small.

Air quality effects of transmission lines[4]	1	SMALL. Production of ozone and oxides of nitrogen is insignificant and does not contribute measurably to ambient levels of these gases.
Noise		
Noise impacts	1	SMALL. Noise levels would remain below regulatory guidelines for offsite receptors during continued operations and refurbishment associated with license renewal.
Geologic Environment		
Geology and soils	1	SMALL. The effect of geologic and soil conditions on plant operations and the impact of continued operations and refurbishment activities on geology and soils would be small for all nuclear power plants and would not change appreciably during the license renewal term.
Surface Water Resources		
Surface water use and quality (non-cooling system impacts)	1	SMALL. Impacts are expected to be small if best management practices are employed to control soil erosion and spills. Surface water use associated with continued operations and refurbishment associated with license renewal would not increase significantly or would be reduced if refurbishment occurs during a plant outage.
Altered current patterns at intake and discharge structures	1	SMALL. Altered current patterns would be limited to the area in the vicinity of the intake and discharge structures. These impacts have been small at operating

		nuclear power plants.
Altered salinity gradients	1	SMALL. Effects on salinity gradients would be limited to the area in the vicinity of the intake and discharge structures. These impacts have been small at operating nuclear power plants.
Altered thermal stratification of lakes	1	SMALL. Effects on thermal stratification would be limited to the area in the vicinity of the intake and discharge structures. These impacts have been small at operating nuclear power plants.
Scouring caused by discharged cooling water	1	SMALL. Scouring effects would be limited to the area in the vicinity of the intake and discharge structures. These impacts have been small at operating nuclear power plants.
Discharge of metals in cooling system effluent	1	SMALL. Discharges of metals have not been found to be a problem at operating nuclear power plants with cooling-tower-based heat dissipation systems and have been satisfactorily mitigated at other plants. Discharges are monitored and controlled as part of the National Pollutant Discharge Elimination System (NPDES) permit process.
Discharge of biocides, sanitary wastes, and minor chemical spills	1	SMALL. The effects of these discharges are regulated by Federal and State environmental agencies. Discharges are monitored and controlled as part of the NPDES permit process. These impacts have been small at operating nuclear power plants.

Surface water use conflicts (plants with once-through cooling systems)	1	SMALL. These conflicts have not been found to be a problem at operating nuclear power plants with once-through heat dissipation systems.
Surface water use conflicts (plants with cooling ponds or cooling towers using makeup water from a river)	2	SMALL or MODERATE. Impacts could be of small or moderate significance, depending on makeup water requirements, water availability, and competing water demands.
Effects of dredging on surface water quality	1	SMALL. Dredging to remove accumulated sediments in the vicinity of intake and discharge structures and to maintain barge shipping has not been found to be a problem for surface water quality. Dredging is performed under permit from the U.S. Army Corps of Engineers, and possibly, from other State or local agencies.
Temperature effects on sediment transport capacity	1	SMALL. These effects have not been found to be a problem at operating nuclear power plants and are not expected to be a problem.
Groundwater Resources		
Groundwater contamination and use (non-cooling system impacts)	1	SMALL. Extensive dewatering is not anticipated from continued operations and refurbishment associated with license renewal. Industrial practices involving the use of solvents, hydrocarbons, heavy metals, or other chemicals, and/or the use of wastewater ponds or lagoons have the potential to contaminate site groundwater, soil, and subsoil. Contamination is subject to State or Environmental Protection

		Agency regulated cleanup and monitoring programs. The application of best management practices for handling any materials produced or used during these activities would reduce impacts.
Groundwater use conflicts (plants that withdraw less than 100 gallons per minute [gpm])	1	SMALL. Plants that withdraw less than 100 gpm are not expected to cause any groundwater use conflicts.
Groundwater use conflicts (plants that withdraw more than 100 gallons per minute [gpm])	2	SMALL, MODERATE, or LARGE. Plants that withdraw more than 100 gpm could cause groundwater use conflicts with nearby groundwater users.
Groundwater use conflicts (plants with closed-cycle cooling systems that withdraw makeup water from a river)	2	SMALL, MODERATE, or LARGE. Water use conflicts could result from water withdrawals from rivers during low-flow conditions, which may affect aquifer recharge. The significance of impacts would depend on makeup water requirements, water availability, and competing water demands.
Groundwater quality degradation resulting from water withdrawals	1	SMALL. Groundwater withdrawals at operating nuclear power plants would not contribute significantly to groundwater quality degradation.
Groundwater quality degradation (plants with cooling ponds in salt marshes)	1	SMALL. Sites with closed-cycle cooling ponds could degrade groundwater quality. However, groundwater in salt marshes is naturally brackish and thus, not potable. Consequently, the human use of such groundwater is limited to industrial purposes.

