

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

NATURAL RESOURCES DEFENSE	)	
COUNCIL, INC.,	)	
	)	
Petitioner,	)	No. 14-1225
	)	
v.	)	
	)	
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION and the	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

**UNDERLYING DECISIONS FROM WHICH PETITION ARISES**

Pursuant to the Court's November 14, 2014 Order, undersigned counsel for Petitioner Natural Resources Defense Council hereby submits the attached underlying decisions from which the Petition arises:

1. *In the Matter of Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-LR and 50-353-LR, CLI-12-19, 76 NRC 377 (Oct. 23, 2012);
2. *In the Matter of Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-LR and 50-353-LR, CLI-13-07, 78 NRC199 (Oct. 31, 2013);

3. *In the Matter of Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-LR and 50-353-LR, LBP-14-15 (Atomic Safety and Licensing Board, Oct. 7, 2014);
4. *Exelon Generation Company, LLC, Limerick Generating Station, Units 1 and 2, License Renewal and Record of Decision*, 79 Fed. Reg. 63,650 (Oct. 24, 2014).

Respectfully submitted,

/s/ Howard M. Crystal

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Attorney for Petitioners

December 15, 2014

## **ATTACHMENT 1**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of )

EXELON GENERATION COMPANY, LLC )

(Limerick Generating Station, Units 1 and 2) )

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) Docket Nos. 50-352-LR &  
) 50-353-LR  
)

**CLI-12-19**

**MEMORANDUM AND ORDER**

Exelon Generation Company, LLC (Exelon) and the NRC Staff have appealed the Atomic Safety and Licensing Board's decision in LBP-12-8,<sup>1</sup> which granted the Natural Resources Defense Council's (NRDC) request for hearing.<sup>2</sup> For the reasons set forth below, we reverse the Board's decision. However, we remand the proceeding to the Board for the limited purpose of considering a waiver petition in accordance with 10 C.F.R. § 2.335(b) through (d), which NRDC may submit by Tuesday, November 27, 2012.

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<sup>1</sup> *Exelon's Notice of Appeal of LBP-12-08* (Apr. 16, 2012) (Exelon Notice of Appeal); *Exelon's Brief in Support of the Appeal of LBP-12-08* (Apr. 16, 2012) (Exelon Appeal); *NRC Staff's Notice of Appeal of LBP-12-08* (Apr. 16, 2012); *NRC Staff's Appeal of LBP-12-08* (Apr. 16, 2012) (NRC Staff Appeal).

<sup>2</sup> LBP-12-8, 75 NRC \_\_ (Apr. 4, 2012) (slip op.).

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## I. BACKGROUND

In response to a notice of opportunity for hearing,<sup>3</sup> NRDC filed a request for hearing and petition to intervene in this license renewal proceeding, submitting four proposed contentions.<sup>4</sup> Although Exelon and the Staff did not challenge NRDC's standing, they argued that NRDC had not submitted an admissible contention, and therefore opposed the hearing request.<sup>5</sup> In LBP-12-8, the Board admitted a narrowed version of Contention 1-E, which asserts that Exelon's Environmental Report both fails to consider, and inappropriately rejects as insignificant, new and significant information that calls into question the adequacy of the 1989 severe accident mitigation design alternatives (SAMDA) analysis that the Staff completed in support of its approval of Limerick's initial operating licenses.<sup>6</sup> The Board dismissed the remaining portions of Contention 1-E, as well as Contentions 2-E and 3-E, which raise similar challenges to the 1989 SAMDA analysis.<sup>7</sup>

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<sup>3</sup> Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF-39 and NPF-85 for an Additional 20-Year Period; Exelon Generation Company, LLC, Limerick Generating Station, 76 Fed. Reg. 52,992 (Aug. 24, 2011).

<sup>4</sup> *Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate* (Nov. 22, 2011) (Hearing Request). The Secretary of the Commission extended the time for NRDC to submit its hearing request until November 22, 2011. Order (Oct. 17, 2011), at 2 (unpublished).

<sup>5</sup> See *Exelon's Answer Opposing NRDC's Petition to Intervene* (Dec. 20, 2011), at 1 (Exelon Answer to Hearing Request); *NRC Staff's Answer to Natural Resource[s] Defense Council Petition to Intervene and Notice of Intention to Participate* (Dec. 21, 2011), at 1.

<sup>6</sup> See generally "Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2," NUREG-0974 Supplement (Aug. 1989) (ADAMS accession no. ML11221A204).

<sup>7</sup> See LBP-12-8, 75 NRC at \_\_ (slip op. at 40). The Board also dismissed Contention 4-E, which challenges the Environmental Report's discussion of the "no-action alternative." See *id.*

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On appeal, Exelon and the Staff ask us to reverse the Board's admission of Contention 1-E, which would result in the denial of NRDC's hearing request. NRDC opposes the appeals.<sup>8</sup>

## II. DISCUSSION

Our rules of practice provide an appeal as of right on the question whether—as relevant here—a hearing request should have been “wholly denied.”<sup>9</sup> We generally defer to board contention admissibility rulings in the absence of an error of law or abuse of discretion.<sup>10</sup> We apply this standard of review today in ruling on Exelon's and the Staff's appeals.

In order to grant a hearing request, a board must find that the petitioner has standing and has proposed at least one admissible contention.<sup>11</sup> NRDC's standing is not before us on appeal, and we do not address it. However, as discussed below, this case presents a difficult question on the issue of contention admissibility, whose resolution depends on the interplay between two provisions of our license renewal regulations. We ultimately find that the Board erred in admitting Contention 1-E.

Our Part 2 rules of practice govern the admissibility of contentions. Relevant here, section 2.335(a) provides that a contention may not challenge an agency rule or regulation in any adjudicatory proceeding absent a waiver from the Commission; subsections (b) through (d)

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<sup>8</sup> *Natural Resources Defense Council's Response to Appeals by Exelon, Inc. and NRC Staff of LBP-12-08* (Apr. 26, 2012) (NRDC Answer).

<sup>9</sup> 10 C.F.R. § 2.311(d)(1).

<sup>10</sup> See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC \_\_\_, \_\_\_ (Mar. 8, 2012) (slip op. at 8).

<sup>11</sup> 10 C.F.R. § 2.309(a).

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set forth the procedure for obtaining a waiver.<sup>12</sup> At bottom, the parties disagree over whether Contention 1-E impermissibly challenges 10 C.F.R. § 51.53(c)(3)(ii)(L), which requires a license renewal applicant's environmental report to include a consideration of alternatives to mitigate severe accidents "[i]f the staff has not previously considered [them] for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment."<sup>13</sup>

#### **A. Relevant History**

In 1989, the Staff conducted a SAMDA analysis as part of its review of Limerick's operating license application, in response to a remand from a decision by the U.S. Court of Appeals for the Third Circuit the same year.<sup>14</sup> The court had invalidated a Commission policy statement that would have precluded the consideration of SAMDAs at the operating license stage. It found that the policy statement was not a sufficient vehicle to preclude the consideration of SAMDAs, and held that the Commission must take the requisite "hard look" at SAMDAs, giving them "the careful consideration and disclosure required by [the National Environmental Policy Act (NEPA)]."<sup>15</sup>

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<sup>12</sup> *Id.* § 2.335(a)-(d). Exelon and the Staff also assert that Contention 1-E fails to meet the general admissibility criteria in 10 C.F.R. § 2.309(f)(1). See Exelon Appeal at 22-27 (citing 10 C.F.R. § 2.309(f)(1)(iv)); NRC Staff Appeal at 10-19 (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)). We need not address this issue today. The applicability of section 2.335(a) is dispositive of the appeals, for the reasons discussed below.

<sup>13</sup> 10 C.F.R. § 51.53(c)(3)(ii)(L).

<sup>14</sup> See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989).

<sup>15</sup> *Id.* at 736-37, 739 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 98 (1983)).

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Later, as part of our 1996 rulemaking to amend Part 51, we decided to address severe accident mitigation on a site-specific basis.<sup>16</sup> With the goal of increasing efficiency in our review of license renewal applications, the Part 51 amendments codified impact findings for certain “Category 1” environmental issues that generically apply to all plants or a subset of plants.<sup>17</sup> The environmental analysis of Category 1 issues is contained in our Generic Environmental Impact Statement for License Renewal (GEIS).<sup>18</sup> For other environmental issues, or “Category 2” issues, we require individual applicants to include a site-specific environmental analysis in their license renewal applications.<sup>19</sup> We designated severe accident mitigation alternatives (SAMA) analysis as a “Category 2” issue.<sup>20</sup> However, we provided an exception in section

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<sup>16</sup> See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,480-82 (June 5, 1996) (Part 51 Amendments).

<sup>17</sup> See *id.* at 28,467-68. Category 1 issues are those for which the Staff has determined that: “(1) the environmental impacts associated with the issue . . . apply either to all plants or, for some issues, to plants having a specific type of cooling system or other specified plant or site characteristics; (2) a single significance level (i.e., small, moderate, or large) has been assigned to the impacts . . . ; and (3) . . . additional plant-specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation.” “Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report” (Final Report), NUREG-1437, Vol. 1 (May 1996), at 1-5 (GEIS) (ML040690705).

<sup>18</sup> A license renewal applicant need not include analyses of the environmental impacts of Category 1 issues in its environmental report; the Staff incorporates the GEIS analysis of Category 1 issues as part of the overall cost-benefit balance in the supplemental environmental impact statement (SEIS) for license renewal. 10 C.F.R. §§ 51.53(c)(3)(i), 51.95(c)(4); GEIS at 1-5.

<sup>19</sup> 10 C.F.R. § 51.53(c)(3)(ii); GEIS at 1-5 to 1-6.

<sup>20</sup> See 10 C.F.R. pt. 51, subpt. A, app. B (Postulated Accidents); *id.* § 51.53(c)(ii)(3)(L); Part 51 Amendments, 61 Fed. Reg. 28,480. The GEIS addresses severe accident *consequences* for all plants, which we have determined to have a small environmental impact after factoring in their low probability of occurrence. The Category 2 issue, then, focuses on severe accident *mitigation*, to further reduce severe accident risk (probability or consequences). See 10 C.F.R. pt. 51, subpt. A, app. B; GEIS at 1-6. See *generally Entergy Nuclear Generation Co. and* (continued . . .)



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51.53(c)(ii)(3)(L) for plants for which the Staff already had conducted a severe accident mitigation analysis (which at that time included Limerick Units 1 and 2, Comanche Peak Units 1 and 2, and Watts Bar Unit 1), stating that “severe accident mitigation alternatives need not be reconsidered for these plants for license renewal.”<sup>21</sup> At the same time, we recognized in promulgating the Part 51 amendments that, consistent with our obligations under NEPA, we must “review and consider any new and significant information presented during the review of individual license renewal applications.”<sup>22</sup> To aid us in this endeavor, we added a requirement that license renewal applicants include in their environmental reports any new and significant information of which they are aware.<sup>23</sup>

Because the Staff already considered SAMAs (albeit SAMDAs, or mitigation alternatives relating to the plant’s design) as part of its review of the Limerick operating licenses, Exelon and the Staff both argue that NRDC’s attempt to litigate SAMA-related issues now presents an improper challenge to section 51.53(c)(3)(ii)(L).<sup>24</sup> NRDC, on the other hand, argues that these

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(. . . continued)

*Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC \_\_\_, \_\_ (Feb. 9, 2012) (slip op. at 2-5).

<sup>21</sup> Part 51 Amendments, 61 Fed. Reg. at 28,481. See *also* GEIS at 5-106 to 5-107.

<sup>22</sup> Part 51 Amendments, 61 Fed. Reg. at 28,468. See *also id.* at 28,470 (explaining that in response to comments on the proposed rule, including those from the Council on Environmental Quality and the Environmental Protection Agency, “the framework for consideration of significant new information has been revised and expanded”).

<sup>23</sup> See *id.* at 28,488; 10 C.F.R. § 51.53(c)(3)(iv).

