

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	50-352-LR/ 50-353-LR
)	
(Limerick Generating Station, Units 1 and 2))	
)	

NRC STAFF'S BRIEF ON THE BOARD'S REFERRED RULING IN LBP-13-1

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NRC STAFF'S BRIEF ON THE BOARD'S REFERRED RULING IN LBP-13-1

INTRODUCTION

Pursuant to the Commission's February 26, 2013 Order,¹ the NRC Staff files its initial brief on the Atomic Safety and Licensing Board's (Board) referred ruling in LBP-13-1.² That ruling denied the "Natural Resources Defense Council's [(NRDC)] 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" (Waiver Petition).³ Under § 51.53(c)(3)(ii)(L) (sub-section (L)) of the Commission's regulations, license renewal applicants need not provide a consideration of severe accident mitigation alternatives (SAMAs) if the NRC has already considered SAMAs for the facility in question. NRDC sought to waive sub-section (L) in order to bring several challenges to the applicant's treatment of SAMAs in this proceeding. In light of its understanding of the purpose of sub-section (L), the Board concluded that waiving that

¹ Order at 1 (Feb. 26, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13057A822) (Briefing Order).

² *Exelon Generation Co., LLC* (Limerick Generating Station Units 1 and 2), LBP-13-1, 77 NRC ___, __ (Feb. 6, 2013) (slip op. at 13).

³ 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) (ADAMS Accession No. ML12326A976) (Waiver Petition).

regulation was a “seemingly impossible task.”⁴ Thus, the Board referred its ruling to the Commission to clarify the interplay between sub-section (L) and the NRC’s waiver standards.⁵

This proceeding represents the first opportunity for a license renewal applicant to invoke sub-section (L) of the NRC’s regulations and not provide a SAMA analysis for license renewal. Because the issue presented is novel, the Commission should review LBP-13-1. As discussed below, the Commission should reverse the portions of LBP-13-1 that conclude that waiving sub-section (L) is impossible because those portions of the Board’s order do not comport with and misinterpret the Commission precedent on waiver. However, the Commission should uphold the Board’s decision to deny the Waiver Petition because NRDC has not provided sufficient information to meet any of the Commission’s waiver standards.

BACKGROUND

On June 22, 2011, Exelon Generation Company, LLC (Exelon) submitted a license renewal application for Limerick Generating Station, Units 1 and 2 (Limerick).⁶ As part of its application, Exelon provided an environmental report (ER).⁷ In that report, Exelon relied on sub-section (L) to omit a discussion of SAMAs, which are typically analyzed in license renewal ERs.⁸ Sub-section (L) reads, “If the staff has not previously considered severe accident mitigation alternatives for the applicant’s plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.”⁹ The NRC Staff previously considered severe accident mitigation design

⁴ *Limerick*, LBP-13-1, 77 NRC at __ (slip op. at 13).

⁵ *Id.*

⁶ Application for Renewed Operating Licenses (June 22, 2011) (ADAMS Accession No. ML11179A096); License Renewal Application, Limerick Generating Station, Units 1 and 2 (June 22, 2011) (ADAMS Accession No. ML11179A101).

⁷ Applicant’s Environmental Report – Operating License Renewal Stage, Limerick Generating Station, Units 1 and 2 (June 22, 2011) (ADAMS Accession No. ML11179A104).

⁸ *Id.* at 4-49.

⁹ 10 C.F.R. § 51.53(c)(3)(ii)(L).

alternatives (SAMDA) for Limerick in an environmental statement at the operating license stage (1989 SAMDA Analysis).¹⁰ In fact, when it promulgated sub-section (L) in its regulations, the Commission explicitly stated that for “Limerick” SAMAs “need not be reconsidered” during license renewal.¹¹ Therefore, Exelon chose to rely on sub-section (L) of the regulations instead of conducting a new SAMA analysis. The ER also considered whether new and significant information affected any previously-resolved environmental issues, including SAMAs under sub-section (L).¹²

On November 22, 2011, NRDC filed a Petition to Intervene in this proceeding.¹³ The Petition to Intervene raised three contentions on the ER’s treatment of SAMAs.¹⁴ The first contention objected to Exelon’s consideration of new and significant information regarding sub-section (L), the second contention claimed that aspects of the original 1989 SAMDA Analysis for Limerick were inadequate, and the third contention questioned whether the 1989 SAMDA Analysis was in fact a SAMA analysis within the meaning of sub-section (L).¹⁵ The Staff and Exelon opposed all three contentions because they impermissibly challenged an NRC regulation, sub-section(L), without first seeking a waiver of that regulation as required by 10

¹⁰ ER at 4-49; 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). For purposes of this brief, the terms SAMA and SAMDA are interchangeable because the Commission has determined that the 1989 SAMDA Analysis at Limerick also constituted a SAMA analysis. Environmental Review for Renewal of Nuclear Power Plant Operating License, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996).

¹¹ 61 Fed. Reg. at 28,481.

¹² ER at § 5; see 10 C.F.R. § 51.53(c)(3)(iv) (“The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.”).

¹³ Natural Resources Defense Council Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) (ADAMS Accession No. ML11326A320) (Petition to Intervene).

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 16, 19, 21.

C.F.R. § 2.335.¹⁶

In LBP-12-08, the Board agreed that NRDC's third contention constituted an impermissible challenge to sub-section (L) of the regulations and dismissed the second contention as immaterial.¹⁷ However, the Board found no need for a waiver for NRDC's first contention and admitted the portions of that contention challenging Exelon's use of economic data and consideration of SAMA candidates identified as potentially cost-beneficial at other sites.¹⁸

The Staff and Exelon appealed the Board's ruling.¹⁹ On appeal, the Commission found that the first contention impermissibly challenged its regulations and therefore the Board erred in admitting portions of it without an accompanying waiver petition.²⁰ The Commission remanded the case to the Board to allow NRDC to file a waiver petition pursuant to § 2.335(b) to support the admitted portions of the first contention as well as any parts of the second and third contentions the Board may have dismissed as impermissible challenges to NRC regulations.²¹ The Commission noted that its *Millstone* decision provided the applicable waiver standard.²² In response, NRDC sought a waiver of sub-section (L) for (1) the two portions of the first contention initially admitted by the Board, regarding economic data and SAMA candidates

¹⁶ NRC Staff's Answer to Natural Resource Defense Council Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011) (ADAMS Accession No. ML11355A174) (Staff Answer); Exelon's Answer Opposing NRDC's Petition to Intervene (Dec. 20, 2011) (ADAMS Accession No. ML11354A451).

¹⁷ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-08, 75 NRC __, __ (Apr. 4, 2012) (slip op. at 29-30, 34). The Board also dismissed a fourth contention, related to alternatives to the project. *Id.* at 39.

¹⁸ *Id.* at 27.

¹⁹ NRC Staff's Notice of Appeal of LBP-12-08 (Apr. 16, 2012) (ADAMS Accession No. ML12107A406) (Staff's Notice of Appeal); Exelon's Notice of Appeal of LBP-12-08 (Apr. 16, 2012) (ADAMS Accession No. ML12107A417).

²⁰ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC __, __ (Oct. 23, 2012) (slip op. at 12-14).

²¹ *Id.* at 15.

