UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
EXELON GENERATION COMPANY, LLC	)	Docket No. 50-352-LR
	)	Docket No. 50-353-LR
(Limerick Generating Station, Units 1 and 2)	)	
		March 13, 2013
(License Renewal Application)		

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

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GLOSSARY

AEA	Atomic Energy Act of 1954
ASLB or Board	Atomic Safety and Licensing Board Panel
BWR	Boiling Water Reactor
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
ER	Environmental Report
Exelon	Exelon Generation Company, LLC
FES	Final Environmental Statement
IPE	Individual Plant Examination
IPEEE	Individual Plant Examination for External Event Programs
Limerick	Limerick Generating Station, Units 1 and 2
NEPA	National Environmental Policy Act
NRDC	Natural Resources Defense Council
NRDC Contentions	NRDC Petition to Intervene and Notice of Intention to Participate
NRDC Cont. Decl.	NRDC Contention Declaration
PWR	Pressurized Water Reactor
SAMAs	Severe Accident Mitigation Alternatives
TMI	Three Mile Island

INTRODUCTION

In June, 2011, Exelon Generation Company, LLC ("Exelon") filed its license renewal application for the Limerick Generating Station, Units 1 and 2 ("Limerick"), including a discussion of what it considered to be the new information related to its previously conducted analysis of Severe Accident Mitigation Alternatives ("SAMA"), and concluding that none of the information was significant.[1] Natural Resources Defense Council ("NRDC") submitted several straightforward Environmental Contentions that challenged the portion of the ER that discussed SAMAs.[2] The basic thrust of the Contentions is that, in relicensing the nuclear power facility, Exelon – and ultimately the Commission – must fully and fairly consider new and significant information concerning SAMAs for the plant, as dictated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq. Id.*[3]

The Atomic Safety and Licensing Board Panel ("ASLB" or "Board") initially *admitted* NRDC's contention that focused on the existence of new and significant information, reasoning that the Commission's SAMA requirement regulation could not reasonably be interpreted to bar consideration of new and significant information under NEPA.[4] The Commission reversed on

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[1] Applicant's Environmental Report (June 2011) (ADAMS Accession No. ML11179A104 (hereafter "ER") at 5-1 to 5-9.

[2] NRDC Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2001) (hereafter "NRDC Contentions") (attached as Exhibit A, along with NRDC's Contention Declaration ("NRDC Cont. Decl.")).

[3] A SAMA – previously referred to in a more restrictive sense as a "SAMDA" – "is a cost-benefit analysis that addresses whether the expense of implementing a mitigation measure not mandated by the NRC is outweighed by the expected reduction in environmental cost it would provide in a core damage event." *Massachusetts v. NRC*, 2013 WL 668468, *2 (1st Cir. Feb. 25, 2013).

[4] *In re Exelon Generation Co.*, LBP-12-8, slip op. (ASLB Apr. 4, 2012) (hereafter

the ground that the Contentions are barred by 10 C.F.R. § 51.53(c)(3)(ii)(L).[5] Then, when NRDC accepted the Commission's invitation to seek a *waiver* of that regulation pursuant to 10 C.F.R. § 2.335(b), the Board *denied* the waiver, explaining that while NRDC is entitled to have its Contentions aired, it has been put into "a catch-22 situation" because, in the Board's view, it cannot meet the strict criteria necessary for a waiver.[6] However, recognizing that the Commission had specifically invited NRDC to submit the waiver request, this anomalous situation caused the Board to refer the matter to the Commission under 10 C.F.R. § 2.323(f)(1), in light of the novel issue raised, seeking guidance from the Commission on the "interplay of 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. § 2.335(b)." Second ALSB Op. at 14.

NRDC's Contentions should be admitted at this time. Pursuant to NEPA, NRDC has a right to challenge the adequacy of Exelon's environmental analysis based on the existence of new and significant information, a right that is reinforced by the fact that NRDC's challenge is based on Exelon's *own* efforts to analyze new and significant information in its ER and the inadequacy of that analysis. Since Exelon does not dispute that it must consider new and significant information relevant to its previously concluded SAMA analysis, the fundamental question here is whether Commission regulations can legally be interpreted to prohibit NRDC from challenging Exelon's analysis. They cannot.

"First ASLB Op.")

[5] *In re Exelon Generation Co.*, CLI -12-19, 2012 WL 5266118 (N.R.C. Oct. 23, 2012) (hereafter "Comm. Op.")

[6] *In re Exelon Generation Co.* LBP-13-1, slip op. at 13 (ASLB Feb. 6, 2013) (hereafter "Second ASLB Op.").

In particular, as detailed below, NRDC is entitled to the admission of the two bases of Contention 1E originally admitted by the ASLB: (a) that Exelon has omitted from its ER a required analysis of new and significant information regarding potential new SAMA alternatives previously considered for other Boiling Water Reactor ("BWR") Mark II Containment reactors (Contention 1E-1); and (b) that Exelon's reliance on data from Three Mile Island ("TMI") in its analysis of the significance of new information regarding economic cost risk constitutes an inadequate analysis of new and significant information (Contention 1E-2). NRDC is also entitled to the admission of Contention 3E, that seeks to require Exelon to utilize modern techniques for assessing whether new information, including consideration of newly identified severe accident mitigation alternatives for BWR Mark II Containment reactors, are cost-beneficial. *See* NRDC Contentions at 22 (¶¶ 1, 3). Any other result would be contrary to NEPA's dictates. *E.g., Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989).

BACKGROUND

A. STATUTORY AND REGULATORY FRAMEWORK

1. The National Environmental Policy Act

NEPA's "twin aims" are to force every agency "to consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Under NEPA, federal agencies are required to prepare an Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Among other issues, an EIS must

analyze the "environmental impact of the proposed action" and reasonable alternatives. *Id.* § 4332(C).

The completion of an EIS for a proposed action does not end an agency's responsibility to weigh the environmental impacts of a proposed action. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371-72 (1989). As the Supreme Court has recognized, it would be incongruous with NEPA's "action-forcing" purpose to allow an agency to put on "blinders to adverse environmental effects," just because an EIS has been completed. *Id*. at 371. Accordingly, an agency must *supplement* its EIS if there is new information showing that the remaining federal action will affect the quality of the human environment "in a significant manner or to a significant extent not already considered." *Id.* at 374; *see also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) ("When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures"); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000).