<sup>24</sup> See Exelon Appeal at 11-12 (“The threshold legal issue on appeal is whether the adequacy of Exelon’s analysis of new and significant information related to SAMAs is litigable in a license renewal proceeding, absent a waiver from the Commission under [s]ection 2.335.”); NRC Staff Appeal at 5 (“Contention 1-E as admitted by the Board is outside the scope of this proceeding because it claims that new and significant information impacts a generic determination in the Commission’s regulations without seeking a rule waiver pursuant to 10 C.F.R. § 2.335.”).

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issues may be challenged in this license renewal proceeding despite the exception in section 51.53(c)(3)(ii)(L), because 10 C.F.R. § 51.53(c)(3)(iv), a subsection of the same regulation, requires Exelon to include in its environmental report any new and significant information.<sup>25</sup>

NRDC asserts that Contention 1-E permissibly challenges the adequacy of the new information relating to severe accident mitigation that Exelon identified in its Environmental Report.<sup>26</sup>

### **B. Analysis of the Board's Ruling**

Contention 1-E, as originally proposed, described several areas of purportedly new and significant information that, according to NRDC, Exelon either failed to consider or improperly dismissed as insignificant.<sup>27</sup> The Board rejected all but two.<sup>28</sup> As admitted, Contention 1-E asserts that Exelon's Environmental Report is deficient because it: (1) fails to include new and significant information regarding potential mitigation alternatives that have been considered for other boiling water reactors with Mark II containments; and (2) incorrectly dismisses new economic cost risk data as insignificant because Exelon relies on data from Three Mile Island—a pressurized water reactor.<sup>29</sup> Specifically, NRDC concludes that if Exelon were to consider this

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<sup>25</sup> See NRDC Answer at 10 (“A recurring, in fact the central, theme of [Exelon’s and the Staff’s] appeals is that because an NRC rule, 10 C.F.R. § 51.53(c)(3)(ii)(L), purportedly absolves Exelon of the legal obligation to conduct a SAMA [analysis], Exelon cannot be compelled to [do so] absent a waiver of that rule. The fundamental flaw in this argument is that . . . [what] is sought by NRDC is that Exelon properly analyze new and significant information related to the continuing applicability of the environmental conclusions stemming from the 1989 SAMDA analysis.”).

<sup>26</sup> See *id.* See *generally* License Renewal Application, Limerick Generating Station, Units 1 and 2, Appendix E, Applicant’s Environmental Report – Operating License Renewal Stage (June 22, 2011), at 5-1 to 5-9 (ML11179A104) (Environmental Report).

<sup>27</sup> See Hearing Request at 16-19.

<sup>28</sup> LBP-12-8, 75 NRC at \_\_\_ (slip op. at 40).

<sup>29</sup> *Id.* at \_\_\_ (slip op. at 19-21, 23-25, 40).

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information, “individually and especially in combination,” it “would plausibly cause a materially different result in the SAMA analysis for Limerick and render the [1989] SAMDA analysis upon which Exelon relies incomplete.”<sup>30</sup>

In ruling on the contention’s admissibility, the Board distinguished between challenges to the 1989 SAMDA analysis—which, the Board reasoned, were impermissible based on section 51.53(c)(3)(ii)(L)—and challenges to the new and significant information in Exelon’s Environmental Report based on section 51.53(c)(3)(iv).<sup>31</sup> The Board thus admitted those portions of Contention 1-E that it found to be proper challenges to the new and significant information in Exelon’s Environmental Report, but rejected the portions that it found to be improper challenges to the 1989 SAMDA analysis. In doing so, the Board reasoned that the requirement to include new and significant information essentially trumps the codified exception that certain plants, like Limerick, for which the Staff already had considered mitigation alternatives under NEPA, need not include another SAMA analysis in their environmental reports.<sup>32</sup> Accordingly, for the admitted portions of Contention 1-E that claim the existence of new and significant information, the Board held that NRDC was not required to submit a petition for waiver or satisfy the waiver criteria in section 2.335(b).<sup>33</sup>

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<sup>30</sup> See *Declaration of Thomas B. Cochran, Ph.D., Matthew G. McKinzie, Ph.D. and Christopher J. Weaver, Ph.D., on Behalf of the Natural Resources Defense Council* (Nov. 22, 2011), at 3 (NRDC Declaration) (appended to Hearing Request).

<sup>31</sup> See LBP-12-8, 75 NRC at \_\_ (slip op. at 11-27).

<sup>32</sup> See, e.g., *id.* at \_\_ (slip op. at 19) (observing that “[d]etermining whether information regarding SAMAs is ‘new’ and ‘significant’ does not involve . . . performing an entirely new SAMA analysis”).

<sup>33</sup> See *id.* at \_\_ (slip op. at 27).

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On appeal, Exelon and the Staff urge us to apply precedent from the *Vermont Yankee* and *Pilgrim* license renewal proceedings.<sup>34</sup> In those cases, we resolved a similar issue concerning the interplay between two subsections of 51.53(c)(3) and, particularly, whether purported new and significant information could be litigated in an adjudicatory proceeding absent a waiver.<sup>35</sup> The contention in *Vermont Yankee* and *Pilgrim*<sup>36</sup> involved a challenge to a “Category 1” environmental issue, meaning that the Staff had considered the underlying issue in the GEIS and determined that licensees of all plants, or a subset of plants, need not consider the issue anew in their license renewal applications.<sup>37</sup> There, the petitioner argued that new and significant information rendered the GEIS analysis of the environmental impacts of spent fuel pool storage inadequate, and asserted that the applicants therefore were required to discuss the issue in their environmental reports.<sup>38</sup>

We upheld the *Vermont Yankee* and *Pilgrim* Boards’ rejection of the contention as an improper challenge to 10 C.F.R. § 51.53(c)(3)(i).<sup>39</sup> We found that the new and significant information requirement in 10 C.F.R. § 51.53(c)(3)(iv) did not override, for the purposes of litigating the issues in an adjudicatory proceeding, the exclusion of Category 1 issues in

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<sup>34</sup> See Exelon Appeal at 21; NRC Staff Appeal at 9-10.

<sup>35</sup> See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, CLI-07-3, 65 NRC 13, 16 (2007) (*Vermont Yankee/Pilgrim*).

<sup>36</sup> The petitioner filed the same contention in both proceedings. *Id.* at 16, 18.

<sup>37</sup> *Id.* at 16-17.

<sup>38</sup> *Id.* at 18-19.

<sup>39</sup> See *id.* at 20 (“Fundamentally, any contention on a ‘Category 1’ issue amounts to a challenge to our regulation that bars challenges to generic environmental findings.”).

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10 C.F.R. § 51.53(c)(3)(i) from site-specific review.<sup>40</sup> As we explained, “[a]djudicating Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”<sup>41</sup> Therefore, we determined that a waiver was required to litigate any new and significant information relating to a Category 1 issue.<sup>42</sup> Because the petitioner had not requested a waiver, we affirmed the Boards’ rejection of the contention.<sup>43</sup>

Although the Board in this proceeding took our decision in *Vermont Yankee* and *Pilgrim* into account, the Board distinguished that decision from the circumstances presented here.<sup>44</sup> The Board placed particular emphasis on the fact that the *Vermont Yankee/Pilgrim* decision involved litigation of an issue that Part 51 (which codifies the GEIS findings) “explicitly declares [to be] Category 1,” thereby excluding it from case-by-case litigation.<sup>45</sup> Observing that Contention 1-E raises issues related to mitigation of severe accidents—a site-specific, Category 2 issue—the Board determined that the *Vermont Yankee/Pilgrim* decision could not be applied

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<sup>40</sup> See *id.* at 21.

<sup>41</sup> *Id.* The *Vermont Yankee* and *Pilgrim* Boards had based their decision on our ruling in *Turkey Point*, which also involved an attempt to litigate a Category 1 issue in a license renewal proceeding. See *id.* at 19-20 (citing *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001)). In *Turkey Point*, we affirmed the Board’s rejection of the contention, noting that the petitioner had not requested a waiver. See *Turkey Point*, CLI-01-17, 54 NRC at 22-23. In *Vermont Yankee/Pilgrim*, we noted with approval the Boards’ reliance on *Turkey Point*. See *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 16, 20-21.

<sup>42</sup> *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20.

<sup>43</sup> *Id.* at 19-21.

<sup>44</sup> See LBP-12-8, 75 NRC at \_\_\_ (slip op. at 13).

<sup>45</sup> *Id.*

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to preclude NRDC's attempt to litigate a SAMA issue unless Exelon or the Staff "establish[ed] that SAMAs are . . . Category 1 issues for Limerick."<sup>46</sup>

The Board was not persuaded, however, by Exelon's and the Staff's arguments that the provision in section 51.53(c)(3)(ii)(L) that exempts Exelon from preparing a fresh SAMA analysis for Limerick is the functional equivalent of a Category 1 issue. The Board noted that for another Category 2 issue—the environmental impacts of groundwater quality degradation at plants with cooling ponds at inland sites—the GEIS and Part 51 expressly label groundwater quality degradation Category 1 for plants with cooling ponds in salt marshes.<sup>47</sup> Based on this example, the Board reasoned that the absence of such an express Category 1 designation for plants falling within the 51.53(c)(3)(ii)(L) exception implies that we did not intend the same "Category 1" treatment for Limerick or similarly exempt plants.<sup>48</sup> As the Board explained, "[i]f the Commission intended SAMAs to be a Category 1 issue[,] . . . it would have said so explicitly."<sup>49</sup> Thus the Board concluded that NRDC may litigate its SAMA contention without a waiver, notwithstanding the fact that section 51.53(c)(3)(ii)(L) exempts Exelon from having to include a discussion of SAMAs in its Environmental Report for the Limerick license renewal application.<sup>50</sup>

At first blush, the Board's analysis highlights a potential ambiguity in our regulations. On the one hand, Exelon is permitted, by rule, not to prepare a site-specific supplemental SAMA analysis in conjunction with the Limerick license renewal application. On the other hand, our

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at \_\_ (slip op. at 13-14).

<sup>48</sup> *Id.* at \_\_ (slip op. at 14).

<sup>49</sup> *Id.* (emphasis omitted).

<sup>50</sup> *See id.* at \_\_ (slip op. at 27).

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rules also provide that the license renewal application must contain any significant new information relevant to the environmental impacts of license renewal of which the applicant is aware; new information, as a general matter, may be challenged in individual adjudications.<sup>51</sup> Confronted with this apparent ambiguity, the Board reconciled the provisions by allowing NRDC to litigate SAMAs in this proceeding without a waiver. But after careful analysis of the regulatory history underlying this question, we find that the rules are better interpreted to require a waiver in the circumstances presented here.

We agree with Exelon and the Staff that our decision in the *Vermont Yankee* and *Pilgrim* proceedings is analogous to the question before us today. As the Board observed, *Vermont Yankee/Pilgrim* arguably is distinguishable because it involved a “Category 1” generic issue, whereas SAMAs are designated as “Category 2” site-specific issues. However, our decision in *Vermont Yankee/Pilgrim* fundamentally was predicated on the fact that the contention amounted to a challenge to an NRC regulation, contrary to section 2.335(a).<sup>52</sup> Similarly, Contention 1-E, reduced to its simplest terms, amounts to a challenge to section 51.53(c)(3)(ii)(L). The assumption underlying Contention 1-E is that Exelon’s 1989 SAMDA analysis is out-of-date, which Exelon then must remedy in its Environmental Report, even though this is something that section 51.53(c)(3)(ii)(L) otherwise exempts Exelon from having to do.

For Limerick and similarly-situated plants for which SAMAs were already considered in an Environmental Impact Statement or Environmental Assessment, the SAMA issue has been

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<sup>51</sup> See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (characterizing an originally-admissible contention as claiming “that there was new, significant information that [the applicant] should have taken into account or acknowledged when performing its SAMA cost-benefit analyses.”).

<sup>52</sup> *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 18 n.15, 20.

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resolved by rule. Indeed, Limerick is specifically named in the Statements of Consideration as a plant for which SAMAs “need not be reconsidered . . . for license renewal.”<sup>53</sup> Consequently, the exception in section 51.53(c)(3)(ii)(L) operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license renewal adjudications.