²² *Id.* at 14 n. 55 (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)).

considered at other facilities,²³ and (2) a portion of its third contention, concerning computer modeling.²⁴

In LBP-13-1, the Board found that NRDC did not meet the Commission's waiver standards "but through no fault of their representatives."²⁵ Rather, in light of the Board's understanding of sub-section (L), the Board concluded that waiving that regulation amounted to a "seemingly impossible task."²⁶ As a result, the Board referred its order in LBP-13-1 to the Commission under 10 C.F.R. § 2.323(f)(1) to "shed light on the interplay of" sub-section (L) and the waiver standards.²⁷ The Board also asserted that the Commission's waiver standards, as described in *Millstone*, went beyond the terms of section 2.335(b) and that only the first two *Millstone* factors were supported by the text of that section.²⁸ Exelon filed an unopposed motion asking the Commission to accept briefs from the parties on the Board's referred ruling in LBP-13-1,²⁹ which the Commission granted on February 26, 2013.³⁰

LEGAL STANDARDS

I. Interlocutory Review

Under 10 C.F.R. § 2.323(f), licensing boards may refer rulings to the Commission that involve "a novel issue that merits Commission review at the earliest opportunity." While interlocutory appeals are generally discouraged, the Commission has recognized that sometimes "interlocutory review is appropriate as an exercise of [its] inherent and ongoing

²³ Waiver Petition at 11 n.5.

²⁴ *Id.*

²⁵ *Limerick*, LBP-13-1, 77 NRC at ___ (slip op. at 13).

²⁶ *Id.*

²⁷ *Id.* (citing 10 C.F.R. § 2.323(f)(1)).

²⁸ *Id.* at 7.

²⁹ Unopposed Motion Requesting Briefing (Feb. 19, 2013) (ADAMS Accession No. ML13050A357).

³⁰ Briefing Order at 1.

supervisory authority over adjudicatory proceedings.”³¹ Thus, the Commission encourages licensing boards to refer to the Commission rulings that present novel questions that “could benefit from early resolution.”³² On review, the Commission may “affirm a Board decision on any ground finding support in the record, whether previously relied on or not.”³³

II. Petitions for Waiver Under 10 C.F.R. § 2.335

Pursuant to 10 C.F.R. § 2.335(a), “[e]xcept as provided in [§ 2.335 (b), (c), and (d)], no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” Subsection (b) of § 2.335 provides,

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.³⁴

In the *Millstone* license renewal proceeding, the Commission emphasized that a waiver of one or more of the license renewal rules may be granted only upon a showing that the following four requirements have been satisfied:

- (i) the rule’s strict application would not serve the purposes for which [it] was adopted;

³¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-00-13, 52 NRC 23, 29 (2000).

³² *Id.* (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998)).

³³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 129, 166 (2005).

³⁴ In addition, “the petition must be accompanied by an affidavit” that “must state with particularity the special circumstances alleged to justify the waiver or exception.” 10 C.F.R. § 2.335(a). NRDC included two affidavits in support of its Waiver Petition. 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) (ADAMS Accession No. ML12326A975) (NRDC Counsel Declaration); Declaration of Christopher J. Weaver, Ph.D., on Behalf of the Natural Resources Defense Council in Support of Motion for Waiver (Nov. 21, 2012) (ADAMS Accession No. ML12326A974) (Weaver Declaration).

- (ii) the movant has alleged special circumstances 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) a waiver of the regulation is necessary to reach a significant safety problem.³⁵

“The use of ‘and’ in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.”³⁶ Thus, unless these requirements are satisfied, any issues the Commission resolved generically through rulemaking cannot be challenged in individual license renewal proceedings.³⁷

Under § 2.335(c), if the Board determines that the petitioning party has not made a *prima facie* showing for waiver as required by section 2.335(b), then “no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.”³⁸ Given the Commission’s interpretation of § 2.335(b), a Board must dismiss any waiver petition that does not establish a *prima facie* case for waiver on each of the four *Millstone* factors.³⁹ If the Board determines that the petitioning party has made the *prima facie* showing for waiver required by

³⁵ *Millstone*, CLI-05-24, 62 NRC at 559-60 (internal quotations omitted). Although the Commission stated that it would only waive application of a rule if a party demonstrated that the waiver was necessary to reach a “significant safety problem,” the Staff assumes that the Commission would also waive a regulation if necessary to reach a significant environmental issue as well. See *infra* Discussion, Section III.

³⁶ *Id.* (emphasis in original). See also *Entergy Nuclear Operation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-06, 75 NRC __, __ (Mar. 8, 2012) (slip op. at 14-15) (applying the four factor *Millstone* test in considering a petition to waive a Part 51 regulation under § 2.335(b)).

³⁷ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10, 12 (2001).

³⁸ 10 C.F.R. § 2.335(c).

³⁹ *Millstone*, CLI-05-24, 62 NRC 551, 559-60; *Pilgrim*, CLI-12-06, 75 NRC at __ (slip op. at 14-15).

section 2.335(b), the Board must certify the petition directly to the Commission for a determination of whether to grant waiver.⁴⁰

III. The NRC's Environmental Review in License Renewal Proceedings

The NRC considers SAMAs in license renewal proceedings as part of its environmental review under the National Environmental Policy Act of 1969 (NEPA).⁴¹ Before undertaking a major action, NEPA requires Federal agencies to prepare a detailed environmental impact statement (EIS) on the proposed action.⁴² The Supreme Court has held, "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences,"⁴³ such as SAMAs. But, the Court has cautioned that "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."⁴⁴

On many environmental issues related to license renewal, the Commission "found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants."⁴⁵ Consequently, the NRC prepared a generic EIS (GEIS) that assessed those issues, called Category 1 issues, generically.⁴⁶ Table B-1 of Appendix B of Subpart A to 10 C.F.R. Part 51 (Table B-1) codifies the results of the GEIS. The Commission also determined that several issues warranted site-specific consideration; these issues are designated as Category 2 issues.⁴⁷ The NRC must address Category 2 issues in the site-

⁴⁰ 10 C.F.R. § 2.335(d).

⁴¹ 10 C.F.R. § 51.53(c)(3)(ii)(L); 42 U.S.C. § 4331.

⁴² 42 U.S.C. § 4332(c).

⁴³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

⁴⁴ *Id.* at 350.

⁴⁵ *Turkey Point*, CLI-01-17, 54 NRC at 11.

⁴⁶ NUREG-1437, Vol. 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report (May 1996) (ADAMS Accession No. ML040690705) (GEIS).

⁴⁷ Table B-1; GEIS.

specific supplemental EIS (SEIS) it prepares for each license renewal application.⁴⁸ In license renewal proceedings, the NRC relies on the applicant's ER to inform its SEIS. Before publication of the SEIS, environmental contentions must challenge the ER.⁴⁹

With respect to the environmental impacts of severe accidents, Table B-1 concludes, "The probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts from severe accidents are small for all plants."⁵⁰ Regarding SAMAs, Table B-1 states that "alternatives to mitigate severe accidents must be considered *for all plants that have not considered such alternatives*."⁵¹ Therefore, because Table B-1 concludes that SAMAs must be considered on a site-specific basis for some plants, it labels severe accidents as a Category 2 issue.⁵² But, the Commission has clarified that the severe-accidents-impact finding and the exception to the SAMA requirement in Table B-1 constitute environmental issues generically "resolved by rule."⁵³

Last, the Supreme Court held in *Marsh v. Oregon Natural Resources Council* that when an agency determines that new information shows that the project "will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared."⁵⁴ Thus, the Commission has found that the NRC must supplement an EIS when new circumstances "reveal a seriously different picture of the

⁴⁸ 10 C.F.R. § 51.95(c).

⁴⁹ 10 C.F.R. § 2.309(f)(2).

⁵⁰ Table B-1; see GEIS at 5-114 to 5-115.