The Council on Environmental Quality's ("CEQ") implementing NEPA regulations similarly require that even after a NEPA process is completed, where an agency learns of "significant new circumstances," or new "information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c), it must supplement its NEPA review. This is a continuing obligation, and a NEPA process may require *more than one supplement*. *E.g.*, *Marsh*, 490 U.S. at 368 ("if all of the information contained in the [two documents] was both new and accurate, the Corps would have been required to prepare a *second supplemental* EIS") (emphasis added); *Deukmejian v. NRC*, 751 F.2d 1287, 1298 (D.C. Cir.

1984) (explaining that "the [NRC's] obligations under NEPA [include] a continuing duty to supplement EISs which have already become final whenever the discovery of significant new information renders the original EIS inadequate").

2. The Commission's NEPA Framework For Relicensing Nuclear Power Plants

The scope of the NEPA review for the relicensing of nuclear power plants by the NRC is set out in 10 C.F.R. Pt. 51, and the NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS") (NUREG-1437) (May 1996). NRC's NEPA regulations require an EIS for any major licensing action significantly affecting the quality of the human environment. 10 C.F.R. §§ 51.71, 51.91. Before the EIS is prepared, however, NRC's regulations require that the license applicant must prepare what amounts to a first draft of the EIS, *i.e.*, the ER, 10 C.F.R. § 51.53(c)(1), *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983), which generally must address all the same impacts, alternatives, and other environmental issues that will be addressed later in the NRC's EIS. *Compare* 10 C.F.R. § 51.53(c)(2) *with* 10 C.F.R. § 51.71.

Some environmental issues that might otherwise be germane in a license renewal proceeding have been resolved generically for all plants in the GEIS. These "Category 1" issues are "beyond the scope of a license renewal hearing." *In re Fla. Power and Light Co.*, 54 N.R.C. 3, 11 (2001); *see* 10 C.F.R. § 51.53(c)(3)(i). For other issues, referred to as "Category 2" issues, an ER "must contain analysis of the[ir] environmental impacts." *Id.* § 51.53(c)(3)(ii). This includes the consideration of "alternatives to mitigate severe accidents" – SAMAs, including the "consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts from severe accidents." *Id.* at Table B-1, Postulated

Accidents; *see also, e.g. Limerick Ecology*, 869 F.2d at 741 (holding that SAMAs "must be given careful consideration" in the NEPA process). Thus, as a threshold matter, SAMAs must be considered in individual relicensing proceedings.

Central to the current dispute, the Category 2 obligation for an applicant and NRC Staff to consider SAMAs during relicensing appears to contain a carve-out for plants seeking a renewed license for severe accident mitigation alternatives that have been previously considered for that plant. 10 C.F.R. § 51.53(c)(3)(ii)(L). There are only three plants that arguably fall into this exception – Limerick, Comanche Peak, and Watts Barr.

Nonetheless, consistent with the CEQ regulations, the Commission's own NEPA regulations also provide that supplements to either a Draft EIS, or a Final EIS, will address, *inter alia*, "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. §§ 51.72(a); 51.92(a). In the relicensing context, this obligation is codified at 10 C.F.R. § 51.53(c)(3)(iv), which provides that the EIS for a license renewal "must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." *See also, e.g., In re Union Elec. Co.*, CLI-11-05, 2011 WL 4027741, at 12 (N.R.C. Sept. 9, 2011) (holding further NEPA review required where new information presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned").

Exelon recognizes the paramount role of the "new and significant information" supplementation requirement in its ER, where a discussion of new and significant information related to its previous SAMDA analysis is included. Although Exelon concludes that none of the new information is significant, it clearly implies that if it had found the information was both

new and significant it would have had to supplement its previous SAMDA analysis. *See* ER at 5-4 to 5-9.[7]

B. PROCEDURAL BACKGROUND

1. The Commission's Prior Consideration of SAMAs for Limerick

In 1980, in the wake of the TMI accident, the Commission issued a policy requiring the consideration of "severe accidents in future NEPA reviews." *Limerick Ecology*, 869 F.2d at 726. Five years later, the agency issued a Final Policy Statement that "excluded consideration of severe accident mitigation design alternatives from individual licensing proceedings." *Id.* at 727.

In the meantime, in 1981 Limerick Ecology and others intervened in the licensing proceeding, challenging, *inter alia*, whether the NRC had adequately considered SAMAs. In the Final Environmental Statement ("FES") the staff rejected these arguments, and, as to SAMDAs in particular, "'concluded that there are *no special or unique circumstances* about the Limerick site and environs that would warrant consideration of'" such alternatives. *Id.* at 732 (quoting FES at 5-126) (emphasis added). On appeal, the Board also relied on the conclusion that there were "*no special or unique circumstances* about the Limerick site" that warranted further review. *Id.* (emphasis added).

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[7] In order to challenge a relicensing application, a party generally must file Contentions setting forth, *inter alia*, the specific issues to be raised, a brief explanation of the bases for those issues, and sufficient evidence supporting those bases to demonstrate that the issue is material to the matters to be decided in a relicensing proceeding and is within the scope of the proceeding. 10 C.F.R. § 2.309(f). Among the issues that may *not* be raised in such a proceeding is a challenge to any "rule or regulation of the Commission, or any provision thereof." 10 C.F.R. § 2.335(a). Rather, if a party seeks to challenge a rule or regulation, then it must file a separate "waiver petition" requesting that the rule or regulations be "waived or an exception made for the particular proceeding," based upon "special circumstances with respect to the subject matter of the particular proceeding." *Id.* § 2.335(b).

Limerick Ecology filed a Petition for Review in the Third Circuit. *Id.* at 719. The Court of Appeals first concluded that the Final Policy Statement did not preclude consideration of the issue, *see id.* at 733-36, and then also rejected the argument that no special or unique circumstances at Limerick warranted consideration of SAMAs there. *Id.* at 738-39. In particular, the Court found that: (a) "the Commission itself has noted [that] the impact of SAMDAs on the environment will differ with the particular plant's design, construction and location," and (b) "the risk will vary with the potential consequences," which "will vary *tremendously* across all plants." *Id.* (emphasis added).