At the same time, however, Exelon has put forward in its license renewal application new information regarding its SAMDA analysis. Exelon claims that this information—which it argues reinforces the validity of its existing SAMDA analysis—may not be challenged in this adjudication, given that no further analysis is permitted by rule. For its part, NRDC finds insufficient the information provided by Exelon, and therefore seeks to challenge the validity of the decades-old SAMDA analysis. To date, we have not been presented with precisely this factual scenario. In our view, NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report. However, based on the circumstances present here and given that our rules expressly provide that a supplemental SAMA analysis need not be performed in this case, 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).<sup>54</sup>

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<sup>53</sup> Part 51 Amendments, 61 Fed. Reg. at 28,481.

<sup>54</sup> That is not to say that a supplemental SAMA analysis *may never* be performed for Limerick or another facility exempted by virtue of section 51.53(c)(3)(ii)(L). We would expect that, if the Staff had in hand new information that could render invalid the original site-specific analysis, then such information should be identified and evaluated by the Staff for its significance, consistent with our NEPA requirements. See 10 C.F.R. § 51.95(c)(3). We also note that we have asked “the staff to review generically an applicant’s duty to supplement or correct its environmental report.” *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-3, 75 NRC \_\_, \_\_ (June 7, 2012) (slip op. at 8 n.32).



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As in any case where the viability of an existing rule is questioned in an adjudication, our waiver provision in section 2.335(b) provides an avenue for a petitioner who seeks to litigate a contention in an adjudicatory proceeding that otherwise would be outside the permissible scope of the proceeding. Section 2.335(b) requires a showing of “special circumstances” demonstrating that application of the rule—here, the exception in section 51.53(c)(3)(ii)(L)—would not serve the purpose for which it was adopted.<sup>55</sup> Alternatively, the petitioner may seek rulemaking to rescind the exception in section 51.53(c)(3)(ii)(L), in accordance with 10 C.F.R. § 2.802.<sup>56</sup> And of course, a petitioner always has the option to participate outside of the adjudication by submitting comments on the Staff’s draft SEIS.<sup>57</sup> For the reasons discussed above, we find that, in the absence of a waiver, the Board erred in admitting Contention 1-E.

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<sup>55</sup> 10 C.F.R. § 2.335(b). See also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (outlining a four-factor test based on section 2.335(b)). Before the Board, NRDC explained that it had not submitted a waiver petition because it believed section 2.335(b) applies to admitted parties only. See Hearing Request at 25 n.7; *Natural Resources Defense Council (“NRDC”) Combined Reply to Exelon and NRC Staff Answers to Petition to Intervene* (Jan. 6, 2012), at 11 n.6. Our case law demonstrates that petitioners, not just parties, may request a waiver in our adjudicatory proceedings. See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC \_\_\_, \_\_\_ (Oct. 12, 2011) (slip op. at 23-34); *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20-21; *Turkey Point*, CLI-01-17, 54 NRC at 21-23. As Exelon points out, there are places in our rules where “party” is used not as a term of art, but rather as a substitute for “participant.” See Exelon Appeal at 16-17 n.72; Exelon Answer to Hearing Request at 20 n.113 (citing *Massachusetts v. United States*, 522 F.3d 115, 129 (1st Cir. 2008)). That is the case with section 2.335(b). Indeed, we recently approved corrections and clarifications to 10 C.F.R. Part 2, including a revision to section 2.335(b) that replaces “party” with “participant.” See Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 46,583 (Aug. 3, 2012).

<sup>56</sup> See 10 C.F.R. § 2.802(a) (“Any interested person may petition the Commission to issue, amend or rescind any regulation.”).

<sup>57</sup> See *id.* §§ 51.73, 51.74. See also Part 51 Amendments, 61 Fed. Reg. at 28,470 (“[T]he NRC will review comments on the draft SEIS and determine whether such comments introduce new and significant information not considered in the GEIS analysis. All comments on the applicability of the analyses of impacts codified in the rule and the analysis contained in the draft (continued . . .)

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That said, however, the circumstances presented here lead us to remand the proceeding to the Board for the limited purpose of permitting NRDC an opportunity to petition for waiver of section 51.53(c)(3)(ii)(L) as it applies to the Limerick SAMDA analysis. We include in the remand Contentions 1-E, 2-E and 3-E, to the extent the Board dismissed them as challenges to the rule.<sup>58</sup>

Ordinarily, our review of the Board's dismissal of Contentions 2-E and 3-E would await the end of the case.<sup>59</sup> But the very analysis that we reverse today runs throughout these claims as well.<sup>60</sup> We find that it would be inefficient to wait until the Board's final decision in this matter only to reach the same result.

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( . . . continued)

[SEIS] will be addressed by NRC in the final [SEIS] in accordance with 40 CFR 1503.4, regardless of whether the comment is directed to impacts in Category 1 or 2.”); GEIS at 1-10 to 1-11. NRDC filed comments on the SAMA analysis during the Staff's environmental scoping process. See Fettus, Geoffrey H., Senior Project Attorney, NRDC, et al., letter to Cindy Bladey, U.S. Nuclear Regulatory Commission (Oct. 28, 2011) (ML11307A456).

<sup>58</sup> We do not include NRDC's claims relating to population data, core damage frequency, cleanup costs, or the quality of the human environment that the Board dismissed for insufficient support. See LBP-12-8, 75 NRC at \_\_\_ (slip op. at 18, 23, 26-27). Additionally, we do not include Contention 4-E, because it concerns the no-action alternative, an unrelated issue. See *id.* at \_\_\_ (slip op. at 34-39); Hearing Request at 23.

<sup>59</sup> See generally 10 C.F.R. §§ 2.311, 2.341.

<sup>60</sup> See, e.g., LBP-12-8, 75 NRC at \_\_\_ (slip op. at 10-27, 30, 34). The balance of Contention 1-E involves the use of additional population data, the use of historical data to calculate core damage frequency, cleanup cost estimates, and the analysis of impacts to the quality of the human environment. The issues in Contentions 1-E, 2-E, and 3-E overlap to a certain extent, but differ in their ultimate conclusions. In addition to the issues identified in Contention 1-E, Contention 2-E also includes claims involving meteorological data and evacuation time estimates. Contention 2-E argues that because the 1989 SAMDA analysis relies on inadequate and outdated data and methodologies, the Environmental Report does not provide a reliable basis for the conclusion that there are no cost-beneficial mitigation alternatives. Contention 3-E includes the issues identified in Contentions 1-E and 2-E, as well as claims involving severe accident scenarios and probabilistic risk assessment methodology. Contention 3-E argues that because the 1989 SAMDA analysis relies on inadequate and outdated data and methodologies, (continued . . .)

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In view of this ruling, we do not consider Exelon's or the Staff's remaining challenges to the Board's application of the general contention admissibility factors in 10 C.F.R.

§ 2.309(f)(1)—either Exelon's argument that NRDC's economic cost risk claim does not raise a genuine dispute with the application,<sup>61</sup> or the Staff's arguments that NRDC has not raised an issue material to the findings the NRC must make to support its decision on the application.<sup>62</sup>

Until the waiver question has been decided, we dismiss these portions of Exelon's and the Staff's appeals without prejudice. Exelon and the Staff may renew their arguments following the decision on any waiver petition that may be filed by NRDC.

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( . . . continued)

the Environmental Report incorrectly concludes that the 1989 analysis qualifies for the exception in 10 C.F.R. § 51.53(c)(3)(ii)(L). See Hearing Request at 16-23.

<sup>61</sup> See Exelon Appeal at 22-27 (citing 10 C.F.R. § 2.309(f)(1)(iv)).

<sup>62</sup> See NRC Staff Appeal at 10-19 (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

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### III. CONCLUSION

Contention 1-E, as admitted by the Board, amounts to an impermissible collateral attack on our regulations. We therefore find that the Board erred in admitting the contention in the absence of a waiver, and we *reverse* the Board's decision granting NRDC's intervention petition. For the reasons discussed above, we *remand* the proceeding to the Board for the limited purpose of considering a waiver petition in accordance with section 2.335(b) through (d), which NRDC may submit by Tuesday, November 27, 2012.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 23<sup>rd</sup> day of October, 2012.

## **ATTACHMENT 2**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of )

EXELON GENERATION COMPANY, LLC )

(Limerick Generating Station, Units 1 and 2) )

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) Docket Nos. 50-352-LR &  
) 50-353-LR  
)  
)

**CLI-13-07**

**MEMORANDUM AND ORDER**

The Licensing Board has referred to us its ruling denying Natural Resources Defense Council's (NRDC) petition to waive a provision of our regulations.<sup>1</sup> For the reasons set forth below, we take review of the referred ruling. We find that the Board erred in its reasoning for denying NRDC's waiver petition, but we affirm the Board's decision on a different ground.

**I. BACKGROUND**

Exelon Generation Company, LLC, has applied to renew its operating licenses for Limerick Generating Station, Units 1 and 2, for an additional twenty years. NRDC requested a hearing on Exelon's license renewal application, proposing four contentions.<sup>2</sup> Of those

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<sup>1</sup> LBP-13-1, 77 NRC 57 (2013).

<sup>2</sup> *Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate* (Nov. 22, 2011).

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contentions, the Board admitted only one—a narrowed version of Contention 1-E, which claimed that Exelon's Environmental Report failed to include new and significant information relating to severe accident mitigation.<sup>3</sup>

Exelon and the NRC Staff appealed the Board's contention admissibility ruling.<sup>4</sup> Both Exelon and the Staff argued that Contention 1-E constituted a collateral attack on 10 C.F.R. § 51.53(c)(3)(ii)(L).<sup>5</sup> The rule exempts Exelon from including in its Environmental Report a site-specific severe accident mitigation alternatives (SAMA) analysis because the Staff previously considered severe accident mitigation design alternatives (SAMDA) in the Final Environmental Statement supporting issuance of the Limerick operating licenses.<sup>6</sup> We agreed that the contention impermissibly challenged section 51.53(c)(3)(ii)(L).<sup>7</sup>

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<sup>3</sup> See LBP-12-8, 75 NRC 539, 561-62 (2012). NRDC's motion to admit a new waste-confidence-related contention currently is pending before the Board; the Board is holding that contention in abeyance in accordance with our direction in CLI-12-16. See Memorandum (Clarifying the Board's July 12, 2013 Order) (Aug. 6, 2013), at 2 (unpublished) (Board Clarification Order); Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012), at 3 (unpublished) (citing *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012)); *NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick* (July 9, 2012); *Natural Resources Defense Council's Resubmission of Contentions in Response to Staff's Supplemental Draft Environmental Impact Statement* (May 30, 2013), at 2-3 (Resubmitted Contentions).

<sup>4</sup> *Exelon's Notice of Appeal of LBP-12-08* (Apr. 16, 2012); *Exelon's Brief in Support of the Appeal of LBP-12-08* (Apr. 16, 2012) (Exelon Appeal); *NRC Staff's Notice of Appeal of LBP-12-08* (Apr. 16, 2012); *NRC Staff's Appeal of LBP-12-08* (Apr. 16, 2012) (Staff Appeal).

<sup>5</sup> See Exelon Appeal at 6-7; Staff Appeal at 5-6.

<sup>6</sup> See generally "Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2," NUREG-0974 Supplement (Aug. 1989) (ADAMS accession no. ML11221A204) (1989 SAMDA Analysis). The 1989 analysis considered SAMDAs, a subset of mitigation alternatives that are based on a plant's design. See CLI-12-19, 76 NRC 377, 382 (2012).

<sup>7</sup> CLI-12-19, 76 NRC at 386.