⁵¹ Table B-1 (emphasis added); GEIS at 5-113 to 5-114. Sub-section (L) exempts license renewal applicants from performing a second SAMA analysis in an ER and Table B-1 exempts the Staff from performing a second SAMA analysis in a site-specific EIS. Because NRDC's Petition to Intervene challenged Exelon's ER, the focus of this proceeding has been on sub-section (L). However, the Staff's arguments regarding the SAMA exception in sub-section (L) also apply to Table B-1.

⁵² Table B-1.

⁵³ *Limerick*, CLI-12-19, 76 NRC at ___ (slip op. at 12-13); see also *id.* at 5 n. 20.

⁵⁴ 490 U.S. 360, 374 (1989) (quotations omitted).

environmental impact of the proposed project.”⁵⁵ Because the NRC previously resolved severe accidents and SAMAs generically for Limerick in Table B-1 and the GEIS, the NRC must address severe accidents or SAMAs in the Limerick SEIS only if it discovers new information that reveals “a seriously different picture” of those issues.⁵⁶

DISCUSSION

While the Board correctly held in LBP-13-1 that NRDC’s Waiver Petition did not provide a sufficient basis for waiving sub-section (L), its conclusion that waiving that regulation is impossible and its description of *Millstone* contravene Commission precedent. Therefore, the Commission should (1) take review of the Board’s referral of LBP-13-1, (2) overrule the portions of LBP-13-1 that are contrary to prior Commission holdings, and (3) affirm the Board’s denial of NRDC’s Waiver Petition.

I. The Commission Should Review the Board’s Referral of LBP-13-1 Under § 2.323(f)

The Board referred its ruling to the Commission under 10 C.F.R. § 2.323(f)(1) because it found that NRDC’s Waiver Petition presented a novel issue regarding the “interplay of 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. 2.335(b).”⁵⁷ The Board asserted that NRDC’s Waiver Petition presented a “‘catch 22’ situation” because the Board found that waiver of sub-section (L) was “seemingly impossible.”⁵⁸ Therefore, the Board referred its decision to the Commission for resolution.

While the Staff respectfully disagrees with the Board’s assertion that waiver of subsection (L) is seemingly impossible, the Staff agrees that the Commission should take

⁵⁵ *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 52 (2001) (citing *Hydro Resources, Inc.*, CLI-99-22, 50 NRC 3, 14 (1999)).

⁵⁶ *Id.* Table B-1; GEIS at 5-114. See also 61 Fed. Reg. at 28,480-81 (explaining the findings regarding SAMAs in Table B-1).

⁵⁷ *Limerick*, LBP-13-1, 77 NRC at ___ (slip op. at 13). The Board did not certify the Waiver Petition to the Commission under section 2.335(d) because it held that NRDC’s Waiver Petition did not meet section 2.335(b). *Id.* at 7.

⁵⁸ *Id.* at 13.

review of LBP-13-1 under § 2.323(f) as the order raises issues that are “novel and worthy of the Commission’s immediate attention.”⁵⁹ Exelon is the first license renewal applicant to invoke sub-section (L) in omitting a SAMA analysis in its environmental report. As a result, this proceeding raises novel issues. Moreover, the Board’s interpretation of the purpose of sub-section (L) contravenes Commission precedent and NEPA. The Commission could avoid delay in this, and perhaps other license renewal proceedings, by providing needed guidance on the purpose of sub-section (L) and the proper waiver standard. As a result, the Commission should take review of LBP-13-1 at this time and not delay providing such guidance until the end of the case. The Commission’s consideration of the matter will contribute to a proper adjudicatory decision in this proceeding and allow this proceeding “to continue with minimal disruption to all participants.”⁶⁰

II. The Board Erroneously Concluded that Sub-section (L) Cannot Be Waived

A. The Board Provided an Unreasonably Narrow Reading of the Purpose of Sub-Section (L)

In LBP-13-1, the Board noted that to waive a regulation under 10 C.F.R. § 2.335, a petitioner must show that applying the regulation to a given proceeding “ ‘would not serve the purposes for which [it] was adopted.’ ”⁶¹ The Board found “that the purpose of sub-section (L) is to exempt those plants that have already performed SAMA analyses from considering severe accident mitigation alternatives at license renewal.”⁶² Thus, the Board concluded that because the purpose of sub-section (L) “will *always* be met if no further analysis is required or submitted by the applicant[,] it is unclear how *any* petitioner could ever demonstrate that the purpose of

⁵⁹ *Id.* at 1.

⁶⁰ *Union Electric Co. d/b/a Ameren Missouri*, (Callaway Plant, Unit 2) CLI-11-05, 74 NRC ___, __ (2011) (slip op. at 35).

⁶¹ *Limerick*, LBP-13-01, 77 NRC at ___ (slip op. at 10) (*quoting* 10 C.F.R. § 2.335(b) (alteration in original)).

⁶² *Id.*

sub-section (L) is frustrated by the application of sub-section (L).⁶³

In reaching this conclusion, the Board relied on an unreasonably restricted view of the purpose of sub-section (L); a view that contravenes Commission precedent regarding the purpose of regulations which reach generic environmental findings for Category 1 issues.⁶⁴ As the Commission explained in the *Diablo Canyon* license renewal proceeding, that purpose

“is to allow the NRC to comply with NEPA by identifying and evaluating certain environmental impacts . . . that are generic to reactor license renewal proceedings, and then allowing the [license renewal applicant] and NRC to dispense with site-specific evaluations of such environmental impacts *in situations covered by the generic analysis*.”⁶⁵

In CLI-12-19, the Commission affirmed that “the exception in section 51.53(c)(3)(ii)(L) operates as the functional equivalent of a Category 1 issue.”⁶⁶ Based on this functional equivalency, the Commission’s description of the purpose of Category 1 issues should also apply to sub-section (L). After all, both sub-section (L) and Category 1 issues excuse applicants and the Staff from considering environmental impacts in individual licensing proceedings based on a generic analysis in the GEIS.⁶⁷ Therefore, the purpose of sub-section (L) is not just to excuse license renewal applicants from performing multiple SAMA analyses but to do so “in situations covered by the generic analysis” supporting sub-section (L).⁶⁸

Previous Commission statements also support this understanding. In discussing §

⁶³ *Id.*

⁶⁴ *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 449 (2011).

⁶⁵ *Id.* (quoting with approval *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 303 (2010) (second alteration in original, emphasis added)) (citing 61 Fed. Reg. 28,467 and GEIS at 1-1).

⁶⁶ *Limerick*, CLI-11-11, 77 NRC at __ (slip op. at 13).

⁶⁷ Table B-1; GEIS.

⁶⁸ *Diablo Canyon*, CLI-11-11, 74 NRC at 449. The Board in *Diablo Canyon* considered and rejected an argument, similar to the conclusion in LBP-13-1, “that the sole purpose of the Part 51 rules is simply to expedite the NEPA process and to apply the generic determinations without exception.” *Diablo Canyon*, LBP-10-15, 72 NRC at 303.

2.335's predecessor, the Commission stated that special circumstances showing that a rule would not serve the purpose for which it was adopted "must be such as to undercut the rationale for the rule sought to be waived."⁶⁹ Thus, the critical inquiry under § 2.335 is not whether waiving a rule would lead to a consideration of an issue the rule resolved generically, but whether the issue *should* be considered because the rationale supporting the rule does not apply to the proceeding. Therefore, the Board erred by not considering whether new information could ever undermine the *rationale* supporting sub-section (L).