The NRC subsequently issued a 1989 document entitled a "Supplement" to the FES for Limerick to address SAMA issues, but the Supplement "discovered no substantial changes in the proposed action as previously evaluated . . . that are relevant to environmental concerns nor significant new circumstances or information relevant to environmental concerns." NUREG-0974 at iii. Thus, the Commission found "no new information that would call into question the FES conclusion" that there is no basis to further consider" SAMAs at Limerick. *Id.* at 1.

2. The Present Proceeding

On November 22, 2011, NRDC submitted a petition to intervene and notice of intent to participate in the Limerick relicensing proceeding, submitting four contentions. *See* NRDC Contentions (Att. A). Contention 1E asserts that, in its ER for the relicensing, Exelon's analysis of new and significant information related to the 1989 SAMDA was inadequate because it failed to properly analyze the significance of *new* information that Exelon conceded existed, and because it failed to acknowledge other new information that was also significant. *Id.* at 16-19. As detailed in NRDC's expert declarations, other BWR plants have identified numerous cost-

beneficial or potentially cost-beneficial SAMAs such as, for example, portable generators for emergency power supply; providing alternative sources of water to address emergencies; and improvements to the connections between electric power systems to allow more flexible supply of critical power needs during an emergency. NRDC Cont. Decl. ¶¶ 12-14. Indeed, as the ASLB recognized, "NRDC has shown there are numerous new SAMA candidates which should be evaluated for their significance." First ASLB Op. at 21.[8]

In Contention 1E, NRDC also argued that Exelon has improperly relied on data from an analysis done at TMI concerning the economic impacts of a severe accident. NRDC Cont. at 18. NRDC explained that use of that analysis was not appropriate since TMI is a markedly different and less economically developed site than Limerick, which includes densely populated areas including Philadelphia, PA. *Id.* NRDC also explained that the comparison is inappropriate because TMI is a Pressurized Water Reactor ("PWR"), with correspondingly different accident scenario source terms than the BWR at Limerick. *Id.*; *see also* NRDC Decl. ¶¶ 17-24.

In addition, in Contention 3E NRDC argued, *inter alia*, that the ER is inadequate in relying on the methodology used in the 1989 SAMDA analysis, both for that analysis and for consideration of any newly identified mitigation alternatives, in light of techniques that have been developed since that SAMDA was conducted to assess whether alternatives are cost-beneficial. NRDC Cont. at 21-23. In particular, Contention 3E asserted, *inter alia*, that the 1989 SAMDA was legally deficient because it failed to use a probabilistic safety assessment severe

[8] NRDC is not seeking a full new SAMA analysis or the redoing of the previous SAMDA analysis. It is seeking consideration of additional potential mitigation measures, using up-to-date methodologies and including full consideration of off-site economic impacts. Thus, what is sought is a supplementation of the prior SAMDA analysis, not a replacement of that analysis with a new SAMA analysis.

accident consequences code system comparable to the MELCOR Accident Consequence Codes Systems ("MACCS") 2. *Id.* Contention 3E was based, in part, on the continuing obligation imposed by NEPA on federal agencies, to update and correct previous information when the agency becomes aware of new information that demonstrates the inadequacy of a prior analysis. *See, e.g., Deukmejian*, 751 F.2d at 1298. Thus, this aspect of Contention 3E sought, *inter alia*, to require Exelon and NRC Staff to use the more accurate and reliable methods available today for assessing the consequences of a severe accident, including economic consequences, and assessing the costs and benefits of the additional mitigation alternatives that are appropriate for BWRs – which has never been done for Limerick.[9]

The applicant and NRC staff opposed intervention, arguing, *inter alia*, that issues related to severe accident mitigation alternatives were precluded by 10 C.F.R. § 51.53(c)(3)(ii)(L).

On April 4, 2012, the Board rejected many of the applicant's and NRC's arguments and admitted a modified version of Contention 1E. First ASLB Op at 40-41. With respect to the threshold argument that any contention concerning SAMAs is precluded by 10 C.F.R. § 51.53(c)(3)(ii)(L), the Board concluded, correctly, that the "regulation[ ] cannot trump statutory mandates," *id.* at 15, and that NEPA mandates an analysis based on "the best information available today." *Id.* The Board further recognized that Exelon had, in fact,

[9] This brief only concerns the Contentions originally admitted by the ASLB, *i.e.*, two aspects of Contention 1E concerning (a) the failure to consider the wider range of mitigation alternatives now identified for BWRs, and (b) the failure to conduct a reliable off-site economic consequences analysis, as well as one aspect of Contention 3E, *i.e.*, the need to use a modern methodology to assess the cost-benefit of new mitigation alternatives for Limerick. NRDC will pursue the other issues raised in its Contentions that were rejected by the ASLB and thus are not presently before the Commission, at the appropriate time.

"identified new information relating to severe accident mitigation," and had included such information in its ER. *Id.* at 30.

Thus, the Board concluded that in the relicensing proceeding Exelon must abide by the regulatory requirement to consider "any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). On that basis the Board admitted a modified Contention 1E focused on the consideration of two of the bases presented by NRDC. *First*, it found that NRDC had raised an admissible contention regarding the extent to which Exelon should have addressed in its ER the "new severe accident mitigation alternatives previously considered for other BWR Mark II Containment reactors." First ASLB Op. at 27. *Second*, the Board found admissible the issue of "whether Exelon's use of data from TMI in its analysis provides an adequate consideration of new and significant information regarding economic cost risk." *Id.* at 25, 27.

The Commission reversed. Comm. Op. As an initial matter, the Commission recognized what it considered to be "ambiguity in our regulations." *Id.* at 11. While the Commission characterized 10 C.F.R. § 51.53(c)(3)(ii)(L) as exempting Exelon from site-specific supplemental SAMA analysis in the relicensing proceeding, it also recognized that the regulations mandate that "the license renewal application must contain any significant new information relevant to environmental impacts," which "may be challenged in individual adjudications." Comm. Op. at 11-12. The Commission also noted that "*Exelon has put forward in its license renewal application new information regarding its [SAMA] analysis*." *Id.* at 13 (emphasis added). Particularly in light of that fact, and NRDC's claim that "the information provided by Exelon" is

insufficient, the Commission ruled that "*NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report*." *Id.* (emphasis added).