Groundwater quality degradation (plants with cooling ponds at inland sites)	2	SMALL, MODERATE, or LARGE. Inland sites with closed-cycle cooling ponds could degrade groundwater quality. The significance of the impact would depend on cooling pond water quality, site hydrogeologic conditions (including the interaction of surface water and groundwater), and the location, depth, and pump rate of water wells.
Radionuclides released to groundwater	2	SMALL or MODERATE. Leaks of radioactive liquids from plant components and pipes have occurred at numerous plants. Groundwater protection programs have been established at all operating nuclear power plants to minimize the potential impact from any inadvertent releases. The magnitude of impacts would depend on site-specific characteristics.
Terrestrial Resources		
Effects on terrestrial resources (non-cooling system impacts)	2	SMALL, MODERATE, or LARGE. Impacts resulting from continued operations and refurbishment associated with license renewal may affect terrestrial communities. Application of best management practices would reduce the potential for impacts. The magnitude of impacts would depend on the nature of the activity, the status of the resources that could be affected, and the effectiveness of mitigation.
Exposure of terrestrial organisms to radionuclides	1	SMALL. Doses to terrestrial organisms from continued operations and refurbishment associated with license

		renewal are expected to be well below exposure guidelines developed to protect these organisms.
Cooling system impacts on terrestrial resources (plants with once-through cooling systems or cooling ponds)	1	SMALL. No adverse effects to terrestrial plants or animals have been reported as a result of increased water temperatures, fogging, humidity, or reduced habitat quality. Due to the low concentrations of contaminants in cooling system effluents, uptake and accumulation of contaminants in the tissues of wildlife exposed to the contaminated water or aquatic food sources are not expected to be significant issues.
Cooling tower impacts on vegetation (plants with cooling towers)	1	SMALL. Impacts from salt drift, icing, fogging, or increased humidity associated with cooling tower operation have the potential to affect adjacent vegetation, but these impacts have been small at operating nuclear power plants and are not expected to change over the license renewal term.
Bird collisions with plant structures and transmission lines[4]	1	SMALL. Bird collisions with cooling towers and other plant structures and transmission lines occur at rates that are unlikely to affect local or migratory populations and the rates are not expected to change.
Water use conflicts with terrestrial resources (plants with cooling ponds or cooling towers using makeup water from a river)	2	SMALL or MODERATE. Impacts on terrestrial resources in riparian communities affected by water use conflicts could be of moderate significance.
Transmission line right-of-	1	SMALL. Continued ROW management

way (ROW) management impacts on terrestrial resources[4]		during the license renewal term is expected to keep terrestrial communities in their current condition. Application of best management practices would reduce the potential for impacts.
Electromagnetic fields on flora and fauna (plants, agricultural crops, honeybees, wildlife, livestock)[4]	1	SMALL. No significant impacts of electromagnetic fields on terrestrial flora and fauna have been identified. Such effects are not expected to be a problem during the license renewal term.
Aquatic Resources		
Impingement and entrainment of aquatic organisms (plants with once-through cooling systems or cooling ponds)	2	SMALL, MODERATE, or LARGE. The impacts of impingement and entrainment are small at many plants but may be moderate or even large at a few plants with once-through and cooling-pond cooling systems, depending on cooling system withdrawal rates and volumes and the aquatic resources at the site.
Impingement and entrainment of aquatic organisms (plants with cooling towers)	1	SMALL. Impingement and entrainment rates are lower at plants that use closed-cycle cooling with cooling towers because the rates and volumes of water withdrawal needed for makeup are minimized.
Entrainment of phytoplankton and zooplankton (all plants)	1	SMALL. Entrainment of phytoplankton and zooplankton has not been found to be a problem at operating nuclear power plants and is not expected to be a problem during the license renewal term.
Thermal impacts on aquatic organisms (plants with once-through cooling	2	SMALL, MODERATE, or LARGE. Most of the effects associated with thermal discharges are localized and are not

systems or cooling ponds)		expected to affect overall stability of populations or resources. The magnitude of impacts, however, would depend on site-specific thermal plume characteristics and the nature of aquatic resources in the area.
Thermal impacts on aquatic organisms (plants with cooling towers)	1	SMALL. Thermal effects associated with plants that use cooling towers are expected to be small because of the reduced amount of heated discharge.
Infrequently reported thermal impacts (all plants)	1	SMALL. Continued operations during the license renewal term are expected to have small thermal impacts with respect to the following: Cold shock has been satisfactorily mitigated at operating nuclear plants with once-through cooling systems, has not endangered fish populations or been found to be a problem at operating nuclear power plants with cooling towers or cooling ponds, and is not expected to be a problem. Thermal plumes have not been found to be a problem at operating nuclear power plants and are not expected to be a problem. Thermal discharge may have localized effects but is not expected to affect the larger geographical distribution of aquatic organisms. Premature emergence has been found to be a localized effect at some operating nuclear power plants but has not been a problem and is not expected to be a