B. The Board's Order Incorrectly Suggested That No New Information Could Ever Challenge Sub-Section (L)

The Board also implied that no new information could ever impinge on the basis for sub-section (L) because in promulgating that regulation, "the Commission understood that technology would change, and that new SAMA candidates could emerge over time."⁷⁰ The analyses supporting sub-section (L) in the GEIS and Commission's Statements of Consideration (SOC) accompanying the rule acknowledge that SAMAs are an evolving field. However, the analyses supporting sub-section (L) also rest on other considerations that could be undermined by changing circumstances.⁷¹ Therefore, contrary to the Board's suggestion, a petitioner could successfully waive sub-section (L) by challenging those other considerations in a given proceeding.

In the GEIS and the accompanying SOC, the NRC explained the purpose behind the finding in sub-section (L) that a subsequent SAMA analysis is unnecessary for license renewal if the Staff has previously considered the issue.⁷² In the GEIS, the NRC noted that the agency already considered severe accident mitigation for all facilities under several ongoing programs,

⁶⁹ *Public Service Co. of New Hampshire* (Seabrook Station Units 1 and 2), CLI- 88-10, 28 NRC 573, 597 (1988).

⁷⁰ *Limerick*, LBP-13-1, 77 NRC at __ (slip op. at 12) (*citing* 61 Fed. Reg. at 28,481).

⁷¹ GEIS at 5-106 to 5-114; 61 Fed. Reg. at 28,481.

⁷² GEIS at 5-106 to 5-114; *see also* 61 Fed. Reg. at 28,481 (explaining sub-section (L)).

including the individual plant examination (IPE) and individual plant examination for external events (IPEEE) programs, the containment performance improvement (CPI) program, and the accident management (AM) program.⁷³ The GEIS also recognized that the NRC had already completed three SAMDA reviews for Limerick, Watts Bar, and Comanche Peak.⁷⁴ The GEIS noted that these reviews had only found that plant procedural or programmatic improvements and minor plant modifications warranted further consideration.⁷⁵

Based on these reviews and programs, the NRC “expect[ed] that a site-specific consideration of severe accident mitigation for license renewal will only identify procedural and programmatic improvements (and perhaps minor hardware changes) as being cost-beneficial in reducing severe accident risk or consequence.”⁷⁶ Likewise, the Commission believed it “unlikely that any site-specific consideration of severe accident mitigation alternatives for license renewal will identify major plant design changes or modifications that will prove to be cost-beneficial for reducing severe accident frequency or consequences.”⁷⁷ The GEIS concluded, “Therefore, a site-specific consideration of alternatives to mitigate severe accidents shall be performed for license renewal *unless such a consideration has already been included in a previous EIS or related supplement.*”⁷⁸

This conclusion finds support in the GEIS’s related conclusion that the probability-weighted environmental impacts of severe accidents would be small during the term of the

⁷³ GEIS at 5-107; *see also* 61 Fed. Reg. at 28,481 (discussing the CPI, IPE, and IPEEE programs).

⁷⁴ GEIS at 5-110 to 5-113; *see also* 61 Fed. Reg. at 28,481 (noting that the NRC already considered SAMDAs for Limerick Units 1 and 2, Comanche Peak Units 1 and 2, and Watts Bar Unit 1).

⁷⁵ GEIS at 5-107, 5-110; *see also* 61 Fed. Reg. at 28, 481 (noting that the IPE, IPEEE, and CPI programs and previous SAMDA analyses had only found programmatic, procedural, and minor plant improvements warranted further consideration).

⁷⁶ GEIS at 5-113 to 5-114.

⁷⁷ 61 Fed. Reg. at 28,481.

⁷⁸ GEIS at 5-114 (emphasis added). The GEIS recognized that this exception would apply to Limerick. *Id.*

renewed license.⁷⁹ The conclusion that the impacts are “small” for severe accidents equates to a determination that the probability-weighted effects of severe accidents “are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute or resource.”⁸⁰ In responding to comments on the GEIS, the Commission observed that this analysis was conservative because it tended “to over-predict, rather than under-predict, environmental consequences” of severe accidents.⁸¹

Therefore, the NRC based the conclusion in sub-section(L) on a determination that in light of the relatively minor benefits future cost-beneficial SAMAs would provide, the agency need only visit the issue once per facility.⁸² The NRC made this finding even though it recognized that future SAMA analyses may use different methodologies to identify additional minor cost-beneficial SAMAs.⁸³ In turn, the expectation that future SAMA analyses would only uncover minor SAMAs rested on the agency’s prior analyses of severe accident mitigation.⁸⁴ Those analyses had only found programmatic and procedural improvements and minor plant modifications that merited further consideration.⁸⁵ Moreover, the agency’s determination that the probability-weighted impact of severe accidents would be small further supports the exception in sub-section (L).⁸⁶

⁷⁹ *Id.* at 5-114 to 5-115.

⁸⁰ Table B-1.

⁸¹ 61 Fed. Reg. at 28, 480.

⁸² *Id.* at 28,481-82; GEIS at 5-114.

⁸³ 61 Fed. Reg. at 28,481.

⁸⁴ GEIS at 5-114; 61 Fed. Reg. at 28, 481.

⁸⁵ GEIS at 5-114; 61 Fed. Reg. at 28, 481.

⁸⁶ Table B-1. The NRC’s license renewal experience has borne out these predictions. Subsequent analyses have concluded that the probability weighted impacts of a severe accident are indeed small. NUREG-1437, Vol. 2, Rev. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Appendices, Draft Report for Comment, at E-43 to E-44 (July 2009) (ADAMS Accession No. ML091770048). Limerick completed an IPE and IPEEE. Staff Answer at 9. Moreover, potentially-cost beneficial SAMAs “tend to be low-cost improvements such as modifications to plant procedures or training, minimal hardware changes, and use of portable equipment.” Perspectives on

A petitioner could challenge the application of the rationale underlying the exception in sub-section (L) by challenging any one of these conclusions with respect to a particular facility. For example, a petitioner could demonstrate that a given cost-beneficial mitigation measure not considered by the NRC might provide more than a minor benefit for the facility in question. Several recent SAMA analyses at pressurized water reactors have identified SAMA candidates related to the reactor coolant pump seals that could result in substantial reductions to core damage frequency or off-site dose risk.⁸⁷ Given the magnitude of these reductions, these SAMAs could be the type of SAMAs that could support a successful waiver petition, had the NRC not already considered them in documents supporting the IPE program.⁸⁸ They demonstrate that some SAMAs could provide a sufficient reduction in severe accident risk to support a successful waiver petition of sub-section (L).

A petitioner could also challenge the application of the rationale of sub-section (L) at a particular facility by demonstrating that the risk of severe accidents is greater at that facility than previously supposed, that the Staff never completed the studies the Commission anticipated would further examine severe accident mitigation, or that those studies in fact routinely discovered significant, non-minor, cost-beneficial SAMAs. Likewise, the Commission noted in

Severe Accident Mitigation Alternatives for U.S. Plant License Renewal, at 10 (Sept. 30, 2009) (ADAMS Accession No. ML092750488) (Perspectives on SAMAs).

⁸⁷ E.g., NUREG-1437, Supplement 40, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Kewaunee Power Station, Final Report, at F-22 (Aug. 2010) (ADAMS Accession No. ML102280229); Applicant's Environmental Report - Operating License Renewal Stage, Sequoyah Nuclear Plant, at E-140 (Jan. 7, 2013) (ADAMS Accession No. ML13024A010).