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Nonetheless, in light of an apparent ambiguity in our license renewal regulations—which, on the one hand exempt Exelon and similarly-situated license renewal applicants from including a SAMA analysis in their environmental reports, but on the other hand require an applicant to identify “any new and significant information of which it is aware”—we invited NRDC to submit a petition to waive the SAMA-analysis exception.<sup>8</sup> We likened the regulatory conflict to other instances in our license renewal adjudications where a petitioner claimed that purported “new and significant information” called into question a “Category 1,” or broadly-applicable, environmental-impact finding codified in 10 C.F.R. Part 51.<sup>9</sup> Challenges to Category 1 findings based on new and significant information require a waiver of 10 C.F.R. Part 51, Subpart A, Appendix B, in order to be litigated in a license renewal adjudication.<sup>10</sup> We held that “the exception in section 51.53(c)(3)(ii)(L) operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license

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<sup>8</sup> See *id.* at 385-86, 388.

<sup>9</sup> See *id.* at 386. “Category 2” issues, on the other hand, require a site-specific analysis for the plant whose license is up for renewal. “Severe accidents” is a Category 2 site-specific issue in 10 C.F.R. Part 51, Subpart A, Appendix B. Our remand decision provides a brief discussion of Category 1 and Category 2 issues. See CLI-12-19, 76 NRC at 381-82. The Generic Environmental Impact Statement for License Renewal (GEIS) provides the environmental analysis that supports our “Category 1” and “Category 2” findings. See “Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report” (Final Report), NUREG-1437, Vol. 1 (May 1996) (ML040690705) (GEIS); “Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report” (Final Report), NUREG-1437, Rev. 1, Vol. 1 (June 2013) (ML13106A241) (GEIS Rev. 1). See *generally* Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013) (GEIS Revisions). In our recent revisions to the GEIS, we did not change the Category 2 status of severe accidents or the exception in 10 C.F.R. § 51.53(c)(3)(ii)(L). See GEIS Revisions, 78 Fed. Reg. at 37,289-90.

<sup>10</sup> See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17, 20 (2007) (Vermont Yankee/Pilgrim).



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renewal adjudications.”<sup>11</sup> Accordingly, we remanded the case to the Board for the limited purpose of permitting NRDC to file a waiver petition.<sup>12</sup> We included in the remand all of NRDC’s SAMA-related contentions, Contentions 1-E, 2-E, and 3-E, to the extent the Board denied them as challenges to section 51.53(c)(3)(ii)(L).<sup>13</sup>

NRDC thereafter filed a waiver petition that again raised the issues that the Board originally had admitted in Contention 1-E, as well as an issue in Contention 3-E that the Board originally had rejected.<sup>14</sup> With regard to Contention 1-E, NRDC sought to litigate its claims that: (1) “Exelon has omitted from its [Environmental Report] a required analysis of new and significant information regarding potential new [SAMAs] previously considered for other [Mark II

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<sup>11</sup> CLI-12-19, 76 NRC at 386.

<sup>12</sup> *Id.* at 388.

<sup>13</sup> We did not include in the remand NRDC’s remaining contention, Contention 4-E, which challenged the Environmental Report’s discussion of the “no-action alternative,” an unrelated issue. See *id.* at 388 & n.58. The Board rejected Contention 4-E as inadmissible. See LBP-12-8, 75 NRC at 570.

<sup>14</sup> *Natural Resources Defense Council’s Petition, By Way of Motion, for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2* (Nov. 21, 2012) (Waiver Petition). NRDC attached two declarations in support of its waiver petition. *Declaration of Christopher J. Weaver, Ph.D., on Behalf of the Natural Resources Defense Council in Support of Motion for Waiver* (Nov. 21, 2012) (Weaver Declaration); *Declaration of Geoffrey H. Fettus, Counsel for the Natural Resources Defense Council (NRDC), Regarding Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2* (Nov. 21, 2012) (Fettus Declaration).

NRDC continues to assert its disagreement with our determination in CLI-12-19 that a waiver is required. See *Natural Resources Defense Council’s Brief in Support of Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2* (Mar. 13, 2013), at 28 (NRDC Initial Brief); Waiver Petition at 13. To the extent that NRDC’s claim is, in substance, a motion for reconsideration of our determination in CLI-12-19, its request is procedurally defective, out of time, and fails to assert compelling circumstances justifying reconsideration. See 10 C.F.R. § 2.323(e); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010).

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boiling water reactors]”; and (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.”<sup>15</sup> With regard to Contention 3-E, NRDC sought to litigate the claim that Exelon must use “modern techniques for assessing whether the newly considered [SAMAs] are cost-beneficial.”<sup>16</sup> Exelon and the Staff opposed NRDC’s waiver petition, arguing that it failed to satisfy our waiver standard in 10 C.F.R. § 2.335(b).<sup>17</sup>

We review waiver petitions under section 2.335, as well as our case law.<sup>18</sup> In interpreting section 2.335, we identified four factors—often referred to as the “*Millstone* factors”—that waiver petitioners must satisfy. The Board’s analysis began and ended with the first *Millstone* factor—a demonstration that applying the rule would not serve its intended purpose.<sup>19</sup> The Board determined that the purpose of the exception in section 51.53(c)(3)(ii)(L)

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<sup>15</sup> Waiver Petition at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Exelon’s Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L)* (Dec. 14, 2012), at 3-4 (Exelon Answer); *Exelon’s Counter Affidavit Supporting Exelon’s Response Opposing NRDC’s Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L)* (Dec. 14, 2012) (Exelon Affidavit); *NRC Staff Answer to Natural Resources Defense Council Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L)* (Dec. 14, 2012), at 1 (Staff Answer). NRDC replied. *Reply of Natural Resources Defense Council in Support of Petition, By Way of Motion, for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) as Applied to Application for Renewal of Licenses for Limerick Units 1 and 2* (Dec. 21, 2012).

<sup>18</sup> See generally *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 & nn.29-34 (2005).

<sup>19</sup> See LBP-13-1, 77 NRC at 66; *Millstone*, CLI-05-24, 62 NRC at 560; 10 C.F.R. § 2.335(b). In denying NRDC’s waiver petition, the Board declined to apply the *Millstone* test, opining that it “establishes an appreciably higher burden for . . . waiver seekers than does [section 2.335(b)].” LBP-13-1, 77 NRC at 64. According to the Board, only the first two *Millstone* factors are consistent with the requirements of section 2.335(b). *Id.* We disagree. The *Millstone* decision, which aggregates cases interpreting the waiver standard, is an example of a uniform, permissible interpretation of our regulations. See *U.S. Steel Mining Co., LLC v. Director*, (continued . . .)

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“is to exempt those plants that have already performed SAMA analyses from considering [SAMAs] at license renewal.”<sup>20</sup> The Board then reasoned that the purpose of the SAMA-analysis exception “will always be met if no further analysis is required or submitted by the applicant.”<sup>21</sup> Based on its interpretation of the rule, the Board therefore concluded that the exception in section 51.53(c)(3)(ii)(L) is “unwaivable.”<sup>22</sup> Accordingly, the Board denied the waiver petition. Finding our remand of the proceeding incompatible with its own finding that waiver of section 51.53(c)(3)(ii)(L) is an “impossibility,” however, the Board referred to us its ruling, seeking a clarification of the interplay between section 51.53(c)(3)(ii)(L) and our waiver criteria in section 2.335(b).<sup>23</sup> The parties have filed initial and response briefs to offer their views on the Board’s decision.<sup>24</sup>

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( . . . continued)

*OWCP*, 386 F.3d 977, 985 (11th Cir. 2004). All four of the *Millstone* requirements derive from the language and purpose of section 2.335(b). Further, a licensing board may not disregard binding Commission case law. *Cf. Nat’l Fed’n of Federal Employees v. FLRA*, 412 F.3d 119 (D.C. Cir. 2005) (“[A]gencies act arbitrarily and capriciously when they ‘ignore [their] own relevant precedent.’” (quoting *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995))). *Accord Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 184 (2009), *aff’d*, CLI-09-20, 70 NRC 911, 917-18, 924 (2009) (acknowledging that a licensing board is bound by Commission precedent; “it is for the Commission, not licensing boards, to revise its rulings”).

<sup>20</sup> LBP-13-1, 77 NRC at 66.

<sup>21</sup> *Id.* (emphasis omitted).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 69. See 10 C.F.R. § 2.323(f)(1).

<sup>24</sup> NRDC Initial Brief; *Exelon’s Initial Brief in Response to the Referral of LBP-13-1 to the Commission* (Mar. 13, 2013); *NRC Staff’s Brief on the Board’s Referred Ruling in LBP-13-1* (Mar. 13, 2013); *Natural Resources Defense Council’s Response Brief in Support of Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) As Applied to Application for Renewal of Licenses for Limerick Units 1 and 2* (Mar. 20, 2013); *Exelon’s Reply Brief in Response to the Referral of LBP-13-1 to the Commission* (Mar. 20, 2013); *NRC Staff’s Reply on the Board’s Referred Ruling in LBP-13-1* (Mar. 20, 2013). See generally *Unopposed Motion Requesting Briefing* (Feb. 19, 2013); Order (continued . . .)

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As discussed below, we take review of the Board's referred ruling, and find that the Board erred in concluding that it is impossible to waive the exception in section 51.53(c)(3)(ii)(L). Nevertheless, we affirm, on different grounds, the Board's denial of the waiver petition.

## II. DISCUSSION

Although we disfavor piecemeal review of licensing board decisions, boards may refer rulings that, although interlocutory, raise "significant and novel legal or policy issues" or require our "resolution . . . to materially advance the orderly disposition of the proceeding."<sup>25</sup> We find that the Board has raised a significant and novel issue that warrants our attention. The Board's referral questions the applicability of one of our basic rules of practice, and it could have broad-reaching implications in future license renewal proceedings.<sup>26</sup> We therefore take review of the Board's referred ruling. We begin with an overview of our waiver criteria in section 2.335(b).

Section 2.335(b) provides a limited exception to our general prohibition against challenges to NRC rules or regulations in adjudicatory proceedings.<sup>27</sup> To litigate an issue that

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( . . . continued)

(Feb. 26, 2013) (unpublished) (granting unopposed motion requesting briefing and setting briefing schedule).

<sup>25</sup> 10 C.F.R. § 2.341(f)(1). We revised Part 2 of our rules of practice last year, including section 2.341(f)(1). Prior to the rule revision, section 2.341(f)(1) required that the referred ruling raise a "significant and novel legal or policy issue" and necessitate "resolution . . . to materially advance the orderly disposition of the proceeding." Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,576 (Aug. 3, 2012). See also *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 686 (2012).

<sup>26</sup> For example, the provision in section 51.53(c)(3)(ii)(L) could come into play in a proceeding on an application for a second license renewal term under 10 C.F.R. § 54.31(d), or for the renewal of a license issued under 10 C.F.R. Part 52. Staff Answer at 35. See *infra* note 83 and accompanying text.

<sup>27</sup> Compare 10 C.F.R. § 2.335(b), with *id.* § 2.335(a).

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otherwise would be outside the scope of an adjudication, a petitioner must file a petition for waiver showing 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 . . . [it] was adopted.”<sup>28</sup> The waiver petitioner must include an affidavit that states “with particularity” the special circumstances that justify waiver of the rule.<sup>29</sup>

Our waiver standard is stringent by design. The NRC has discretion to transact its business broadly, through rulemaking, or case-by-case, through adjudication.<sup>30</sup> When we engage in rulemaking, we are “carving out”<sup>31</sup> issues from adjudication for generic resolution.<sup>32</sup> Therefore, to challenge the generic application of a rule, a petitioner seeking waiver must show that there is something extraordinary about the subject matter of the proceeding such that the rule should not apply.<sup>33</sup>

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<sup>28</sup> *Id.* § 2.335(b).

<sup>29</sup> *Id.*

<sup>30</sup> See *Balt. Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 101 (1983).

<sup>31</sup> *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI-88-10, 28 NRC 573, 596 (1988).

<sup>32</sup> See Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,129 (July 28, 1972) (Waiver Standard) (creating general prohibition on challenges to NRC rules and regulations with limited exceptions “[i]n view of the expanding opportunities for participation in Commission rulemaking proceedings and increased emphasis on rulemaking proceedings as the appropriate forum for settling basic policy issues”). *Accord Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

<sup>33</sup> See 10 C.F.R. § 2.335(b). See also, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 364-65 (2012); *Seabrook*, CLI-88-10, 28 NRC at 596.