However, while evidently recognizing that the matters raised by NRDC *should* be admitted, the Commission concluded that in light of 10 C.F.R. § 51.53(c)(3)(ii)(L), "the proper procedural avenue for NRDC to raise its concerns is to seek a waiver of the relevant provision in" that section. Comm. Op. at 13. The Commission further invited NRDC to include other Contentions that had been rejected on the basis of 10 C.F.R. § 51.53(c)(3)(ii)(L). *Id.*

Following that invitation, on November 21, 2012 NRDC filed a Petition, by way of motion, for waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), as applied to the Limerick Renewal proceeding. Waiver Petition ("Waiver Pet.") (Nov. 21, 2012) (Attached as Exhibit B, along with a Waiver Declaration ("NRDC Waiver Decl.") and a Declaration of Counsel ("Counsel Decl.")). The Waiver Petition explained that if a waiver is necessary for NRDC to pursue its Contentions, a waiver must be granted, and that, in fact, NRDC meets the requirements for a waiver because: (a) application of 10 C.F.R. § 51.53(c)(3)(ii)(L) to exempt Exelon from at all considering new and significant information related to SAMAs in the relicensing process would be contrary to the purpose of the regulation; (b) special circumstances unique to Limerick warrant a waiver; and (c) a waiver is necessary to address a significant environmental concern. Waiver Pet. at 13-27; *see also* Reply in Support of Waiver Petition (Dec. 21, 2012).

On February 6, 2013, the Board denied the Waiver Petition. Second ASLB Op. The Board's rationale was that, contrary to NRDC's arguments (and the Commission's apparent assumption in inviting NRDC to take this procedural path), it is entirely *consistent* with the purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) for NRDC to be precluded from raising its Contentions,

because, in promulgating the regulation, the Commission's evident intent was to excuse, *inter alia*, Exelon from having to do any additional SAMA analysis even if there were new and significant information related to the previous analysis, and thus to preclude anyone from raising such new and significant information during relicensing, for nuclear power plants that had conducted some SAMA analysis before the regulation was issued – which includes Limerick. Second ASLB Op. at 9 ("the purpose of subsection (L) seems quite clear: it evidences the Commission determination that, in effect, one SAMA analysis is enough" and thus "even if it was performed almost 25 years ago, the applicant does not need to perform another, *regardless of whether new SAMA candidates have been discovered in the interim*") (emphasis added).

However, the Board also recognized that this result created "a difficult and ambiguous situation," *id.* at 12, which the Board characterized as a legal "catch-22." *Id.* at 13. On the one hand, the Commission had recognized, as had the Board originally, that "NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report," Comm. Op. at 12, and, as the Board recognized, the Commission had suggested that a Waiver Petition was the appropriate mechanism to do so. Second ASLB Op. at 13 ("the Commission believed that a petitioner or party could be granted a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L)"). On the other hand, the Board had concluded that a waiver was not appropriate, because applying the regulation in this instance would be consistent with the regulation's purposes. Second ASLB Op. at 13.

Accordingly, the Board referred the issue to the Commission under 10 C.F.R. § 2.323(f)(1), *id.* at 13-14, on the grounds that it is "novel and worthy of the Commission's

immediate attention." *Id.* at 1. Subsequently, the Commission afforded an opportunity for further briefing. Order of Feb. 26, 2013.

ARGUMENT

I. NRDC Satisfies The Criteria For A Waiver Of 10 C.F.R. § 51.53(c)(3)(ii)(L) With Respect To Contention 1E As Admitted By The ASLB And Contention 3E.

In *In re Dominion*, CLI-05-24, 62 N.R.C. 551 (2005) which involved a request for a waiver of the NRC's emergency planning regulations, the Commission articulated a four-part waiver test: (i) strict application of the rule sought to be waived "would not serve the purposes for which it was adopted"; (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 issue. *Id.* at 560. NRDC's Contentions satisfy this test.[10]

1. Application of 10 C.F.R. § 51.53(c)(3)(ii)(L) in the manner interpreted by the Commission would not serve the purposes for which the regulation was adopted.

In denying NRDC's Waiver Request, the Board determined that NRDC could not demonstrate that application of 10 C.F.R. § 51.53(c)(3)(ii)(L) in this instance would be inconsistent with the regulation's purpose, because it was clear to the Board that the regulations' purpose is *to preclude further consideration of SAMAs during relicensing for Limerick.* Second

[10] Since these precedents concerned safety issues, the fourth prong of the analysis was focused on whether a significant "safety problem" was at issue, but where, as here, the waiver request involves an environmental concern this last factor focuses on the significance of the potential environmental impacts involved. *See In re Pacific Gas & Elec. Co.*, LPB-10-15, at 35-36, 38 (ASLB Aug. 4, 2010).

ASLB Op. at 7-12. Thus, reviewing the considerations that went into promulgating the regulation, the Board concluded that it was *designed* to preclude parties like NRDC from challenging Exelon and the Commission's failure to consider SAMAs during the relicensing process, because the Commission had decided that these matters should be considered in other venues. *Id.* at 12 n.43 (discussing the Individual Plant Examination ("IPE") and Individual Plant Examination for External Event ("IPEEE") Programs).

As NRDC explained to the Board, this reading is not compelled by 10 C.F.R. § 51.53(c)(3)(ii)(L) or the Statement of Consideration. Waiver Pet. (Exh. B) at 16-22. Rather, the regulation's purpose can – and should – be interpreted to simply limit facilities that had previously considered SAMAs from being obligated to reconsider the *same* SAMAs during relicensing. Alternatively, the Commission should conclude that a waiver must be granted in order to reconcile the regulation with NEPA.

a. The purpose of the regulation was to avoid revisiting SAMAs previously considered.