⁸⁸ See e.g., NUREG-1150, Vol. 1, Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants, at 1-2, 7-5 to 7-6 (Dec. 1990) (ADAMS Accession No. ML040140729) (noting that the report supports development of the NRC's IPE program, discussing the importance of reactor coolant pump seal integrity, and noting that the Zion Nuclear Plant had committed to upgrade equipment to reflect this vulnerability). In the GEIS, the NRC stated that it would determine whether modifications identified by the IPE program warranted further consideration under the terms of the agency's backfit rule, 10 C.F.R. § 50.109, which establishes a high standard for changing a plant's licensing basis. GEIS at 5-107. Thus, mitigation measures that could be significant under *Marsh* may not have warranted further consideration under the IPE program when the Commission initially considered them. Moreover, the NRC has continued to study reactor coolant pump seals as part of its ongoing safety review of operating reactors. NUREG-0933, Supp. 34, Resolution of Generic Safety Issues, at 32 (Sep. 2011) (ADAMS Accession No. ML11353A382).

CLI-12-19 that new information may require waiver of sub-section (L) if it “could render invalid the original site-specific analysis.”⁸⁹ Therefore, the Board’s suggestion that no information could ever undermine the rationale supporting sub-section (L)⁹⁰ is simply not correct.

The Board’s analogy to the Category 1 issue of bird collisions with cooling towers illustrates this error in the Board’s reasoning.⁹¹ The Board noted that the Category 1 bird collision issue rests on a finding that “[t]hese 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.”⁹² The Board argued that a petitioner may successfully waive this rule by showing that “changes in the migratory habits of a certain bird during the initial operating term led to a large number of collisions with the cooling towers at a specific plant.”⁹³ In contrast, the Board argued that “the possibility that new SAMA candidates may become available cannot be the basis for a successful waiver petition, because the Commission knew that SAMA technology would change.”⁹⁴

However, as described above, the Board relies on too narrow a description of the Commission’s rationale for sub-section (L). The Commission did not only expect that future SAMA analyses may uncover cost-beneficial SAMAs, the Commission expected that those SAMA analyses would produce programmatic, procedural, or minor plant improvements.⁹⁵ Thus, just as new information could require waiver of the generic finding on bird collisions by showing that the issue “may be a problem,” new information could also require waiver of sub-

⁸⁹ *Limerick*, CLI-12-19, 76 NRC at ___ n. 54 (slip op. at 13 n. 54).

⁹⁰ *Limerick*, LBP-13-1, 77 NRC at ___ (slip op. at 11-12).

⁹¹ *Id.*

⁹² *Id.* at 11 (*citing* Table B-1).

⁹³ *Id.*

⁹⁴ *Id.* at 12 (*citing* 61 Fed. Reg. at 28,481).

⁹⁵ GEIS at 5-114; 61 Fed. Reg. at 28,481.

section (L) if it showed a potentially major cost-beneficial SAMA. Contrary to the Board's conclusion, a petitioner could meet the first *Millstone* factor by providing new information that undermined the rationale behind sub-section (L).

C. The Board's Interpretation of Sub-Section (L) Would Render the Provision
Inconsistent with NEPA

Finally, the Board's conclusion that waiving sub-section (L) is a "seemingly impossible task" in LBP-13-1 creates an interpretation of the NRC's regulations that would render the regulations inconsistent with NEPA. As discussed above, the NRC must address severe accident mitigation for reactor licensing actions.⁹⁶ In addition, the NRC must consider whether new and significant information provides a seriously different picture of environmental issues already resolved in a previous EIS, such as the GEIS.⁹⁷ Finally, the D.C. Circuit has held that the NEPA process must fully accompany an application for a federal license through every stage of the agency's review including, where provided by the agency, adjudications.⁹⁸ If the Board's interpretation of sub-section (L) stands, namely that waiver of that regulation is seemingly impossible, any new and significant information affecting the agency's generic finding on severe accident mitigation would not accompany the license renewal application through the agency adjudication of particular license renewal applications. For example, NRDC would have no opportunity to bring claims of new and significant information regarding SAMAs in this adjudication. Thus, the Board's interpretation would render sub-section (L) inconsistent with binding precedent governing NEPA compliance.⁹⁹

Therefore, the Commission should overturn the Board's conclusion that a petitioner could never produce new information to waive sub-section (L) under 10 C.F.R. § 2.335. This

⁹⁶ *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989).

⁹⁷ *Marsh*, 490 U.S. at 373-74.

⁹⁸ *Calvert Cliffs' Coordinating Comm, Inc. v. AEC*, 449 F.2d 1109, 1117-19 (D.C. Cir. 1971).

⁹⁹ *Id.*

conclusion rests on an unreasonably narrow view of the purpose of sub-section (L), relies on a similarly limited description of the rationale supporting the rule, and, ultimately, yields an interpretation of agency regulations that is inconsistent with NEPA. Nonetheless, the Commission should rely on alternate grounds to find that NRDC has not submitted a sufficient waiver petition to meet § 2.335.¹⁰⁰ As outlined in Section IV., NRDC has not provided enough information to meet any of the four parts of the *Millstone* test, which as discussed in Section III., is the correct standard for evaluating waiver petitions. Consequently, while the Commission should overturn the Board's rationale for denying NRDC's Waiver Petition, the Commission should uphold the Board's ultimate decision to deny the Waiver Petition.

III. The Board's Analysis of *Millstone* Contravenes Commission Precedent

In its order ruling on NRDC's Waiver Petition, the Board asserted that the Commission's *Millstone* factors establish "a more arduous [test] for waiver petitions" than that outlined in § 2.335(b).¹⁰¹ Specifically, the Board stated that:

on its face, Section 2.335(b) appears to only require a petitioner to satisfy the first two prongs of the *Millstone* test. In other words, Section 2.335(b) does not require petitioners to demonstrate that their complaint is "unique" to the facility in question *or* that their complaint reflects a "significant safety issue."¹⁰²

Given this view of *Millstone*, the Board only examined whether NRDC's Waiver Petition met the first two *Millstone* factors, which the Board considered the "threshold of 10 C.F.R. 2.335(b)."¹⁰³ The Board's conclusion that "Section 2.335(b) does not require petitioners to demonstrate that their complaint is 'unique' to the facility in question or that their complaint

¹⁰⁰ *Private Fuel Storage*, CLI-05-01, 61 NRC at 166.

¹⁰¹ See *Limerick*, LBP-13-1, 77 NRC __ (slip op. at 6). See *id.* at 7 ("It is clear to us that the *Millstone* test establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. 2.335(b).").

¹⁰² *Id.* at 7.

¹⁰³ *Id.* See also *id.* at 7-12 (providing Board's analysis).

reflects a 'significant safety issue' ”¹⁰⁴ is contrary to Commission precedent interpreting 2.335(b).¹⁰⁵ The Commission's decision in *Millstone* plainly establishes that all four *Millstone* factors must be met to justify waiver, and the Commission has frequently applied this test to waiver petitions and observed that such petitions must meet all four factors.¹⁰⁶

The third *Millstone* factor embodies the Commission's determination that for reasons of fairness and efficiency, a waiver petition must raise issues unique to the facility, not generic issues applicable to any facility.¹⁰⁷ The text of § 2.335(b) also supports this requirement to provide unique facts not common to a large class of facilities. The regulation states that the petition must identify “*the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule...would not serve the purposes for which the rule...was adopted.*”¹⁰⁸ Absent this showing of uniqueness, the proper challenge to a regulation is a petition for rulemaking.¹⁰⁹

Regarding the fourth *Millstone* factor, the Commission has explained that the purpose of this factor is to only allow waiver petitions to be certified if they raise significant regulatory matters:

The Commission also believes that a [waiver petition] ought not to be certified unless the petition and other allowed papers indicate that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. The

¹⁰⁴ *Id.* at 7.