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The waiver standard in section 2.335(b) has remained virtually unchanged since its codification in 1972.<sup>34</sup> Since that time, our case law has given meaning to the “special circumstances” requirement.<sup>35</sup> In 2005, in the *Millstone* license renewal proceeding, we compiled the waiver case law to reflect the four-part test that we have long used.<sup>36</sup> To set aside a Commission rule or regulation in an adjudicatory proceeding, a petitioner must demonstrate that:

- (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;
- (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.<sup>37</sup>

All four *Millstone* factors must be met to justify a rule waiver.<sup>38</sup> The waiver petitioner faces a

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<sup>34</sup> See Waiver Standard, 37 Fed. Reg. at 15,136 (adding then-section 2.758 to permit waiver of a Commission rule or regulation in special circumstances); Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2224 (Jan. 14, 2004) (Part 2 Amendments) (moving section 2.758 to section 2.335 without substantive change).

<sup>35</sup> See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989); *Seabrook*, CLI-88-10, 28 NRC at 596-97; *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980).

<sup>36</sup> See *Millstone*, CLI-05-24, 62 NRC at 559-60. We issued *Millstone* over a year after a major restructuring of our 10 C.F.R. Part 2 rules of practice, thus demonstrating the continued applicability of our waiver case law. See Part 2 Amendments, 69 Fed. Reg. at 2182.

<sup>37</sup> *Millstone*, CLI-05-24, 62 NRC at 559-60.

<sup>38</sup> See *id.* at 560.

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substantial burden,<sup>39</sup> but not an impossible one.

The *Millstone* factors are derived from the language and purpose of section 2.335. The first two factors, as the Board observed, closely track the plain language of section 2.335(b).<sup>40</sup> The second two factors interpret section 2.335(b) in accordance with the provision's underlying purpose.

A showing of "uniqueness," the third *Millstone* factor, is necessary to justify our setting aside that regulation for the purposes of a specific proceeding.<sup>41</sup> This reflects our view that, in general, challenges to regulations are best evaluated through generic means.<sup>42</sup> Only where a particular challenge to a regulation 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. To be sure, if an issue were "common to a large class of facilities," then it would be appropriate for us to address the issue through rulemaking. And in view of the fact that we will not set aside a duly-promulgated regulation lightly, the fourth *Millstone* factor requires a showing that the requested waiver is

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<sup>39</sup> Cf. *Long Island Lighting Co.* (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275, 280 (1985) (Separate Views of Commissioner Asselstine).

<sup>40</sup> LBP-13-1, 77 NRC at 64. See 10 C.F.R. § 2.335(b) ("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.").

<sup>41</sup> See *Seabrook*, CLI-88-10, 28 NRC at 597-98.

<sup>42</sup> If a petitioner's challenge to an agency rule or regulation relates to an issue of broader significance, then filing a petition for rulemaking under 10 C.F.R. § 2.802 is the better approach. See 10 C.F.R. § 2.802(a) ("Any interested person may petition the Commission to issue, amend or rescind any regulation."). See also *Waiver Standard*, 37 Fed. Reg. at 15,129; *Pilgrim*, CLI-12-6, 75 NRC at 364-65; *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20-21.

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necessary to address an issue of some significance. The rationale that we provided over twenty years ago holds true today: our “agenda is crowded with significant regulatory matters . . . . It would not be consistent with [our] statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.”<sup>43</sup>

The underlying issue in *Millstone* related to safety, as did the issue in the *Seabrook* proceeding referenced therein.<sup>44</sup> Since our decision in *Millstone*, we have not stated expressly whether “significance” would apply to an environmental question, but we have implied in other cases, including this one, that a waiver could be obtained for an environmental contention as well.<sup>45</sup> We clarify now that the fourth *Millstone* factor also may apply to a significant environmental issue.

#### **A. The Referred Ruling**

Here, presented with the perceived “impossibility” of finding a prima facie case for waiver, the Board referred to us the Board’s denial of NRDC’s waiver petition, asking us to explain the interplay between 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. § 2.335(b).<sup>46</sup> The Board focused on the language of section 51.53(c)(3)(ii)(L) and determined that the purpose of the provision is to exempt license renewal applicants from considering SAMAs if they have been

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<sup>43</sup> *Seabrook*, CLI-88-10, 28 NRC at 597.

<sup>44</sup> See *Millstone*, CLI-05-24, 62 NRC at 555 (emergency planning); *Seabrook*, CLI-88-10, 28 NRC at 600 (financial qualifications).

<sup>45</sup> See, e.g., CLI-12-19, 76 NRC at 388; *Pilgrim*, CLI-12-6, 75 NRC at 365. Although we need not reach the fourth *Millstone* factor today (as discussed *infra*), we provide clarification on this point to reinforce that waiver of a rule pertaining to the agency’s environmental responsibilities is possible.

<sup>46</sup> LBP-13-1, 77 NRC at 69.



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considered already.<sup>47</sup> The source of the Board's confusion is its notion of the purpose of the exception in section 51.53(c)(3)(ii)(L).<sup>48</sup> Exempting certain applicants from providing a SAMA analysis at the license renewal stage is certainly the intended effect of the rule, but the rule's underlying purpose is more complex than that. Rather than assuming that a rule's purpose is simply to achieve its stated effect, one must "look further."<sup>49</sup>

Like all of our environmental regulations in 10 C.F.R. Part 51, section 51.53(c)(3)(ii)(L) is aimed at satisfying the NRC's obligations under the National Environmental Policy Act (NEPA).<sup>50</sup> NEPA requires the NRC to prepare a "detailed statement," i.e., an environmental impact statement (EIS), discussing the environmental impacts, alternatives, and mitigation measures for any "major Federal action[] significantly affecting the quality of the human environment."<sup>51</sup> To assist us in the preparation of a supplemental EIS, we require license renewal applicants to prepare an environmental report.<sup>52</sup> Among other Part 51 provisions, section 51.53(c)(3)(ii) describes the types of information that an environmental report must

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<sup>47</sup> *Id.* at 66.

<sup>48</sup> *See id.* at 69.

<sup>49</sup> *Seabrook*, CLI-88-10, 28 NRC at 599. The *Seabrook* case is instructive. In *Seabrook*, we recognized that a superficial reading of the rule sought to be waived—there, a rule that exempted electric utilities from a financial qualifications review at the operating license stage—would lead to a waiver "impossibility" result. *See id.* We explained that "[t]he purpose of the . . . rule sought to be waived is elimination of case-by-case financial qualifications reviews. If we go no further than the . . . rule, no waiver could ever be granted because any waiver, by its nature, would defeat rather than advance the rule's purpose." *Id.* (emphasis omitted). Recognizing that waivers were "clearly contemplated," we reasoned that we must look further than the rule language, by examining "the underlying purpose of the requirement that there be a financial qualifications review." *Id.* at 599-600 (emphasis omitted).

<sup>50</sup> *See* 10 C.F.R. § 51.10.

<sup>51</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

<sup>52</sup> *See* 10 C.F.R. §§ 51.41, 51.45(a), 51.95(c).

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contain.<sup>53</sup> Section 51.53(c)(3)(ii)(L), in particular, requires that an environmental report include a discussion of SAMAs if the NRC has not considered them previously for the applicant's plant.<sup>54</sup> As we explained in the Statements of Consideration adopting section 51.53(c)(3)(ii)(L), we did not require license renewal applicants for whom SAMAs were considered previously to provide a supplemental SAMA analysis because we determined that one SAMA analysis would uncover most cost-beneficial measures to mitigate both the risk and the effects of severe accidents, thus satisfying our obligations under NEPA.<sup>55</sup> Putting all of this together, the purpose of the supplemental-SAMA-analysis exception in section 51.53(c)(3)(ii)(L), then, is to reflect our view that one SAMA analysis, as a general matter, satisfies our NEPA obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents.

That said, even at that time, we did not foreclose the possibility that cost-beneficial mitigation measures might be identified in future license-application reviews.<sup>56</sup> Indeed, we acknowledged that we are required under NEPA to consider new and significant information in our environmental analyses.<sup>57</sup> Therefore, when promulgating the final Part 51 rule, we included section 51.53(c)(3)(iv), which requires a license renewal applicant to identify in its environmental

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<sup>53</sup> *Id.* § 51.53(c)(3)(ii). See generally *id.* §§ 51.45(a), 51.53.

<sup>54</sup> *Id.* § 51.53(c)(3)(ii)(L).

<sup>55</sup> See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996) (Part 51 Amendments) (“The Commission believes it unlikely that any site-specific consideration of [SAMAs] 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.”).

<sup>56</sup> See *id.* (noting possible cost-beneficial “procedural and programmatic fixes”).

<sup>57</sup> *Id.* at 28,468. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989).

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report any “new and significant information of which the applicant is aware” to assist in the preparation of our own new-and-significant-information analysis.<sup>58</sup>

“New and significant information” related to SAMAs could undermine the purpose of the exception in section 51.53(c)(3)(ii)(L). If new and significant information is available, then the original SAMA analysis may be inadequate to satisfy NEPA at the license renewal stage, and may require supplementation.<sup>59</sup> Our rules provide a mechanism for supplementing an original NEPA analysis.<sup>60</sup> But our rules do not guarantee a hearing,<sup>61</sup> nor is a hearing necessary to satisfy our NEPA obligations.<sup>62</sup>

As we explained in CLI-12-19, if a petitioner wishes to litigate the adequacy of a previously-conducted SAMA analysis in a license renewal adjudication, a waiver of section 51.53(c)(3)(ii)(L) would be required. The environmental analysis of severe accidents is designated as a “Category 2” site-specific issue for license renewal, and therefore the SAMA

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<sup>58</sup> See 10 C.F.R. § 51.95(c)(4); Part 51 Amendments, 61 Fed. Reg. at 28,468, 28,488.

<sup>59</sup> See *Marsh*, 490 U.S. at 374 (“If there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.” (alterations in original)). As we stated earlier in this case, “[w]e would expect that, if the Staff had in hand new information that could render invalid the original site-specific analysis, then such information should be identified and evaluated by the Staff for its significance, consistent with our NEPA requirements.” CLI-12-19, 76 NRC at 386-87 n.54.

<sup>60</sup> See, e.g., 10 C.F.R. §§ 51.73, 51.95(c)(3), (c)(4).

<sup>61</sup> See, e.g., *id.* §§ 2.309(f)(1), 2.335(b).

<sup>62</sup> See *Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013) (deferring to NRC’s decision not to admit petitioners’ NEPA contentions for hearing where NRC found the contentions did not satisfy 10 C.F.R. Part 2 contention admissibility requirements). See also *Massachusetts v. NRC*, 708 F.3d 63, 78 (1st Cir. 2013); *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 22.

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analysis normally is subject to challenge in a license renewal adjudicatory proceeding.<sup>63</sup> Thus, as a general matter, a petitioner may raise a SAMA-related contention in a license renewal adjudication if it satisfies our general contention admissibility criteria in section 2.309(f)(1).<sup>64</sup> In CLI-12-19, however, we explained that the exception in section 51.53(c)(3)(ii)(L) operates as the “functional equivalent” of a Category 1 designation “[f]or Limerick and similarly-situated plants for which SAMAs were already considered in an Environmental Impact Statement or Environmental Assessment.”<sup>65</sup> For Limerick and certain other plants, “the SAMA issue has been resolved by rule,” which means that the issue has been carved out from adjudication.<sup>66</sup> Consequently, to litigate a SAMA-related contention in this, as well as other adjudicatory proceedings where the SAMA-analysis exception applies, a petitioner must obtain a waiver by satisfying the requirements in section 2.335(b), in addition to satisfying the contention admissibility criteria in section 2.309(f)(1).<sup>67</sup> Alternatively, a petitioner may submit to the Staff any information that it believes to be new and significant by participating in our parallel NEPA

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<sup>63</sup> See 10 C.F.R. § 51.53(c)(3)(ii)(L); 10 C.F.R. pt. 51, subpt. A, app. B; CLI-12-19, 76 NRC at 386. See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39 (2012).