		problem. Stimulation of nuisance organisms has been satisfactorily mitigated at the single nuclear power plant with a once-through cooling system where previously it was a problem. It has not been found to be a problem at operating nuclear power plants with cooling towers or cooling ponds and is not expected to be a problem.
Effects of cooling water discharge on dissolved oxygen, gas supersaturation, and eutrophication	1	SMALL. Gas supersaturation was a concern at a small number of operating nuclear power plants with once-through cooling systems but has been mitigated. Low dissolved oxygen was a concern at one nuclear power plant with a once-through cooling system but has been mitigated. Eutrophication (nutrient loading) and resulting effects on chemical and biological oxygen demands have not been found to be a problem at operating nuclear power plants.
Effects of non-radiological contaminants on aquatic organisms	1	SMALL. Best management practices and discharge limitations of NPDES permits are expected to minimize the potential for impacts to aquatic resources during continued operations and refurbishment associated with license renewal. Accumulation of metal contaminants has been a concern at a few nuclear power plants but has been satisfactorily mitigated by replacing copper alloy condenser tubes with those of another metal.
Exposure of aquatic organisms to radionuclides	1	SMALL. Doses to aquatic organisms are expected to be well below exposure

		guidelines developed to protect these aquatic organisms.
Effects of dredging on aquatic organisms	1	SMALL. Dredging at nuclear power plants is expected to occur infrequently, would be of relatively short duration, and would affect relatively small areas. Dredging is performed under permit from the U.S. Army Corps of Engineers, and possibly, from other State or local agencies.
Water use conflicts with aquatic resources (plants with cooling ponds or cooling towers using makeup water from a river)	2	SMALL or MODERATE. Impacts on aquatic resources in stream communities affected by water use conflicts could be of moderate significance in some situations.
Effects on aquatic resources (non-cooling system impacts)	1	SMALL. Licensee application of appropriate mitigation measures is expected to result in no more than small changes to aquatic communities from their current condition.
Impacts of transmission line right-of-way (ROW) management on aquatic resources[4]	1	SMALL. Licensee application of best management practices to ROW maintenance is expected to result in no more than small impacts to aquatic resources.
Losses from predation, parasitism, and disease among organisms exposed to sublethal stresses	1	SMALL. These types of losses have not been found to be a problem at operating nuclear power plants and are not expected to be a problem during the license renewal term.
Special Status Species and Habitats		
Threatened, endangered, and protected species and	2	The magnitude of impacts on threatened, endangered, and protected species, critical

essential fish habitat		habitat, and essential fish habitat would depend on the occurrence of listed species and habitats and the effects of power plant systems on them. Consultation with appropriate agencies would be needed to determine whether special status species or habitats are present and whether they would be adversely affected by continued operations and refurbishment associated with license renewal.
Historic and Cultural Resources		
Historic and cultural resources[4]	2	Continued operations and refurbishment associated with license renewal are expected to have no more than small impacts on historic and cultural resources located onsite and in the transmission line ROW because most impacts could be mitigated by avoiding those resources. The National Historic Preservation Act (NHPA) requires the Federal agency to consult with the State Historic Preservation Officer (SHPO) and appropriate Native American Tribes to determine the potential effects on historic properties and mitigation, if necessary.
Socioeconomics		
Employment and income, recreation and tourism	1	SMALL. Although most nuclear plants have large numbers of employees with higher than average wages and salaries, employment, income, recreation, and tourism impacts from continued operations and refurbishment associated with license renewal are expected to be small.

Tax revenues	1	SMALL. Nuclear plants provide tax revenue to local jurisdictions in the form of property tax payments, payments in lieu of tax (PILOT), or tax payments on energy production. The amount of tax revenue paid during the license renewal term as a result of continued operations and refurbishment associated with license renewal is not expected to change.
Community services and education	1	SMALL. Changes resulting from continued operations and refurbishment associated with license renewal to local community and educational services would be small. With little or no change in employment at the licensee's plant, value of the power plant, payments on energy production, and PILOT payments expected during the license renewal term, community and educational services would not be affected by continued power plant operations.
Population and housing	1	SMALL. Changes resulting from continued operations and refurbishment associated with license renewal to regional population and housing availability and value would be small. With little or no change in employment at the licensee's plant expected during the license renewal term, population and housing availability and values would not be affected by continued power plant operations.
Transportation	1	SMALL. Changes resulting from continued operations and refurbishment