¹⁰⁵ See, e.g., *Pilgrim*, CLI-12-06, 75 NRC at ___ (slip op. at 15-16) (deciding a waiver petition seeking to waive a Part 51 regulation did not meet *Millstone* because it did not identify a unique issue).

¹⁰⁶ *Millstone*, CLI-05-24, 62 NRC at 559-60; *Pilgrim*, CLI-12-06, 75 NRC at ___ (slip op. at 14); *Limerick*, CLI-12-19, 76 NRC at ___ (slip op. at 14 n. 55).

¹⁰⁷ See *Millstone*, CLI-05-24, 62 NRC at 559-60. See also Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,129, 15,136 (July 28, 2012) (“[R]ule making proceedings [are] the appropriate forum for settling basis policy issues.”); NRC Staff Answer to Natural Resources Defense Council Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), at 34 (Dec. 14, 2012) (ADAMS Accession No. ML12349A384) (NRC Staff Answer to NRDC's Waiver Petition).

¹⁰⁸ 10 C.F.R. § 2.335(b) (emphasis added).

¹⁰⁹ 10 C.F.R. 2.335(e).

Commission's agenda is crowded with *significant regulatory matters*, including new rules on nuclear plant maintenance, fitness for duty, and high-level waste repository licensing, and safety oversight of the over 100 nuclear power plants with operating licenses. *It would not be consistent with the Commission's statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.*¹¹⁰

Thus, while the fourth *Millstone* factor says "safety problem," the rationale underlying the factor suggests that a significant regulatory matter, including an environmental issue, could meet the fourth *Millstone* factor. Therefore, the Commission has also reasonably indicated that an environmental issue can fall within the fourth *Millstone* factor.¹¹¹

For the reasons discussed above, the four factor *Millstone* test is the correct standard for evaluating NRDC's Waiver Petition. The Board's holding to the contrary diverges from Commission decisions and the text of § 2.335(b). Therefore, the Commission should also overturn this portion of LBP-13-1.

IV. NRDC's Waiver Petition Does Not Meet Any of the *Millstone* Factors and the Commission Should Affirm the Board's Denial of the Petition

As discussed in the Staff's Answer to NRDC's Waiver Petition and summarized below, NRDC has not made a *prima facie* case for waiver regarding any of the four required *Millstone* factors. Therefore, the Commission should affirm the Board's denial of NRDC's Waiver Petition.¹¹²

A. Factor 1 Not Met: Applying Sub-Section (L) in the Limerick License Renewal Proceeding Would Serve the Purpose for Which the Rule Was Adopted

The purpose of sub-section (L) is to codify the Commission's determination that if the Staff has previously considered SAMAs in an EIS or supplement for a plant, the applicant need

¹¹⁰ *Seabrook*, CLI-88-10, 28 NRC at 597.

¹¹¹ See *Diablo Canyon*, CLI-11-11, 74 NRC at 449. See *Limerick*, CLI-12-19, 76 NRC at ___ n. 55 (slip op. at 14 n. 55) (indicating that a waiver under § 2.335(b) was the proper procedural mechanism for seeking a waiver of NRDC's claims regarding sub-section (L), an environmental regulation).

¹¹² See *Limerick*, LBP-13-1, 77 NRC ___ (slip op. at 1); *Private Fuel Storage*, CLI-00-13, 52 NRC at 28-29.

not reassess SAMAs for license renewal since an additional SAMA analysis is unlikely to uncover major cost-beneficial SAMAs.¹¹³

Instead of providing an argument about why the purpose of sub-section (L) would not be served in this proceeding, NRDC's Waiver Petition offered a narrow view of the purpose of the rule, while acknowledging that its view is contrary to the regulation's plain text.¹¹⁴ As the Board explained, NRDC claimed that the purpose of sub-section (L) is that "if the staff has previously considered certain severe accident mitigation alternatives, a consideration of those specific alternatives need not be provided, but a consideration of other alternatives must be provided."¹¹⁵ This assertion contravenes the plain text of sub-section (L), which waived the requirement for a "consideration" of SAMAs altogether, not just the specific severe accident mitigation alternatives previously considered at a plant. Therefore, like the Staff, the Board was not persuaded by NRDC's arguments in support of its "strained and inappropriate interpretation" of the purpose of sub-section (L).¹¹⁶

NRDC makes several other arguments to support its claim that sub-section (L) does not serve its intended purpose in this proceeding.¹¹⁷ For example, NRDC provides a list of cost-beneficial or potentially cost-beneficial SAMA candidates identified in SAMA analyses for other facilities.¹¹⁸ But, NRDC does not indicate how any of the SAMAs it provides undermine the rationale supporting sub-section (L), which expressly noted that additional minor SAMAs could

¹¹³ 61 Fed. Reg. at 28,481; GEIS at 5-114; *Diablo Canyon*, CLI-11-11, 74 NRC at 449.

¹¹⁴ See Waiver Petition at 17 ("Accordingly, *despite its language*, the *purpose* of 10 C.F.R. 51.53(c)(3)(ii)(L) was simply to exempt companies such as Exelon from being forced to reconsider *specific alternatives previously considered . . .*") (first emphasis added). See also NRDC's Waiver Petition at 19-21.

¹¹⁵ *Limerick*, LBP-13-1, 77 NRC __ (slip op. at 9).

¹¹⁶ *Id.* See generally NRC Staff Answer to NRDC's Waiver Petition at 12 – 27 (discussing why NRDC's Waiver Petition does not meet the first *Millstone* factor).

¹¹⁷ See Weaver Declaration.

¹¹⁸ See *id.* at 5-8.

be identified in future SAMA reviews at other plants.¹¹⁹

Additionally, NRDC alleges that the 1989 SAMDA Analysis “did not compute cost-benefit values for SAMDA candidates with respect to their reduction in land contamination subject to long-term interdiction, or the reduction in associated economic cost, from a severe accident.”¹²⁰ Thus, NRDC argues 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-benefit results in a new SAMA analysis for Limerick.”¹²¹

But, NRDC’s assumption that the 1989 SAMDA Analysis did not consider economic impacts is incorrect. In the 1989 SAMDA Analysis, “the staff used [a] \$1000 per person-rem value as a screen to compare values and impacts.”¹²² At the time, the \$1000 per person-rem value had been defined “as a surrogate for all averted offsite losses, health as well as property.”¹²³ Although the agency later determined not to use the \$1000 per person-rem value as a surrogate for economic losses, the agency made that determination before it promulgated sub-section (L).¹²⁴ Thus, NRDC’s challenges regarding economic damages do not undermine the stated rationale for the regulation. Rather, when the Commission promulgated the regulation it recognized that different SAMA analyses, including the 1989 SAMDA Analysis, took differing approaches to considering off-site economic costs. With this knowledge, the Commission recognized that (1) the 1989 SAMDA Analysis was a SAMA analysis and another SAMA analysis need not be done at Limerick for license renewal and (2) declined to codify or

¹¹⁹ 61 Fed. Reg. at 28, 481. See also NRC Staff Answer to NRDC’s Waiver Petition at 24-25.

¹²⁰ Weaver Declaration at 11-12 ¶ 17.

¹²¹ See *Id.* See NRC Staff’s Answer to NRDC’s Waiver Petition at 25-26 (discussing this claim).