<sup>64</sup> See, e.g., *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 406-18 (2012); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322-37 (2012).

<sup>65</sup> CLI-12-19, 76 NRC at 386.

<sup>66</sup> *Id.* License renewal applicants whose facilities qualify for the SAMA-analysis exception are exempt from addressing severe accident mitigation in their environmental reports, just as they would be exempt from addressing Category 1 issues. Compare 10 C.F.R. § 51.53(c)(3)(i), with *id.* § 51.53(c)(3)(ii)(L).

<sup>67</sup> CLI-12-19, 76 NRC at 386.

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process. Among other things, the Staff provides an opportunity for public comment on the draft supplemental EIS.<sup>68</sup>

The operation of the SAMA-analysis exception here is analogous to the Board's example of the waiver process relative to bird collisions with cooling towers,<sup>69</sup> which is analyzed in the license renewal Generic Environmental Impact Statement (GEIS) and designated as a "Category 1" issue.<sup>70</sup> As the Board observed, we determined that bird collisions "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."<sup>71</sup> Because this issue has been designated Category 1, it reflects the NRC's expectation that our NEPA obligations have been satisfied with reference to

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<sup>68</sup> See 10 C.F.R. §§ 51.73, 51.74. On April 30, 2013, the Staff published the Limerick draft supplemental EIS for public comment. "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants Regarding Limerick Generating Station, Units 1 and 2" (Draft Report for Comment), NUREG-1437, Supplement 49 (Apr. 30, 2013) (ML13120A078) (Limerick Draft SEIS). Thereafter, NRDC re-filed all four of its original contentions, as well as its pending waste confidence contention, *see supra* note 3, to apply them to the draft supplemental EIS, and to preserve its "rights to appeal either by a timely motion for reconsideration or to the Commission or an appellate court." Resubmitted Contentions at 2. In addition, NRDC filed comments on the draft supplemental EIS. See Fettus, Geoffrey H., et al., Natural Resources Defense Council, Letter to Cindy Bladey, NRC (June 27, 2013) (ML13189A129). The Board tolled the time for NRDC to resubmit the contentions associated with its waiver request until we issued a decision addressing the Board's referred ruling in LBP-13-1, but denied NRDC's request to resubmit its remaining contentions. See Memorandum and Order (Ruling on Resubmission of Contentions) (July 12, 2013), at 1 (unpublished); Board Clarification Order at 1-2. (The Board continues to hold the waste confidence contention in abeyance. *See supra* note 3.) Our decision today renders moot the need to toll the deadline for resubmitting the contentions associated with NRDC's waiver petition.

<sup>69</sup> See LBP-13-1, 77 NRC at 67.

<sup>70</sup> See GEIS at 4-45 to 4-48; GEIS Rev. 1, at 4-70 to 4-74.

<sup>71</sup> LBP-13-1, 77 NRC at 67 (quoting 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1)). *See also* GEIS Revisions, 78 Fed. Reg. at 37,320 ("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.").

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our previously-conducted environmental analysis in the GEIS.<sup>72</sup> And because it is a Category 1 issue, a license renewal applicant need not address bird collisions in its environmental report unless it is aware of relevant new and significant information.<sup>73</sup>

Continuing with the Board's example, if new and significant information showed that "changes in the migratory habits of a certain bird . . . led to a large number of collisions with the cooling towers at a specific plant," then "a petitioner might well be able to satisfy . . . [our waiver criteria] and, therefore, challenge [an] applicant's lack of consideration of bird collisions with cooling towers" in a license renewal adjudicatory proceeding.<sup>74</sup> In other words, the petitioner must show that new and significant information, unique to a particular plant, exists with regard to bird collisions, such that the Category 1 finding in 10 C.F.R. Part 51, Subpart A, Appendix B should be waived to litigate the issue in a site-specific proceeding. Likewise, the focus in this case is whether there is new and significant information, unique to Limerick, pertaining to the 1989 SAMDA analysis for Limerick's original operating licenses, such that the exception in section 51.53(c)(3)(ii)(L) should be waived to litigate NRDC's claims in this proceeding.<sup>75</sup>

## **B. NRDC's Waiver Petition**

With this framework in mind, we turn to NRDC's waiver petition. As discussed above, NRDC raised three challenges to Exelon's Environmental Report, claiming that Exelon (and,

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<sup>72</sup> See GEIS at 1-7 to 1-11, 4-45 to 4-48; GEIS Rev. 1, at 1-16 to 1-19, 4-70 to 4-74.

<sup>73</sup> See 10 C.F.R. §§ 51.53(c)(3)(i), 51.53(c)(3)(iv). But even then, a waiver would be necessary to litigate the issue of potentially new and significant information pertaining to bird collisions in an adjudicatory proceeding. See *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20-21.

<sup>74</sup> LBP-13-1, 77 NRC at 67.

<sup>75</sup> See CLI-12-19, 76 NRC at 386-87. See generally 1989 SAMDA Analysis.

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ultimately, the NRC in the supplemental EIS)<sup>76</sup> must: (1) consider potential new SAMAs that have been considered for other Mark II boiling water reactors; (2) use economic cost information specific to Limerick, rather than Three Mile Island; and (3) use “modern techniques for assessing whether the newly considered [SAMAs] are cost-beneficial.”<sup>77</sup>

Exelon and the Staff argued that NRDC’s waiver petition failed to meet any of the four *Millstone* factors.<sup>78</sup> Based on our review of NRDC’s petition, we find that a waiver is not warranted here. We agree with Exelon and the Staff that NRDC has not shown that the issues it raises are unique to Limerick.<sup>79</sup>

NRDC’s witnesses, Dr. Weaver and Mr. Fettus, claimed that Limerick is unique because it will be the only boiling water reactor not to update its SAMA analysis with the potentially new and significant information that NRDC identifies.<sup>80</sup> But at bottom, NRDC’s challenge to Exelon’s Environmental Report amounts to a general claim that could apply to any license renewal applicant for whom SAMAs already were considered. Due to the nature of the rule, twenty or more years may pass between an original SAMA analysis and the submission of a license

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<sup>76</sup> See 10 C.F.R. § 2.309(f)(2) (“On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant’s environmental report.”).

<sup>77</sup> Waiver Petition at 3 & n.3. See also Fettus Declaration; Weaver Declaration. Exelon asserts that the Weaver Declaration is deficient because it is a revised version of the declaration that NRDC submitted with its hearing request that is signed only by Dr. Weaver, and therefore apparently lacks the approval of two of its original signatories. See Exelon Answer at 43. We need not address that issue. As discussed below, viewing NRDC’s waiver petition and supporting documentation in the light most favorable to NRDC, we find that NRDC has not shown that a waiver is appropriate here.

<sup>78</sup> Exelon Answer at 3-4; Staff Answer at 1.

<sup>79</sup> Because NRDC’s claims fail to satisfy the “uniqueness” factor, we need not, and do not, reach the other *Millstone* factors in today’s decision.

<sup>80</sup> See Fettus Declaration ¶ 4; Weaver Declaration ¶ 9.

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renewal application for most, if not all applicants that qualify for the SAMA-analysis exception in section 51.53(c)(3)(ii)(L).<sup>81</sup> For example, if the licensees for Comanche Peak Units 1 and 2, and Watts Bar Unit 1—whose plants also qualify for the SAMA-analysis exception—apply to renew their operating licenses, they may face the same criticism: essentially, that the passage of time between original licensing and renewal has rendered their SAMA analysis out-of-date.<sup>82</sup> Similarly, plants for which a SAMA analysis was conducted for the first time under section 51.53(c)(3)(ii)(L) may face this general criticism upon application for a subsequent renewal term.<sup>83</sup> As the Staff points out, waiver of the provision in section 51.53(c)(3)(ii)(L) based on NRDC's proffered new information alone would create an exception to litigate SAMAs in the

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<sup>81</sup> In other words, this time frame is inherent in our regulatory scheme, which provides for a forty-year license term, with the possibility of license renewal for an additional twenty-year period. See, e.g., 10 C.F.R. §§ 2.109(b), 50.51(a), 54.17(c). The earliest a license renewal application may be submitted is twenty years before the expiration date of the operating license in effect. *Id.* § 54.17(c).

<sup>82</sup> See Part 51 Amendments, 61 Fed. Reg. at 28,481 (“NRC staff considerations of [SAMAs] have already been completed and included in an EIS or supplemental EIS for Limerick, Comanche Peak, and Watts Bar. Therefore, [SAMAs] need not be reconsidered for these plants for license renewal.”). Although Comanche Peak Units 1 and 2 and Watts Bar Unit 1 are not boiling water reactors, additional SAMAs have been considered for other license renewal applications since they received their operating licenses. In addition, Comanche Peak and Watts Bar received their operating licenses prior to the release of the MACCS2 code. See Staff Answer at 29-30; Exelon Answer at 35. As we explained in the Statements of Consideration regarding section 51.53(c)(3)(ii)(L), we did not mandate a specific approach to SAMA analyses; instead, we stated that we would review “each severe accident mitigation consideration provided by a license renewal applicant on its merits and determine whether it constitutes a reasonable consideration of [SAMAs].” Part 51 Amendments, 61 Fed. Reg. at 28,481-82.

<sup>83</sup> See 10 C.F.R. § 54.31(d). This also could be the case for new plants licensed under 10 C.F.R. Part 52. See, e.g., *South Carolina Electric & Gas Co. and South Carolina Public Service Authority (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-9, 75 NRC 421 (2012); *Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC 63 (2012).



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*Limerick* proceeding that would “necessarily swallow the rule in [section] 51.53(c)(3)(ii)(L).”<sup>84</sup>

Accordingly, “[t]he rulemaking process, as opposed to a site-specific licensing proceeding, is the appropriate venue for such a far-reaching challenge.”<sup>85</sup>

That is not to say that a challenge based on new and significant information cannot overcome the “uniqueness” factor of our waiver standard. Here, however, NRDC offers little to show how the information it provides sets *Limerick* apart from other plants undergoing license renewal whose previous SAMA analyses purportedly also would be in need of updating. For example, some of NRDC’s proposed SAMAs could be used for any boiling water reactor, not just those with Mark II containments.<sup>86</sup> And NRDC’s argument that a new SAMA analysis should be performed because a newer methodology is available could apply to two other plants now (Comanche Peak and Watts Bar),<sup>87</sup> and presumably to other plants in the future whenever further developments occur regarding other methods of SAMA analysis.

Additionally, with regard to economic cost, NRDC provides data that is specific to *Limerick* and the surrounding area, but fails to make a sufficient connection between this data and the 1989 SAMDA analysis for *Limerick*.<sup>88</sup> Instead, Dr. Weaver concludes, without support, that “[n]ew information pertaining to economic risk could plausibly cause materially different results in the assessment of impacts of an accident at *Limerick*, and materially different cost-

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<sup>84</sup> Staff Answer at 35. See also *id.* at 27.

<sup>85</sup> *Id.* at 35.

<sup>86</sup> See Exelon Answer at 34; Exelon Affidavit ¶¶ 31, tbl. A.

<sup>87</sup> See Exelon Answer at 35.

<sup>88</sup> See Weaver Declaration ¶¶ 14-24.

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benefit results in a new SAMA analysis for Limerick.”<sup>89</sup> Similarly, Dr. Weaver asserts, without more, that use of the MACCS2 code or similar methodology would be “specific” to Limerick, and could show that additional mitigation alternatives are cost-beneficial.<sup>90</sup> In other words, NRDC offers new information, but makes no attempt, other than concluding that a change in the SAMA analysis is “plausible,” to discuss its potential significance to Limerick.<sup>91</sup> To litigate SAMA-related issues in an adjudicatory proceeding, however, we require the demonstration of “a potentially significant deficiency” in the SAMA analysis—“that is, a deficiency that credibly could render the SAMA analysis unreasonable under NEPA standards.”<sup>92</sup> Otherwise, “[i]t always will be possible to conceive of yet another input or methodology that could have been used in the SAMA computer modeling, and many different inputs and approaches may all be reasonable choices.”<sup>93</sup> Given that similar updated information could be used for other plants that qualify for the SAMA-analysis exception, there is nothing unique about the information that NRDC identifies to justify waiving the rule for this particular adjudicatory proceeding.