As noted, the Commission developed its Category 1 and 2 regulations to distinguish between issues that have been "considered and addressed generically for all plants," *Turkey Point*, 54 N.R.C. at 15 (Category 1), and those that may "requir[e] further analysis" in light of "significant new information." 10 C.F.R. Part 51, preamble to App. B to Subpart A (Category 2). The Commission intended that consideration of mitigation alternatives, as to which the regulations provide for consideration of "alternatives to mitigate severe accidents," be considered a Category 2 issue, and thus be adequately considered in the ER for relicensing. *Id.* Table 3-1.

Indeed, the Proposed Rule had put this issue into Category 1, and it was in response to comments that the Commission made it a Category 2 issue, recognizing that *severe accident*

mitigation should generally be addressed on a site-specific basis. *See* 61 Fed. Reg. at 28,480-82. Thus, in the Statement of Consideration the Commission stated that the *purpose* of the regulatory exception here was simply to limit the analysis during relicensing to exclude "consideration of *such alternatives* regarding plant operation" that were previously considered. *Id.* (emphasis added). Accordingly, it would be entirely consistent with the approach the Commission took in promulgating the regulation to conclude that 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 SAMA alternatives previously considered*, from which it necessarily follows that any *new* alternatives that would mitigate severe accidents should be subject to the standard for "new and significant information." 10 C.F.R. § 51.53(c)(3)(iv); *see* NRDC Counsel Decl. ¶¶ 1-3.[11]

This more limited purpose for 10 C.F.R. § 51.53(c)(3)(ii)(L) is supported by other portions of the Statement of Consideration. Thus, in multiple sections the Commission provided assurances that "any new and significant information presented during the review of individual license renewal applications" *will be considered*. *E.g.* 61 Fed. Reg. at 28,468; *see also id.* at 28,472 ("For individual plant reviews, information codified in the rule, information developed in the GEIS, and *any significant new information introduced during the plant-specific review* . . . will be considered in reaching conclusions in the supplemental EIS")(emphasis added); *id.* at 28,470.

[11] Before the Board, Staff and Exelon urged that this more limited reading of the provision's purpose must be rejected because it would be inconsistent with the plain language of the regulation. *E.g.* NRC Staff Ans. To Waiver Pet. (Dec. 14, 2012) at 16. This argument, however, misses the entire point of a waiver request, which proceeds on the *premise* that the action requested is inconsistent with the regulation, and thus seeks a *waiver* of the regulation's application in a particular instance.

This view of the purpose of the regulation is further supported by the Third Circuit's ruling in *N.J. Dep't. of Envtl. Prot. v. NRC*, 561 F.3d 132, 135 (3d Cir. 2009), where the Court explained that the purpose of the Category 2 regulations, including this one, is to require "evaluations of site-specific Category 2 issues – including a consideration of [SAMAs] for *those issues that have not previously been considered*." *Id.* (emphasis added). Thus, since the purpose of the exemption for previously conducted SAMAs, as explained both in the regulatory preamble and the case law, was to simply exempt "those *issues*" previously considered, rather than to wholly exempt from any future environmental impact statement consideration of severe accident mitigation alternatives that had not been previously considered, it would not serve the purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) to apply it in a way that would prevent NRC from considering newly identified mitigation alternatives, from evaluating those newly identified mitigation alternatives in light of their off-site economic consequences, and from using the most advanced and established methodologies for evaluating the costs and benefits of those newly identified mitigation alternatives – and that would prevent NRDC from challenging Exelon's ER for its failure to properly fulfill these obligations. NRDC Counsel Decl. ¶¶ 1-3.[12]

In reaching its conclusion, the Board reasoned that because the Commission was aware of ongoing safety analyses such as IPE and IPEEE at the time it promulgated subsection (L)

[12] In the Statement of Consideration, the Commission also recognized that, in light of inevitable changes that occur over time, "10 years is a suitable period" to delimit the outer bounds of when the Commission will assume that changes in condition and technology do not warrant additional NEPA review. 61 Fed. Reg. at 28,471. The last consideration of mitigation alternatives for severe accidents at Limerick occurred in 1989 – 24 years ago. Accordingly, it would also plainly be inconsistent with the purpose of these regulations to limit the scope of these severe accident mitigation alternatives, the offsite economic impacts of severe accidents, and the methodology for assessing the costs and benefits of such mitigation alternatives to alternatives to those that were considered so long ago.

exception, it must have not intended that new and significant information relevant to the Commission's environmental obligations under NEPA would be a basis for supplementing a previous SAMA analysis. Second ASLB Op. at 12-13. However, this attempt to have a program under the Atomic Energy Act function as a substitute for NEPA obligations had already been firmly rejected by the Third Circuit in *Limerick Ecology*:

> The language of NEPA indicates that Congress did not intend that it be precluded by the AEA. Section 102 of NEPA requires agencies to comply "to the fullest extent possible." 42 U.S.C. § 4332. Although NEPA imposes responsibilities that are purely procedural . . . there is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA. Moreover, there is no language in AEA that would indicate AEA precludes NEPA.

Limerick Ecology, 869 F.2d at 729.

b. The Commission may not apply 10 C.F.R. § 51.53(c)(3)(ii)(L) in a manner that violates NEPA.

More fundamentally, it would be flatly contrary to NEPA to conclude that both the language and purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) is to preclude any obligation to consider new and significant information relevant to a 24 year old SAMDA analysis during the Limerick relicensing process. In short, NEPA's mandate for consideration of new and significant information, *e.g., Marsh v. Oregon Natural Res. Council*, 490 U.S. at 365, plainly trumps any contrary regulation, *e.g. Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (explaining that an agency may not apply a regulation that is "manifestly contrary to the statute"), and *requires* that the regulation be construed and applied in a manner that is consistent with Congressional commands.

Indeed, this is especially true here, where the regulation is accompanied by *another* regulation which, faithfully implementing NEPA's statutory mandate, *expressly provides* that the

NEPA review for license renewal "must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(iv).

Accordingly, even in the event the Commission were to conclude that the apparent purpose of 10 C.F.R. § 51.53(c)(3)(ii)(L) was to avoid these NEPA obligations, the Commission should grant a waiver on the more basic ground that a waiver is necessary where a regulation is in conflict with a statute such as NEPA.