		associated with license renewal to traffic volumes would be small.
Human Health		
Radiation exposures to the public	1	SMALL. Radiation doses to the public from continued operations and refurbishment associated with license renewal are expected to continue at current levels, and would be well below regulatory limits.
Radiation exposures to plant workers	1	SMALL. Occupational doses from continued operations and refurbishment associated with license renewal are expected to be within the range of doses experienced during the current license term, and would continue to be well below regulatory limits.
Human health impact from chemicals	1	SMALL. Chemical hazards to plant workers resulting from continued operations and refurbishment associated with license renewal are expected to be minimized by the licensee implementing good industrial hygiene practices as required by permits and Federal and State regulations. Chemical releases to the environment and the potential for impacts to the public are expected to be minimized by adherence to discharge limitations of NPDES and other permits.
Microbiological hazards to the public (plants with cooling ponds or canals or cooling towers that discharge to a river)	2	SMALL, MODERATE, or LARGE. These organisms are not expected to be a problem at most operating plants except possibly at plants using cooling ponds, lakes, or canals, or that discharge into

		rivers. Impacts would depend on site-specific characteristics.
Microbiological hazards to plant workers	1	SMALL. Occupational health impacts are expected to be controlled by continued application of accepted industrial hygiene practices to minimize worker exposures as required by permits and Federal and State regulations.
Chronic effects of electromagnetic fields (EMFs)[4,6]	N/A[5]	Uncertain impact. Studies of 60-Hz EMFs have not uncovered consistent evidence linking harmful effects with field exposures. EMFs are unlike other agents that have a toxic effect (e.g., toxic chemicals and ionizing radiation) in that dramatic acute effects cannot be forced and longer-term effects, if real, are subtle. Because the state of the science is currently inadequate, no generic conclusion on human health impacts is possible.
Physical occupational hazards	1	SMALL. Occupational safety and health hazards are generic to all types of electrical generating stations, including nuclear power plants, and are of small significance if the workers adhere to safety standards and use protective equipment as required by Federal and State regulations.
Electric shock hazards[4]	2	SMALL, MODERATE, or LARGE. Electrical shock potential is of small significance for transmission lines that are operated in adherence with the National Electrical Safety Code (NESC). Without a review of conformance with NESC criteria

		of each nuclear power plant's in-scope transmission lines, it is not possible to determine the significance of the electrical shock potential.
Postulated Accidents		
Design-basis accidents	1	SMALL. The NRC staff has concluded that the environmental impacts of design-basis accidents are of small significance for all plants.
Severe accidents	2	SMALL. The probability-weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to groundwater, and societal and economic impacts from severe accidents are small for all plants. However, alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives.
Environmental Justice		
Minority and low-income populations	2	Impacts to minority and low-income populations and subsistence consumption resulting from continued operations and refurbishment associated with license renewal will be addressed in plant-specific reviews. See NRC Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions (69 FR 52040; August 24, 2004).
Waste Management		
Low-level waste storage and disposal	1	SMALL. The comprehensive regulatory controls that are in place and the low public doses being achieved at reactors

		ensure that the radiological impacts to the environment would remain small during the license renewal term.
Onsite storage of spent nuclear fuel	1	SMALL. The expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated onsite during the license renewal term with small environmental effects through dry or pool storage at all plants.
Offsite radiological impacts of spent nuclear fuel and high-level waste disposal	N/A[5]	Uncertain impact. The generic conclusion on offsite radiological impacts of spent nuclear fuel and high-level waste is not being finalized pending the completion of a generic environmental impact statement on waste confidence.[7]
Mixed-waste storage and disposal	1	SMALL. The comprehensive regulatory controls and the facilities and procedures that are in place ensure proper handling and storage, as well as negligible doses and exposure to toxic materials for the public and the environment at all plants. License renewal would not increase the small, continuing risk to human health and the environment posed by mixed waste at all plants. The radiological and nonradiological environmental impacts of long-term disposal of mixed waste from any individual plant at licensed sites are small.
Nonradioactive waste storage and disposal	1	SMALL. No changes to systems that generate nonradioactive waste are anticipated during the license renewal