We therefore find that NRDC has not shown that a waiver of section 51.53(c)(3)(ii)(L) is appropriate here. Fundamentally, NRDC claims that the SAMA analysis must be redone due to the passage of time between initial licensing and Exelon’s submittal of its license renewal

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<sup>89</sup> *Id.* ¶ 17.

<sup>90</sup> *Id.* ¶ 4, 9, 13.

<sup>91</sup> *See id.* ¶ 17.

<sup>92</sup> *Pilgrim*, CLI-12-1, 75 NRC at 57 (emphasis omitted).

<sup>93</sup> *Id.* *See also Seabrook*, CLI-12-5, 75 NRC at 323 (“[T]he proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA. We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely ‘suggestions’ of other ways an analysis could have been done, or other details that could have been included.”).

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application. If our waiver standard is to operate as intended, we decline to set aside the rule based merely on a claim of new and significant information, without the support necessary to show that it is unique to Limerick.<sup>94</sup> For these reasons, we deny NRDC's waiver request.

Nonetheless, we recognize the NRC's continuing duty to take a "hard look" at new and significant information for each "major federal action" to be taken.<sup>95</sup> The issues that NRDC raises are not appropriate for litigation in a site-specific proceeding due to NRDC's failure to demonstrate the need for a rule waiver. We find, however, that NRDC has identified information that bears consideration in our environmental review of Exelon's application outside of the adjudicatory process.<sup>96</sup> Therefore, we refer NRDC's waiver petition to the Staff as additional comments<sup>97</sup> on the Limerick draft supplemental EIS for the Staff's consideration and response.<sup>98</sup>

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<sup>94</sup> Cf. *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 21 ("Adjudicating Category 1 issues site by site based merely on a claim of 'new and significant information,' would defeat the purpose of resolving generic issues in a GEIS.").

<sup>95</sup> See *Marsh*, 490 U.S. at 374.

<sup>96</sup> We disagree with NRDC's assertion, see Waiver Petition at 15, that obtaining a waiver and litigating a previously-considered environmental issue is the only way to consider new and potentially significant information regarding that issue. See CLI-12-19, 76 NRC at 387 (noting NRDC's option to participate outside of the adjudication by submitting comments on the draft supplemental EIS); Part 51 Amendments, 61 Fed. Reg. at 28,470 (noting that the NRC will consider all comments on the draft supplemental EIS "regardless of whether the comment is directed to impacts in Category 1 or 2"). *Accord Massachusetts*, 708 F.3d at 74.

<sup>97</sup> See *supra* note 68.

<sup>98</sup> Cf. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-29, 72 NRC 556, 563 (2010) (directing the Staff to consider new information regarding need for power and alternative sources of energy).

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We expect that the Staff will incorporate any new SAMA-related information that it finds to be significant in the final supplemental EIS.<sup>99</sup>

### III. CONCLUSION

For the reasons set forth above, we *review* the Board's referred ruling, and *find* that the Board erred in interpreting the purpose of the SAMA-analysis exception in 10 C.F.R. § 51.53(c)(3)(ii)(L). We *affirm* the Board's denial of NRDC's waiver petition because NRDC has not shown that the issues it seeks to litigate are unique to Limerick and thereby justify waiver of the rule to permit litigation in this adjudicatory proceeding. Without a waiver, NRDC's SAMA-related contentions impermissibly challenge section 51.53(c)(3)(ii)(L). Nevertheless, we *direct* the Staff to review the significance of any new SAMA-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.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 31<sup>st</sup> day of October, 2013.

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<sup>99</sup> See *Marsh*, 490 U.S. at 374; *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980). See also *Watts Bar*, CLI-10-29, 72 NRC at 563; Part 51 Amendments, 61 Fed. Reg. at 28,470. In the Limerick draft supplemental EIS, the Staff already has considered some new information beyond what Exelon included in its Environmental Report, including whether to incorporate potentially cost-beneficial SAMAs identified at other plants, as well as the practicality of using state-of-the-art SAMA methodology. See Limerick Draft SEIS at 5-7, 5-11 to 5-13.

## **ATTACHMENT 3**

LBP-14-15

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chair  
Dr. Michael F. Kennedy  
Dr. William E. Kastenberg

In the Matter of

EXELON GENERATION COMPANY, LLC

(Limerick Generating Station, Units 1 & 2)

Docket Nos. 50-352-LR, 50-353-LR

ASLBP No. 12-916-04-LR-BD01

October 7, 2014

MEMORANDUM AND ORDER

(Denying Motion to File New Contention and Terminating Adjudicatory Proceeding)

The Natural Resources Defense Council (NRDC) has challenged Exelon Generation Company, LLC's (Exelon's) application to renew for twenty years its operating licenses for both nuclear power reactors at the Limerick Generating Station near Limerick, Pennsylvania.<sup>1</sup> After two published decisions by this Board and two appeals to the Commission, the only remaining contention in this proceeding concerns the storage and disposal of the facility's spent fuel.<sup>2</sup>

I. BACKGROUND

Exelon received operating licenses for Limerick Generating Station Unit 1 in 1985 and for Unit 2 in 1989.<sup>3</sup> As the result of a court challenge during the initial application process, the

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<sup>1</sup> NRDC's Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011).

<sup>2</sup> NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

<sup>3</sup> See Philadelphia Electric Company, Limerick Generating Station, Unit 1, Docket No. 50-352, Facility Operating License, License No. NPF-39 (Aug. 8, 1985) (ADAMS Accession No. ML011520196); Limerick Generating Station, Unit 2, Docket No. 50-353, Facility Operating License, License No. NPF-85 (Aug. 25, 1989) (ADAMS Accession No. ML052780037).

NRC was ordered to analyze features or actions, currently called “Severe Accident Mitigation Alternatives” (SAMAs), that could prevent a serious accident or mitigate its consequences.<sup>4</sup>

The NRC Staff conducted the SAMA analysis and supplemented the Final Environmental Statement for the Limerick facility in August 1989.<sup>5</sup>

Exelon filed a license renewal application for Limerick Units 1 and 2, which included an environmental report (ER), on June 22, 2011.<sup>6</sup> NRDC petitioned to intervene and, among several other issues, proffered the contention that Exelon’s 2011 ER had overlooked “new and significant” information required by 10 C.F.R. § 51.53(c)(3)(iv) because the report did not discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar Boiling Water Reactor (BWR) Mark II design.<sup>7</sup> The NRC Staff argued, based on 10 C.F.R. § 51.53(c)(3)(ii)(L), that the regulations do not require Exelon to perform a new SAMA analysis.<sup>8</sup> Noting the tension between these regulatory sections—one exempts Exelon from conducting a new SAMA analysis, but the other requires Exelon to review all new and significant information—the Board ruled that NRDC had proffered an admissible contention with respect to the significance of these new SAMAs.<sup>9</sup> The Board admitted NRDC’s contention:

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<sup>4</sup> See Limerick Ecology Action v. NRC, 869 F.2d 719, 722–23 (3d Cir. 1989).

<sup>5</sup> This review was called a “Severe Accident Mitigation Design Alternatives” analysis. See Office of Nuclear Reactor Regulation, Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2, NUREG-0974 Supp. (Aug. 1989) (ADAMS Accession No. ML11221A204).

<sup>6</sup> Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF-39 and NPF-85 for an Additional 20-Year Period, Exelon Generation Co., LLC, Limerick Generating Station, 76 Fed. Reg. 52,992 (Aug. 24, 2011).

<sup>7</sup> NRDC’s Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) at 17.

<sup>8</sup> NRC Staff’s Answer to NRDC’s Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011) at 8.

<sup>9</sup> LBP-12-08, 75 NRC 539, 561 (2012).

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 ER fails to present a legally sufficient analysis in that:

1. Exelon has omitted from its ER a required analysis of new and significant information regarding potential new severe accident mitigation alternatives previously considered for other BWR 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.<sup>10</sup>

Both Exelon and NRC Staff appealed the Board's decision to the Commission.<sup>11</sup>

The Commission determined on appeal that NRDC's contention regarding mitigation alternatives was effectively a collateral attack on § 51.53(c)(3)(ii)(L), the section that exempts applicants from having to re-analyze SAMAs during the renewal process.<sup>12</sup> Therefore, the Commission concluded, NRDC had not offered an admissible contention because intervenors in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing "special circumstances" under 10 C.F.R. § 2.335(b).<sup>13</sup> The Commission remanded the proceeding to the Board to consider whether NRDC had satisfied this waiver requirement.<sup>14</sup> Under the test established by the Commission, a waiver may be granted only when all four factors are met: (1) strict application of the rule would not serve the rule's intended purpose, (2) special circumstances exist that were not considered during rulemaking, (3) those

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<sup>10</sup> Id. at 561–62.

<sup>11</sup> Exelon's Notice of Appeal of LBP-12-08 (Apr. 16, 2012); Exelon's Brief in Support of the Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff's Notice of Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff's Appeal of LBP-12-08 (Apr. 16, 2012).

<sup>12</sup> CLI-12-19, 76 NRC 377, 385–86 (2012).

<sup>13</sup> Id. at 387.

<sup>14</sup> Id. at 388–89.



circumstances are unique to the facility, and (4) the waiver is necessary to address a significant safety problem.<sup>15</sup>

The Board rejected NRDC's request for a waiver on February 6, 2013.<sup>16</sup> The Board concluded, based on the first factor, that NRDC was not entitled to a waiver because the apparent purpose of § 51.53(c)(3)(ii)(L) was to exempt applicants from having to analyze SAMAs again for the same facility and therefore the rule served its purpose.<sup>17</sup> The Commission affirmed our decision on a different ground,<sup>18</sup> explaining that the purpose of the exemption was "to reflect our view that one SAMA analysis, as a general matter, satisfies our . . . obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents."<sup>19</sup> The Commission thus concluded that unique circumstances might require a new analysis, but determined that NRDC had not met its burden of showing those circumstances here.<sup>20</sup> NRDC has appealed the Commission's decision in CLI-13-7 to the United States Court of Appeals for the District of Columbia Circuit.<sup>21</sup>

Meanwhile, in June 2012, while the SAMA analysis contention was pending before the Commission, the United States Court of Appeals for the District of Columbia Circuit vacated 10 C.F.R. § 51.23, a regulation governing the storage and disposal of spent nuclear fuel.<sup>22</sup> Based on that decision, in July 2012 NRDC moved to file a new contention concerning the temporary

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<sup>15</sup> See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 (2005).

<sup>16</sup> LBP-13-1, 77 NRC 57, 60 (2013).

<sup>17</sup> Id. at 65–66.

<sup>18</sup> CLI-13-7, 78 NRC 199, 202 (2013).

<sup>19</sup> Id. at 210.

<sup>20</sup> Id. at 216.

<sup>21</sup> See Initial Opening Brief for Petitioner, NRDC v. NRC, No. 13-1311 (D.C. Cir. July 21, 2014).

<sup>22</sup> New York v. NRC, 681 F.3d 471, 483 (D.C. Cir. 2012).

storage and ultimate disposal of Limerick Generating Station's spent fuel.<sup>23</sup> On August 7, 2012, the Commission directed that all such contentions be held in abeyance.<sup>24</sup> The Board issued an order holding NRDC's contention in abeyance on August 8, 2012.<sup>25</sup>

## II. ANALYSIS

On August 26, 2014, after undergoing a two-year rulemaking process during which public comments were received and considered, the Commission adopted (1) a generic environmental impact statement (GEIS) to identify and analyze the environmental impacts of continued storage of spent nuclear fuel; and (2) associated revisions to the Temporary Storage Rule in 10 C.F.R. § 51.23 (now called the "Continued Storage of Spent Nuclear Fuel" Rule).<sup>26</sup> The Commission "concluded that the impacts of continued storage will not vary significantly across sites," noting that "[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings."<sup>27</sup> The Commission directed the Licensing Boards, including this one, to reject the pending waste confidence contentions that had been held in abeyance.<sup>28</sup>

Following the Commission's direction in CLI-14-08, we deny the NRDC's motion seeking to admit a new contention concerning the environmental impacts of the storage and disposal of Limerick Generating Station's spent nuclear fuel. Even if NRDC disputes that the Commission's

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<sup>23</sup> NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

<sup>24</sup> CLI-12-16, 76 NRC 63, 68–69 (2012).