¹²² NUREG-1530, “Reassessment of NRC’s Dollar Per Person-Rem Conversion Factor Policy,” at 3 (Dec. 1995) (ADAMS Accession No. ML063470485) (NUREG-1530). See also *id.* at 4; 1989 SAMDA Analysis at v, vi, 1, 2, 10, 14, 15.

¹²³ NUREG-1530 at 3.

¹²⁴ *Id.* at 6-7.

endorse one particular approach to considering off-site economic costs.¹²⁵

Finally, NRDC argues that the ER should have considered “the most up-to-date [accident modeling] methodology.”¹²⁶ But, the rule specifies “a consideration of severe accident mitigation alternatives,” not a particular methodology. The SOC supporting the rule specifically stated that sub-section (L) does not codify the scope of an acceptable SAMA.¹²⁷ Instead, the Commission recognized that SAMA analyses could be conducted in a variety of ways, using a variety of methods, and that each severe accident mitigation consideration provided by an applicant would be reviewed on its merits to “determine whether it constitutes a reasonable consideration of severe accident mitigation alternatives.”¹²⁸

When it promulgated sub-section (L), the Commission understood that future SAMA analyses may uncover additional cost-beneficial SAMAs, that previous SAMA analyses employed different methods to consider economic information, and that future SAMA analyses could use differing methodologies. Thus, NRDC’s arguments regarding additional SAMA candidates, economic data, and advanced computer modeling do not undermine the Commission’s stated rationale for sub-section(L). Because NRDC has not met the first *Millstone* factor, the Waiver Petition should be denied.¹²⁹

B. Factor 2 Not Met: NRDC Has Not Demonstrated “Special Circumstances”

NRDC has also not made a *prima facie* case with respect to the second *Millstone* factor, which requires a showing that there are “special circumstances that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to

¹²⁵ 61 Fed. Reg. at 28,481.

¹²⁶ Weaver Declaration at 5-6 ¶ 9 and Waiver Petition at 21.

¹²⁷ See 61 Fed. Reg. at 28,481-82.

¹²⁸ 61 Fed. Reg. at 28,481-82.

¹²⁹ See *Millstone*, CLI-05-24, 62 NRC at 559-60; 10 C.F.R. §2.335(b).

be waived.”¹³⁰

To meet the second *Millstone* factor, NRDC argues that additional SAMA candidates revealed from other facilities’ SAMA analyses were not considered by the Commission when it decided that Limerick need not prepare another SAMA analysis for license renewal.¹³¹ But, the Commission explicitly addressed the possibility that future SAMA analyses at other plants could identify different cost-beneficial SAMAs. Specifically, the Commission noted that future SAMA analyses could identify cost-beneficial changes that “generally would be procedural and programmatic fixes, with any hardware changes being only minor in nature and few in number.”¹³² NRDC does not indicate how the additional SAMA candidates listed in the Waiver Petition are different from those contemplated by the Commission when promulgating sub-section (L). Therefore, NRDC’s arguments regarding additional SAMAs do not demonstrate a special circumstance.

Likewise, as discussed above, NRDC’s arguments regarding economic impacts and computer modeling do not raise special circumstances unforeseen by the Commission when it promulgated sub-section (L).¹³³ Rather, the Commission considered both of these issues when it promulgated sub-section (L) and determined that Limerick need not prepare another SAMA analysis for license renewal. The Limerick SAMDA analyses relied on \$1000 per person rem screen to account for economic costs, but later analyses considered economic costs separately.¹³⁴ Thus, the Commission clearly understood that future SAMA analyses may address economic costs outside of the \$ 1000 per person-rem screen, but declined to require Limerick to revisit the issue. The Commission likewise noted that different SAMA analyses

¹³⁰ *Millstone*, CLI-05-24, 62 NRC at 560 (internal quotations omitted). See also 10 C.F.R. § 2.335(b).

¹³¹ Waiver Petition at 23-24.

¹³² 61 Fed. Reg. at 28,481.

¹³³ Waiver Petition at 23-24.

¹³⁴ NUREG-1530 at 6-7.

could take different approaches to considering severe accident mitigation and expressly declined to require all SAMA analyses to utilize one methodology.¹³⁵ Therefore, NRDC has not made a *prima facie* case that there are special circumstances regarding these claims, and its Waiver Petition must be denied.

C. Factor 3 Not Met: NRDC's Claims Are Not Unique to Limerick

NRDC has also not made a *prima facie* case that there are special circumstances that are “ ‘unique’ to the facility rather than ‘common to a large class of facilities.’ ”¹³⁶ NRDC argues its claims are unique because “the Limerick plant will be the *only* [boiling water reactor] nuclear power plant that will be relicensed without the operator or the NRC giving NEPA consideration to the most recent mitigation alternatives, assessment methodologies, and economic considerations.”¹³⁷ As explained in the Staff's Answer to NRDC's Waiver Petition, this claim is not unique. Many other facilities, including reactors licensed under Part 52 and reactors applying for a subsequent license renewal, could take advantage of the exception in sub-section (L).¹³⁸ Therefore, a rulemaking, not a waiver, would be the more appropriate mechanism to address NRDC's concern.¹³⁹ Because NRDC has not made a *prima facie* case with respect to the third *Millstone* factor, its Waiver Petition must be denied.

D. Factor 4 Not Met: NRDC Has Not Established the Significance of Its Claims

An environmental issue should meet the fourth part of the *Millstone* test if it raises a “significant” environmental impact under *Marsh* (*i.e.*, the issue reveals a seriously different

¹³⁵ For example, although the Commission acknowledged that Level 3 PRAs had been used in prior SAMDA analyses, it did not necessarily require future applicants to perform them, noting instead that “other quantitative approaches” would be acceptable. See 61 Fed. Reg. at 28,481.

¹³⁶ *Millstone*, CLI-05-24, 62 NRC at 559-60.

¹³⁷ Waiver Petition at 24.

¹³⁸ NRC Staff Answer to NRDC's Waiver Petition at 35.

¹³⁹ See Staff Answer at 35. See also § 2.335(e) (discussing option to submit rulemaking petition).

picture of the environmental impact of the proposed project).¹⁴⁰ This interpretation aligns with (1) the Commission's approach to establishing the significance of an environmental issue under its standards for reopening a closed record,¹⁴¹ (2) many courts' interpretation of *Marsh*,¹⁴² and (3) NRC regulations, which define significance in terms of "effects" and "impact."¹⁴³ As mitigation measures, SAMAs themselves do not lead to any appreciable environmental effects or impacts. Instead, mitigation measures reduce the environmental impact of the proposed action;¹⁴⁴ for license renewal, SAMAs reduce the risk of a severe accident during the period of extended operation (PEO).¹⁴⁵ Thus, with respect to SAMAs, new information would be significant if it indicated a given SAMA was not just cost-beneficial¹⁴⁶ but could also provide a "serious" reduction in the risk of severe accidents during the PEO.

NRDC's Waiver Petition does not establish the significance of its claims, and should therefore be denied. NRDC claims that it has identified "significant" information in three areas:

¹⁴⁰ See Staff Answer to NRDC Waiver Petition at 37-39. See *Marsh*, 490 U.S. at 374.

¹⁴¹ To reopen a closed record, a petitioner must "address a significant safety or environmental issue." 10 C.F.R. § 2.326(a)(2). See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 29 (2006) (equating the significance of an environmental issue with the *Marsh* standard for supplementing an EIS).