This result is also consistent with the Commission's prior decisions. For example, after the regulations at issue here were promulgated several other plants complained that the Commission had erred in making SAMAs a Category 2 issue, on the grounds that soon all plants will have considered the issue in an IPE or an IPEE. 61 Fed. Reg. 66,547, 66,540 (Dec. 18, 1996). The Commission *rejected* this argument, reiterating that these issues must be considered in site-specific NEPA reviews, as an IPE or IPEE *cannot substitute for NEPA review. Id.* Several years later, the Nuclear Energy Institute submitted a formal rulemaking petition seeking to make SAMAs a Category 1 issue, and, again, the Commission expressly rejected that proposal. 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001). Thus, the Commission has elsewhere recognized that it may not abrogate its fundamental NEPA obligation to consider new and significant information concerning SAMAs.[13]

Moreover, as noted, even the Statement of Consideration noted that if a commenter puts forward "new, site specific information which demonstrates that the analysis of an impact

[13] These decisions also refute the Board's conclusion that the reference to the IPE IPEE programs in the Statement of Consideration demonstrates that the Commission intended to rely solely on these programs to address changed circumstances, rather than allowing them to be raised in the NEPA process. Second ASLB Op. at 12 n.43.

codified in the rule is incorrect with respect to the particular plant, the NRC staff *will seek Commission approval to waive the application of the rule* with respect to that analysis in that specific renewal proceeding." 61 Fed. Reg. at 28,470 (emphasis added). Thus, the Commission recognized that, at bottom, the Rule could not be applied in a situation like the one here, because doing so would be contrary to NEPA.

It also bears noting in this regard that, consistent with NEPA, the NRC's regulations also require that an ER consider "appropriate alternatives to recommended courses of action," including "alternatives available for *reducing or avoiding adverse environmental effects*." 10 C.F.R. § 51.45(b)(3), (b)(5) (emphasis added); see also 10 C.F.R. § 51.103 (requiring discussing of alternatives in the Record of Decision, including, inter alia, the "preferences among alternatives" and "whether the Commission has taken all practicable measures . . . to avoid or minimize environmental harm from the alternative selected"). This regulation similarly applies here, as it requires consideration of alternatives that mitigate against severe accidents and their consequences. *E.g. Limerick Ecology*, 869 F.2d at 741.

In short, regardless of the purpose for which the Commission promulgated 10 C.F.R. § 51.53(c)(3)(ii)(L), a waiver must be granted to insure compliance with NEPA, and thus the Commission must allow NRDC to pursue the following contentions:

i. 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 (Contention 1E-1)

NRDC's Contention 1E, and supporting declaration, contends that the ER is deficient because it ignores new severe accident mitigation alternatives previously considered for other

BWR Mark II Containment reactors. NRDC Cont. at 16-19; *see also* First ASLB Op. at 40; NRDC Decl. ¶¶ 5-13. For the foregoing reasons, it would not serve the purposes of 10 C.F.R. § 51.53(c)(3)(ii)(L) for the regulation to bar consideration of this basis for Contention 1E here. *See also* NRDC Counsel Decl. ¶ 1.

ii. Exelon's reliance on data from TMI in its analysis of the significance of new information regarding economic cost risk constitutes an inadequate analysis of new and significant information (1E-2).

NRDC's Contention 1E, and supporting declaration, also contends that the ER is deficient in relying on data from TMI in order to consider the significance of the new information concerning economic cost risks. NRDC Cont. at 18 (¶ 5); *see also* First ASLB Op. at 40; NRDC Decl. ¶¶ 17-24. For the foregoing reasons, it would not serve the purposes of 10 C.F.R. § 51.53(c)(3)(ii)(L) for the regulation to bar consideration of this basis for Contention 1E here either. *See also* NRDC Counsel Decl. ¶ 2.

iii.. A legally sufficient analysis of newly identified severe accident mitigation alternatives for Limerick must utilize modern techniques for assessing whether those alternatives are cost-beneficial, and Exelon's ER erroneously concluded that new mitigation alternatives can be evaluated without use of those modern techniques (3E)

As noted, the Commission invited NRDC to seek a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) not only as to the two modified bases for Contention 1E that were admitted by the ASLB, but also as to Contention 3E. NRDC seeks a waiver as to one basis for Contention 3E not covered by Contention 1E – the adequacy of the ER vis-à-vis techniques used to assess whether SAMDA's are cost-beneficial. NRDC Cont. at 22 (¶¶ 1, 3). In particular, this basis for Contention 3E contends that the 1989 SAMDA failed to use a probabilistic safety assessment

severe accident consequences code system comparable to the MELCOR Accident Consequence Codes Systems ("MACCS") 2. *Id.* This basis for Contention 3E seeks to require Exelon and NRC Staff to use the more accurate and reliable methods available *today* for assessing the consequences of a severe accident, including economic consequences, and assessing the costs and benefits of the additional mitigation alternatives that are appropriate for BWRs. *Id.* For the foregoing reasons, it would also not serve the purposes of 10 C.F.R. § 51.53(c)(3)(ii)(L) for the regulation to bar consideration of this basis for Contention 3E. *See also* NRDC Counsel Decl. ¶ 3.

2. There are special circumstances unique to Limerick that warrant the waiver and were not considered in the rulemaking leading to 10 C.F.R. § 51.53(c)(3)(ii)(L).[14]

NRDC also plainly meets the "special circumstances" test here with respect to all three Contentions. As a threshold matter, this issue was arguably resolved in the *Limerick Ecology* case, where the Third Circuit considered the argument that the Commission need not consider mitigation for severe accidents at Limerick *specifically* because there were no special circumstances warranting such an individual review. As noted, the Commission had concluded that "there [we]re *no special or unique circumstances*" warranting consideration of these alternatives at Limerick, and the Board in that case similarly concluded that there were "*no special or unique circumstances* about the Limerick site" that warranted further review. 859 F.2d at 732 (emphasis added). The Third Circuit *rejected this conclusion*, finding that addressing severe accident mitigation at Limerick *is unique*, because, *inter alia*, these issues "*vary tremendously* across all plants," and at Limerick in particular in light of its "particular

[14] Because it found that NRDC did not meet the first part of the test, the Board did not consider whether NRDC met the other factors here.

plant's design, construction and location." *Id.* at 738 (emphasis added); *see also id.* at 738 (population "affects the magnitude and location of potential consequences from radiation releases," which "*is particularly true for plants such as Limerick which were built near densely populated areas*") (emphasis added).