<sup>25</sup> Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 (unpublished).

<sup>26</sup> Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

<sup>27</sup> CLI-14-08, 80 NRC \_\_, \_\_ (slip op. at 9) (Aug. 26, 2014).

<sup>28</sup> Id. at \_\_ (slip op. at 10).

newly adopted Continued Storage of Spent Nuclear Fuel Rule satisfies the requirements of the National Environmental Policy Act or the court's decision in New York v. NRC,<sup>29</sup> it cannot challenge the adoption or validity of the rule itself before this Board.<sup>30</sup>

### III. CONCLUSION

Because our denial of NRDC's motion results in it no longer having any contentions before the Board, this adjudicatory proceeding is terminated.<sup>31</sup> This order shall constitute the final decision of the Commission, unless, within twenty-five (25) days of its service, a petition for review is filed in accordance with 10 C.F.R. § 2.341(b).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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William J. Froehlich, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Michael F. Kennedy  
ADMINISTRATIVE JUDGE

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Dr. William E. Kastenber  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
October 7, 2014

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<sup>29</sup> See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (2012); New York v. NRC, 681 F.3d at 483.

<sup>30</sup> See 10 C.F.R. § 2.335(a). As the Commission noted, “[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.” CLI-14-08, 80 NRC at \_\_ n.27 (slip op. at 9 n.27).

<sup>31</sup> We suspended this proceeding before NRDC could reply to NRC Staff's and Exelon's Answers to its motion. See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 n.15 (unpublished). In light of the Commission's decision in CLI-14-08, any reply would now be moot.

## **ATTACHMENT 4**

environmental impacts associated with the approval of the requested exemption.

#### *Alternative to the Proposed Action*

Since there are no significant environmental impacts associated with the proposed action, any alternatives with equal or greater environmental impact are not evaluated. The alternative to the proposed action would be to deny approval of the exemption. This alternative would have the same environmental impacts.

#### *Agencies and Persons Consulted*

A draft of this EA was sent by email dated April 3, 2014, to both Ms. Aggie Leitheiser, Assistant Commissioner of the Minnesota Department of Health (MDH) (ADAMS accession no. ML14100A328) and Mr. Ron Johnson, President of Tribal Council for the Prairie Island Indian Community (PIIC) (ADAMS accession no. ML14100A354). The MDH response was received by email dated April 7, 2014 (ADAMS accession No. ML14100A098). The email response states that MDH reviewed the draft EA and had no comments. The PIIC response with comments was received by email on April 11, 2014 (ADAMS accession No. ML14154A335). Following revisions to the draft EA, it was reissued to MDH and PIIC for comment.

By email dated July 25, 2014, the revised EA was sent to Ms. Aggie Leitheiser at MDH and Mr. Philip Mahowald, General Counsel for the PIIC. The MDH response was received by email dated August 11, 2014 (ADAMS accession no. ML14266A174). The email response states that MDH reviewed the draft EA and had no comments. The PIIC's email response was received by email dated September 4, 2014 (ADAMS accession no. ML14251A373). The email response states that PIIC reviewed the draft EA and had no comments.

The NRC staff has determined that a consultation under Section 7 of the Endangered Species Act is not required because the proposed action will not affect listed species or critical habitat. The NRC staff has also determined that the proposed action is not a type of activity that has the potential to impact historic properties because the proposed action would occur within the established Prairie Island site boundary. Therefore, no consultation is required under Section 106 of the National Historic Preservation Act.

### **III. Finding of No Significant Impact**

The environmental impacts of the proposed action have been reviewed in

accordance with the requirements set forth in 10 CFR Part 51. Based upon this environmental assessment, the NRC finds that the proposed action, issuance of an exemption from specific physical security requirements in 10 CFR 73.51(d)(3), as further discussed in the safety evaluation, will not significantly impact the quality of the human environment. Accordingly, preparation of an environmental impact statement for the proposed exemption is not warranted, and a finding of no significant impact is appropriate.

Dated at Rockville, Maryland, this 16th day of October, 2014.

For the Nuclear Regulatory Commission.

#### **Michele Sampson,**

*Chief, Spent Fuel Licensing Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2014-25356 Filed 10-23-14; 8:45 am]

**BILLING CODE 7590-01-P**

### **NUCLEAR REGULATORY COMMISSION**

**[Docket Nos. 50-352 and 50-353; NRC-2011-0166]**

#### **Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License renewal and record of decision; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has issued renewed facility operating license Nos. NPF-39 and NPF-85 to Exelon Generation Company, LLC (the licensee), the operator of the Limerick Generating Station, Units 1 and 2 (Limerick). Renewed facility operating license Nos. NPF-39 and NPF-85 authorize operation of Limerick by the licensee at reactor core power levels not in excess of 3515 megawatts thermal for each unit, in accordance with the provisions of the Limerick renewed licenses and technical specifications. In addition, the NRC has prepared a record of decision (ROD) that supports the NRC's decision to renew facility operating license Nos. NPF-39 and NPF-85.

**DATES:** The license renewal referenced in this document is effective on October 20, 2014.

**ADDRESSES:** Please refer to Docket ID NRC-2011-0166 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2011-0166. Address questions about NRC dockets to Carol Gallagher; telephone: 301-287-3422; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Richard Plasse, Office of Nuclear Reactor Regulation, telephone: 301-415-1427; email: [Richard.Plasse@nrc.gov](mailto:Richard.Plasse@nrc.gov), U.S. Nuclear Regulatory Commission, Washington, DC 20555.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the NRC has issued renewed facility operating license Nos. NPF-39 and NPF-85 to Exelon Generation Company, LLC, the operator of Limerick. Renewed facility operating license Nos. NPF-39 and NPF-85 authorize operation of Limerick by the licensee at reactor core power levels not in excess of 3515 megawatts thermal for each unit, in accordance with the provisions of the Limerick renewed licenses and technical specifications. The NRC's ROD that supports the NRC's decision to renew facility operating license Nos. NPF-39 and NPF-85 is available in ADAMS under Accession No. ML14281A259. As discussed in the ROD and the final supplemental environmental impact statement (FSEIS) for LGS, Supplement 49 to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Limerick Generating Station, Units 1 and 2," dated August 2014 (ADAMS Accession Nos. ML14238A284 and ML14238A290), the NRC has considered

a range of reasonable alternatives that included natural gas combined-cycle, supercritical pulverized coal, new nuclear, wind power, purchase power, and the no action alternative. The ROD and FSEIS documents the NRC decision for the environmental review that the adverse environmental impacts of license renewal for Limerick are not so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.

Limerick Units 1 and 2 are boiling water reactors located in Limerick Township, Pennsylvania. The application for the renewed licenses, "Limerick Generating Station License Renewal Application," dated June 22, 2011 (ADAMS Accession No. ML111790800), complied with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations. As required by the Act and the NRC's regulations in 10 CFR Chapter 1, the NRC has made appropriate findings, which are set forth in the licenses. A public notice of the proposed issuance of the renewed licenses and an opportunity for a hearing was published in the **Federal Register** on August 24, 2011 (76 FR 52992).

For further details with respect to this action, see: (1) Exelon Generation Company, LLC, license renewal application for Limerick Generating Station, Units 1 and 2 dated June 22, 2011, as supplemented by letters dated through June 4, 2014; (2) the NRC's safety evaluation report published in January 2013, and supplemented in August 2014, (ADAMS Accession Nos. ML12354A349 and ML14190B070); (3) the licensee's Final Safety Analysis Report; (4) the NRC's final environmental impact statement (NUREG-1437, Supplement 49), for the LGS, Units 1 and 2, published in August 2014; and (5) the NRC's ROD.

Dated at Rockville, Maryland, this 20th day of October, 2014.

For the Nuclear Regulatory Commission.  
**Christopher G. Miller,**  
Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2014-25365 Filed 10-23-14; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Notice of Meeting

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor

Safeguards (ACRS) will hold a meeting on November 6-8, 2014, 11545 Rockville Pike, Rockville, Maryland.

#### Thursday, November 6, 2014, Conference Room T2-B1, 11545 Rockville Pike, Rockville, Maryland

8:30 a.m.-8:35 a.m.: *Opening Remarks by the ACRS Chairman* (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.-10:00 a.m.: *Draft Regulatory Guide DG-1299, "Regulatory Guidance on the Alternate Pressurized Thermal Shock Rule"* (Open)—The Committee will hear presentations by and hold discussions with representatives of the staff regarding DG-1299, "Regulatory Guidance on the Alternate Pressurized Thermal Shock Rule."

10:15 a.m.-12:15 p.m.: *SECY-14-XXXX, "Proposed Updates of Licensing Policies, Rules, and Guidance for Future Reactor Applications"* (Open)—The Committee will hear presentations by and hold discussions with representatives of the staff regarding SECY-14-XXXX, "Proposed Updates of Licensing Policies, Rules, and Guidance for Future Reactor Applications."

1:15 p.m.-2:45 p.m.: *Meeting with Representatives of the Nuclear Energy Institute* (Open)—The Committee will hear presentations by and hold discussions with representatives of the Nuclear Energy Institute regarding topics of mutual interest.

3:00 p.m.-6:00 p.m.: *Preparation of ACRS Reports* (Open)—The Committee will discuss proposed ACRS reports on matters discussed during this meeting. The Committee will also consider a response to the August 28, 2014, letter from the Executive Director for Operations regarding Standard Review Plan Chapter 19 and Section 17.4.

#### Friday, November 7, 2014, Conference Room T2-B1, 11545 Rockville Pike, Rockville, Maryland

8:30 a.m.-8:35 a.m.: *Opening Remarks by the ACRS Chairman* (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.-9:45 a.m.: *Future ACRS Activities/Report of the Planning and Procedures Subcommittee* (Open/Closed)—The Committee will discuss the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the

Full Committee during future ACRS Meetings, and matters related to the conduct of ACRS business, including anticipated workload and member assignments. [Note: A portion of this meeting may be closed pursuant to 5 U.S.C. 552b (c) (2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

10:00 a.m.-11:00 a.m.: *Meeting with NRC Commissioner, William C. Ostendorff* (Open)—The Committee will meet with NRC Commissioner, William C. Ostendorff, on topics of mutual interest.

11:15 a.m.-11:30 a.m.: *Reconciliation of ACRS Comments and Recommendations* (Open)—The Committee will discuss the responses from the NRC Executive Director for Operations to comments and recommendations included in recent ACRS reports and letters.

11:30 a.m.-12:00 p.m.: *Assessment of the Quality of Selected NRC Research Programs—FY 2014* (Open)—The Committee will discuss the quality assessment of selected NRC research projects.

1:00 p.m.-6:00 p.m.: *Preparation of ACRS Reports* (Open)—The Committee will continue its discussion of proposed ACRS reports.

#### Saturday, November 8, 2014, Conference Room T2-B1, 11545 Rockville Pike, Rockville, Maryland

8:30 a.m.-11:30 a.m.: *Preparation of ACRS Reports* (Open)—The Committee will continue its discussion of proposed ACRS reports.

11:30 a.m.-12:00 p.m.: *Miscellaneous* (Open)—The Committee will continue its discussion related to the conduct of Committee activities and specific issues that were not completed during previous meetings.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 13, 2014 (79 FR 59307-59308). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff (Telephone: 301-415-5844, Email: [Quynh.Nguyen@nrc.gov](mailto:Quynh.Nguyen@nrc.gov)), five