		term. Facilities and procedures are in place to ensure continued proper handling, storage, and disposal, as well as negligible exposure to toxic materials for the public and the environment at all plants.
Cumulative Impacts		
Cumulative impacts	2	Cumulative impacts of continued operations and refurbishment associated with license renewal must be considered on a plant-specific basis. Impacts would depend on regional resource characteristics, the resource-specific impacts of license renewal, and the cumulative significance of other factors affecting the resource.
Uranium Fuel Cycle		
Offsite radiological impacts—individual impacts from other than the disposal of spent fuel and high-level waste	1	SMALL. The impacts to the public from radiological exposures have been considered by the Commission in Table S–3 of this part. Based on information in the GEIS, impacts to individuals from radioactive gaseous and liquid releases, including radon-222 and technetium-99, would remain at or below the NRC's regulatory limits.
Offsite radiological impacts—collective impacts from other than the disposal of spent fuel and high-level waste	1	There are no regulatory limits applicable to collective doses to the general public from fuel-cycle facilities. The practice of estimating health effects on the basis of collective doses may not be meaningful. All fuel-cycle facilities are designed and operated to meet the applicable regulatory limits and standards. The Commission concludes that the collective impacts are

		acceptable. The Commission concludes that the impacts would not be sufficiently large to require the NEPA conclusion, for any plant, that the option of extended operation under 10 CFR part 54 should be eliminated. Accordingly, while the Commission has not assigned a single level of significance for the collective impacts of the uranium fuel cycle, this issue is considered Category 1.
Nonradiological impacts of the uranium fuel cycle	1	SMALL. The nonradiological impacts of the uranium fuel cycle resulting from the renewal of an operating license for any plant would be small.
Transportation	1	SMALL. The impacts of transporting materials to and from uranium-fuel-cycle facilities on workers, the public, and the environment are expected to be small.
Termination of Nuclear Power Plant Operations and Decommissioning		
Termination of plant operations and decommissioning	1	SMALL. License renewal is expected to have a negligible effect on the impacts of terminating operations and decommissioning on all resources.

[1] Data supporting this table are contained in NUREG–1437, Revision 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (June 2013).

[2] The numerical entries in this column are based on the following category definitions:

Category 1: For the issue, the analysis reported in the Generic Environmental Impact Statement has shown:

(1) The environmental impacts associated with the issue have been determined to apply either to all plants or, for some issues, to plants having a specific type of cooling system or other specified plant or site characteristic;

(2) A single significance level (i.e., small, moderate, or large) has been assigned to the impacts (except for Offsite radiological impacts—collective impacts from other than the disposal of spent fuel and high-level waste); and

(3) Mitigation of adverse impacts associated with the issue has been considered in the analysis, and it has been determined that additional plant-specific mitigation measures are not likely to be sufficiently beneficial to warrant implementation.

The generic analysis of the issue may be adopted in each plant-specific review.

Category 2: For the issue, the analysis reported in the Generic Environmental Impact Statement has shown that one or more of the criteria of Category 1 cannot be met, and therefore additional plant-specific review is required.

[3] The impact findings in this column are based on the definitions of three significance levels. Unless the significance level is identified as beneficial, the impact is adverse, or in the case of "small," may be negligible. The definitions of significance follow:

SMALL—For the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. For the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in this table.

MODERATE—For the issue, environmental effects are sufficient to alter noticeably, but not to destabilize, important attributes of the resource.

LARGE—For the issue, environmental effects are clearly noticeable and are sufficient to destabilize important attributes of the resource.

For issues where probability is a key consideration (i.e., accident consequences), probability was a factor in determining significance.

[4] This issue applies only to the in-scope portion of electric power transmission lines, which are defined as transmission lines that connect the nuclear power plant

to the substation where electricity is fed into the regional power distribution system and transmission lines that supply power to the nuclear plant from the grid.

[5] NA (not applicable). The categorization and impact finding definitions do not apply to these issues.

[6] If, in the future, the Commission finds that, contrary to current indications, a consensus has been reached by appropriate Federal health agencies that there are adverse health effects from electromagnetic fields, the Commission will require applicants to submit plant-specific reviews of these health effects as part of their license renewal applications. Until such time, applicants for license renewal are not required to submit information on this issue.

[7] As a result of the decision of United States Court of Appeals in *New York v. NRC*, 681 F.3d 471 (DC Cir. 2012), the NRC cannot rely upon its Waste Confidence Decision and Rule until it has taken those actions that will address the deficiencies identified by the D.C. Circuit. Although the Waste Confidence Decision and Rule did not assess the impacts associated with disposal of spent nuclear fuel and high-level waste in a repository, it did reflect the Commission's confidence, at the time, in the technical feasibility of a repository and when that repository could have been expected to become available. Without the analysis in the Waste Confidence Decision and Rule regarding the technical feasibility and availability of a repository, the NRC cannot assess how long the spent fuel will need to be stored onsite.