In any event, it is evident that NRDC's Contentions raise issues that are both unique to Limerick and were not considered in the 10 C.F.R. § 51.53(c)(3)(ii)(L) rulemaking. NRDC's fundamental concern, reflected in its Contentions, is that there are a number of potentially cost-beneficial measures to address severe accidents at Limerick that, to date, Exelon has refused to consider; that the evaluation of the costs and benefits of these mitigation alternatives must include offsite economic consequences that reflect the current status and reasonably foreseeable changes to the population and economic value at risk within the 50 mile radius of the Limerick Plant's potential radionuclide ingestion pathway, in the event of a severe accident occurring within the extended license period under review; and that the methodology used to assess the cost and benefits of these additional mitigation alternatives must be the most advanced techniques available for such analyses.

Every other BWR nuclear power plant in the country that has undergone relicensing to date has conducted an analysis of SAMAs that is more inclusive of potential alternatives, includes the offsite economic consequences of a severe accident and utilizes the advanced computer methodology of MACCS2 to determine costs and benefits. NRDC Decl. ¶¶ 5-13. For none of these has the existence of the IPE and IPEEE programs served as a substitute for a NEPA cost/benefit analysis of mitigation alternatives, and for all of these some cost beneficial mitigation measures have been identified, none of which are being considered for Limerick.

Thus, the Contentions apply only to Limerick, and, more importantly, absent the waiver sought here, the Limerick plant will be the *only* BWR 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 regarding severe accident mitigation alternatives. Rather, while all other plants conduct such analyses, and provide them to the public for public comment, the millions of people living near Limerick during the license extension period will be forced to rely on an analysis publish 24 years ago. NRDC Counsel Decl. ¶ 4.

Absent a waiver, or some other mechanism for consideration of these issues, by the time Limerick Unit 2 completes its license renewal period, in 2049, its NEPA analysis of SAMAs will potentially be *sixty years* old, without any obligation to adequately update the analysis in the light of new and significant information, and without affording the interested public their rights under NEPA to challenge the licensee's use of such information and/or failure to apprehend its importance to identification of cost-effective measures for mitigating the environmental consequences of severe accidents. Such anomalous, highly prejudicial, and NEPA-violative outcomes are a possible and readily foreseeable result of failing to waive application of Subpart L to the relicensing of Limerick, and thus also comprise the "special circumstances" satisfying this prong of the waiver analysis.

These issues certainly were not considered in the 10 C.F.R. § 51.53(c)(3)(ii)(L) rulemaking. To the contrary, as discussed above, the Commission was focused first and foremost on insuring that these kind of alternatives *are* considered in relicensing proceedings (which is why the Commission made them Category 2 issues), and, secondarily, it sought to

avoid *duplicative* NEPA processes by exempting specific mitigation alternatives that had previously been considered from being subject to reconsideration. Nothing in the regulatory preamble suggests that the Commission contemplated that the regulation would forever preclude Exelon from being required to consider new, previously unconsidered, mitigation alternatives during relicensing.[15]

Exelon's own contradictory approach to this issue is also a special circumstance plainly not contemplated when this regulation was adopted. NRDC Counsel Decl. ¶ 4. It is critical to recognize in this regard that the ER *does discuss alternatives to mitigate for severe accidents*. *See* ER at 5-1 to 5-9. In conducting this analysis, Exelon recognized that it has an obligation to "identify any new and significant information of which" it is aware. *Id.* at 5-2. According to Exelon, it was because it did *not identify* any information that met the standard that no specific design alternatives were identified or discussed. *Id.* at 5-9.

The net effect of the Board's decision that subsection (L) cannot be waived is that although the NEPA analysis includes a discussion of new and significant information related to the prior SAMDA, there is no opportunity to challenge that discussion in the licensing process. This is akin to what the Court addressed when it first overturned AEC NEPA regulations that failed to include NEPA issues among the matters that had to be addressed in licensing proceedings.

> We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102(2)(c) requirement (that the "detailed statement" accompany proposals through agency review processes) if

[15] The fact that the issue is unique is also highlighted by the fact that although three plants are arguably covered by the exception – Limerick, Comanche Peak, and Watts Bar. 61 Fed. Reg. at 28,481 – only Limerick is a BWR, while the other two are Pressurized Water Reactors. Accordingly, the mitigation measures at issue only apply to Limerick.

> "accompany" means no more than physical proximity mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy.

Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1117 (D.C. Cir. 1971).

NRDC's Contentions focus both on flaws in the way the ER analyzed the significance of new information, and the failure to consider all relevant new information related to SAMAs. Had Exelon claimed the "new and significant information" standard in 10 C.F.R. § 51.53(c)(3)(iv) does not apply *at all* in light of 10 C.F.R. § 51.53(c)(3)(ii)(L), then it would not have conducted this review, and its position here would at least be consistent with its approach to preparing the ER. *See also* NRDC Counsel Decl. ¶ 4.

In adopting 10 C.F.R. § 51.53(c)(3)(ii)(L) the Commission certainly did not contemplate that in a license renewal, an applicant could, on the one hand, recognize that 10 C.F.R. § 51.53(c)(3)(iv) *does apply*, and on the other hand claim that an intervenor has no right to challenge the adequacy of that analysis. Rather, such an anomalous approach is plainly contrary to both the regulations and NEPA mandates, particularly where, as here, the new and significant information is *uniquely relevant to this one plant*. All other plants licensed to date have evaluated a wider range of mitigation alternatives, are conducting analyses of off-site economic consequences, and are using the most up-to-date methodology for analyzing the costs and benefits of SAMAs.

Accordingly, NRDC meets the "special circumstances" part of the waiver test as well.