¹⁴² See e.g., *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 663 (3d Cir. 1999) ("[T]he key to whether a Supplemental Environmental Impact Statement is necessary is not whether the area has undergone significant change, but whether the proposed [action] will have a significant impact on the environment in a manner not previously evaluated and considered."); *North Idaho Community Action Network v. Dep't of Transp.*, 545 F.3d 1147, 1157 (9th Cir. 2008) (quotations omitted) (finding that an agency must supplement an EIS "only if changes, new information, or circumstances may result in significant environmental impacts in a manner not previously evaluated and considered").

¹⁴³ See 50 C.F.R. § 51.14(b) (noting that the definitions in 40 C.F.R. § 1508.27 will be used in implementing NEPA); 40 C.F.R. § 1508.27 (defining significance in terms of "effects" and "impact").

¹⁴⁴ *Methow Valley*, 490 U.S. at 351-52.

¹⁴⁵ 10 C.F.R. § 51.53(c)(3)(ii)(L); Table B-1.

¹⁴⁶ To be meaningful under the NRC's NEPA analysis, the new information must also pertain to cost-beneficial SAMAs. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 11-12 (2002) (noting that in SAMA analyses "it will always be possible to come up with some type of mitigation alternative that has not been addressed" but "whether a SAMA alternative is worthy of more detailed analysis . . . hinges upon whether it may be cost-beneficial").

(1) additional SAMA candidates, (2) economic impacts, and (3) computer modeling.¹⁴⁷ NRDC argues that this information is significant because it could “plausibly cause a materially different result in the SAMA analysis for Limerick”¹⁴⁸ (i.e., establish that additional SAMAs could be cost beneficial).

NRDC’s claims regarding additional SAMA candidates do not provide a *prima facie* case of significance. As discussed above, when promulgating sub-section (L) and concluding that Limerick did not need to undertake a new SAMA analysis at license renewal, the Commission explicitly recognized that future SAMA analyses done at other plants may identify other cost-beneficial SAMAs.¹⁴⁹ However, the Commission expected that most of these SAMAs would be relatively minor, such as “procedural and programmatic fixes.”¹⁵⁰ The Staff’s review of completed SAMA analyses has confirmed that this is indeed the case.¹⁵¹ NRDC has not indicated how any cost-beneficial SAMA it identified would lead to a substantial reduction in risk of severe accidents. Therefore, on its face, the Waiver Petition fails to establish the significance of this issue for purposes of the *Millstone* test.

Likewise, NRDC does not provide sufficient information on its economic data and computer modeling claims to raise a significant issue under the fourth *Millstone* factor.¹⁵² Specifically, NRDC does not indicate how this information could lead to a substantial reduction in severe accident risk at the Limerick facility. Moreover, Limerick’s calculated core damage

¹⁴⁷ Waiver Petition at 20-21 (*citing* Weaver Declaration, NRDC Counsel Declaration).

¹⁴⁸ Weaver Declaration at 2-3.

¹⁴⁹ 61 Fed. Reg. at 28,481.

¹⁵⁰ *Id.*

¹⁵¹ Perspectives on SAMAs at 10.

¹⁵² Waiver Petition at 26-27 (*citing* Weaver Declaration and NRDC Counsel Declaration).

frequency has decreased by nearly an order of magnitude since 1989,¹⁵³ indicating that the risk of severe accidents has already decreased significantly since 1989.¹⁵⁴ Therefore, these factors are unlikely to reveal a significant reduction in risk at Limerick in light of the already-achieved significant reduction in the estimated risk at the facility since 1989.

NRDC also argues that its SAMA claims are “significant” because severe accidents are a significant public safety issue.¹⁵⁵ While severe accidents are obviously an important safety issue, the Staff does not agree that all SAMA claims are significant to public safety. As explained by the Commission and the Staff, SAMAs are part of the environmental review and many past and ongoing studies, analyses, and efforts outside of the SAMA context also reduce the risks associated with a plant.¹⁵⁶ Thus, a SAMA analysis is a search for potentially cost-beneficial measures *beyond* those identified in other contexts, and works to *further* reduce the severe accident risk of a plant.¹⁵⁷ In the reopening context, the Commission has recognized that claims related to severe accident mitigation are not necessarily significant themselves under the *Marsh* standard.¹⁵⁸ Therefore, NRDC’s argument that its claims on economic data,

¹⁵³ ER at 5-5 to 5-6. This reduction is attributed to more reliable data, “improvements in procedural guidance and plant capability,” fewer reactor trips, and implementation of the IPE, Accident Management and CPI programs. *Id.* at 5-6.

¹⁵⁴ The risk of severe accidents is the product of the frequency and consequences of such events. See, e.g., 61 Fed. Reg. at 28,481 (discussing severe accidents in terms of frequency and consequence).

¹⁵⁵ Waiver Petition at 26-27 (arguing that NRDC’s Contentions are significant because “[b]y definition, NRDC’s Contentions concern how to best mitigate for ‘severe’ accidents”).

¹⁵⁶ Since sub-section(L) was promulgated, the NRC has further considered severe accidents and ways to mitigate their impacts, including its response to the events of September 11, 2001, its response to the Fukushima incident, as well as its Level 3 PRA study. See *Diablo Canyon*, CLI-11-11, 74 NRC at ___ (slip op. at 40, 43-44); SRM-SECY-11-0089, Staff Requirements — SECY-11-0089 — Options for Proceeding with Future Level 3 Probabilistic Risk Assessment (PRA) Activities (Sept. 21, 2011) (ADAMS Accession No. ML112640419).

¹⁵⁷ Affidavit of Dr. Nathan E. Bixler and Dr. S. Tina Ghosh in Support of the NRC Staff’s Answer in Opposition to Pilgrim Watch’s Request for Hearing on Post Fukushima SAMA Contention, at 4-5 ¶ 8 (June 6, 2011) (ADAMS Accession No. ML111570502).

¹⁵⁸ *Entergy Nuclear Operation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC ___, __ (June 7, 2012) (slip op. at 28-32).

computer modeling, and other SAMA candidates are significant simply because they relate to severe accident mitigation fails to establish a significant issue under the fourth *Millstone* factor. Because NRDC has not made a *prima facie* case that its claims are significant under *Millstone*, its Waiver Petition must be denied.

CONCLUSION

For the reasons discussed above, the Commission should overturn the Board's rationale for denying NRDC's Waiver Petition, but uphold the Board's ultimate decision to deny the Waiver Petition. Specifically, the Commission should reverse (1) the Board's view of the purpose of sub-section (L) as unduly narrow and contrary to Commission precedent, (2) the Board's suggestion waiving sub-section (L) is a "seemingly impossible task," and (3) the Board's view that section 2.335(b) only requires a petitioner for waiver to meet the first two *Millstone* factors.

However, the Commission should affirm the Board's holding that NRDC's Waiver Petition should be denied because it did not present a "*prima facie* case that it has satisfied 10 C.F.R. 2.335(b)." ¹⁵⁹ Under Commission precedent, a waiver petition must be denied if any one of the four *Millstone* factors is not met. NRDC did not present a *prima facie* case on any of the four *Millstone* factors. For this reason, the Commission should affirm the Board's denial of NRDC's Waiver Petition.

/Signed (electronically) by/
Maxwell C. Smith
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Executed in Accord with 10 CFR 2.304(d)
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¹⁵⁹ *Limerick*, LBP-13-1, 77 NRC at ___ (slip op. at 13).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	50-352-LR/ 50-353-LR
)	
(Limerick Generating Station, Units 1 and 2))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF ON THE BOARD'S REFERRED RULING IN LBP-13-1" in the above captioned proceeding have been served over the Electronic Information Exchange, the NRC's E-Filing System, this 13th day of March, 2013.

/Signed (electronically) by/

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