3. Waiver of the regulation is necessary here to address a significant environmental concern.

Finally, the issues NRDC seeks to raise also plainly address a significant environmental concern. *See In re Pacific Gas & Elec. Co.*, LPB-10-15, at 35-36, 38 (finding that this factor "should be construed in this instance to permit a waiver if it is necessary to reach a significant environmental issue"). By definition, NRDC's Contentions concern how to best mitigate for "severe" accidents. Courts, including in *Limerick Ecology*, have repeatedly *rejected* the notion that a small risk of a severe accident is an insignificant problem that need not be addressed in the NEPA process. 869 F.2d at 738 ("risk equals the likelihood of an occurrence times *the severity of the consequences*") (emphasis added); *accord New York v. NRC*, 681 F.3d 471, 478-79 (D.C. Cir. 2012); *cf. Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) ("the more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing").

During the life of a relicensed Limerick plant the surrounding population within 50 miles will grow to over 9 million people, including more than 400,000 people living within 10 miles of the site. NRDC Waiver Decl. ¶¶ 14-16. It is vital that appropriate mitigation alternatives be considered to ameliorate the risks to these residents.

The alternatives NRDC contends Exelon must consider are all designed to address these risks, which is why they have been considered for other BWR Mark II Containment plants. Severe accidents could result from external events such as tornadoes, floods, earthquakes, fires, or even sabotage, and could result in substantial damage to the reactor core. Where there are inadequate means to achieve backup power in the event of a power failure, for example, that could lead to a severe accident, as at the Fukushima plant. Or where inadequate training allows

operation of a reactor while auxiliary feed pumps are closed for maintenance, a malfunction in the primary pumps can lead to a severe accident, as occurred at TMI. The mitigation alternatives NRDC has identified from the SAMA analyses for other BWRs are designed either to reduce the likelihood of severe accidents, or to mitigate the severity of their consequences should they nonetheless occur. NRDC Decl. ¶¶ 16. Because, absent the waiver, Exelon will not be required to consider these measures, the waiver is plainly necessary to address significant environmental issues regarding cost-beneficial mitigation alternatives. *See also* NRDC Counsel Decl. ¶ 5.

II. Alternatively, NRDC Is Entitled To Pursue Its Contention That Exelon Must Consider A Reasonable Range of Severe Accident Mitigation Alternatives As Mandated By NEPA Without A Waiver.

Finally, even assuming *arguendo* that the Commission were to conclude the waiver criteria set forth in 10 C.F.R. § 2.335(a) were not satisfied here, NRDC nonetheless would be entitled to have its Contentions admitted. Consistent with NEPA, NRC's regulations provide that in conducting an environmental review – be it in an initial EIS, a supplemental review, or a further supplemental stage – the Commission must consider "*any new and significant information* regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv) (emphasis added). This regulation fulfills the NEPA obligation to supplement a NEPA review in appropriate circumstances, even when a prior NEPA review has been completed. *E.g.*, *Marsh*, 490 U.S. at 365.

Arrayed against this Supreme Court and NEPA mandated obligation to consider new and significant information regarding prior environmental analyses prior to taking a major federal action, is the exception in subsection (L). Unlike the obligation imposed by NEPA and the Supreme Court, the subsection (L) exception is, at most, a paperwork convenience provision,

instituted to alleviate an applicant of the obligation to undertake two SAMA analyses. Undoubtedly, if that second SAMA analysis were merely a repeat of the first analysis and if no new and significant information were available, the Commission would have a basis to enforce the subsection (L) exception. However, where, as here, the exception, if allowed to stand, would prevent the Commission from complying with its NEPA obligations and the Supreme Court's mandate in *Marsh*, the lesser rule must be set aside to allow the more substantively important requirements of 10 C.F.R. § 51.53(c)(iv) to be met. Otherwise, the NEPA analysis for Limerick will be fatally flawed as it will be based on a demonstrably outdated and inaccurate, 24-year old, SAMDA analysis.

Indeed the Commission's earlier ruling strongly suggested this very outcome, noting both that "Exelon has put forward in its license renewal application *new information* regarding its [SAMA] analysis," and that "*NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report.*" Comm. Op. at 13 (emphasis added). This result is also entirely consistent with recent court rulings, which have emphasized both that, "under NEPA [the NRC] must look at both the probabilities of potentially harmful events and the consequences if those events come to pass," *New York*, 681 F.3d at 478, and that, more specifically, an NRC environmental "report for a license renewal must analyze the environmental impacts of the proposed action *and include a severe accident mitigation alternatives ("SAMA") analysis*." *Massachusetts v. NRC*, 2013 WL 668468, at *2 (emphasis added); *see also Beyond Nuclear v. NRC*, 704 F.3d 12, 17 n.4 (1st Cir. 2013) (discussing an "admitted contention . . . that the severe accident mitigation analysis in the report minimizes or underestimates the potential amount of radioactive release in a severe accident").

Accordingly, because an agency rule cannot be construed in such a manner as to violate a statutory mandate, *e.g. Auer v. Robbins*, 519 U.S. 452, 463 (1997) (while agency "is free to write [ ] regulations as broadly as [it] wishes," that discretion is subject "to the limits imposed by the statute"), the Contentions should be admitted irrespective of 10 C.F.R. § 51.53(c)(3)(ii)(L) and the waiver process.[16]

CONCLUSION

For the foregoing reasons, NRDC respectfully requests that the Commission admit NRDC's Contention 1E-1 and 1E2, as originally admitted by the ASLB, as well as that aspect of Contention 3E that concerns appropriate techniques to analyze SAMAs.

Respectfully Submitted,

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Filed this date of March 13, 2013

[16] As the D.C. Circuit recently explained, on review the Commission will not be entitled to deference for its interpretation of the regulation. *Shieldalloy Met. Corp. v. NRC*, No. 11-1449, 2013 WL 599469 (D.C. Cir. Feb. 19, 2013) ("Hand-waving about complexity seems especially unsuitable where the text's opacity is all of the agency's choosing and it concerns a complex regulatory program with immense public safety implications").

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing 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 and supporting documents in the captioned proceeding were served via the Electronic Information Exchange (EIE) on the 13th day of March 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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