



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

April 24, 2020

BY ELECTRONIC FILING

Mark Langer, Clerk of Court
United States Court of Appeals for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *Friends of the Earth, et al., v. NRC*, No. 20-1026 – Notice of
Supplemental Authority

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Respondent Nuclear Regulatory Commission (NRC), on behalf of Federal Respondents, informs the Court of a development before the agency in this matter.

This petition for review pertains to the NRC's renewal of the licenses for two nuclear power reactor units at the Turkey Point Nuclear Generating Station. On March 23, 2020, Federal Respondents filed a consolidated motion to dismiss the petition for lack of jurisdiction ("Motion"), on the grounds that the renewed licenses were not yet final because multiple administrative petitions for review concerning the issuance of those licenses remained pending.

On April 23, 2020, the Commission issued the enclosed order ("CLI-20-03"), resolving one of three matters pending before the Commission in this licensing proceeding. As explained in Federal Respondents' Motion, 5-8, during the course of administrative proceedings before the agency, the Atomic Safety and Licensing Board ("Board"), convened by the NRC to preside over requests for a hearing received from the public, made a legal determination concerning the applicability of an NRC regulation—10 C.F.R. § 51.53(c)(3)—to applications for a subsequent

M. Langer

renewed license. The Board referred its ruling to the Commission, and CLI-20-03 affirms the Board's legal interpretation of this regulation.

As further explained in Federal Respondents' Motion, 8-10, the Board ultimately denied Petitioners' request for a hearing in the Turkey Point licensing proceeding by denying each of their submitted "contentions," and Petitioners filed two administrative petitions for review with the Commission concerning these denials. CLI-20-03 does not act on these administrative petitions for review. Accordingly, Petitioners' two administrative petitions pertaining to the same issues raised in their Petition for Review in this Court remain pending before the Commission.

Federal Respondents maintain that the petition for review filed in this Court should still be dismissed for lack of jurisdiction, consistent with the arguments already raised in our Motion. The renewed licenses remain "non-final" during the pendency of the remaining two administrative petitions before the Commission which, if granted, may provide Petitioners with the relief they seek in this Court.

Respectfully,

/s/ Eric Michel
Senior Attorney

Encl.: Slip opinion, *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-03 (Apr. 23, 2020)

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

FLORIDA POWER & LIGHT CO.

(Turkey Point Nuclear Generating Units 3 and 4)

Docket Nos. 50-250-SLR
50-251-SLR

CLI-20-03

MEMORANDUM AND ORDER

Today we address the referred ruling that interpreted 10 C.F.R. § 51.53(c)(3) as applying to a subsequent license renewal applicant's preparation of an environmental report. We accept the referral from the Atomic Safety and Licensing Board, uphold the ruling, and hold that the NRC Staff may rely on the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS) and 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (Table B-1) to evaluate environmental impacts of Category 1 issues.

I. BACKGROUND

The Board ruled on multiple petitions to intervene and requests for hearing in LBP-19-3 related to the application from Florida Power & Light Company (FPL) to permit an additional twenty years of operation for two nuclear power reactors, Turkey Point Nuclear Generating Units 3 and 4.¹ The Board granted the petition to intervene of Natural Resources Defense

¹ LBP-19-3, 89 NRC 245 (2019); see Letter from William D. Maher, FPL, to NRC Document Control Desk (Apr. 10, 2018) (ADAMS accession no. ML18113A132 (package) and ML18102A521) (transmitting a revised subsequent license renewal application).

- 2 -

Council, Friends of the Earth, and Miami Waterkeeper (collectively, Petitioners), which challenged the environmental report that FPL submitted as part of its subsequent license renewal application. Petitioners submitted five contentions challenging the environmental report, and the Board admitted two in part.² Contention 1-E, as admitted, claims that FPL should have considered mechanical draft cooling towers as a reasonable alternative to the cooling canal system in light of the adverse impact of the system on the threatened American crocodile and its critical seagrass habitat.³ Contention 5-E, as admitted, relates to the impact of ammonia releases on endangered and threatened species and their critical habitat during the renewal period.⁴ As relevant here, the Board did not admit the other contentions, or any portions thereof, because of its interpretation that section 51.53(c)(3) applies to subsequent license renewal.⁵ The Board also referred its ruling on the scope of 10 C.F.R. § 51.53(c)(3) pursuant to 10 C.F.R. § 2.323(f)(1).⁶

The Board found that Contentions 1-E and 5-E migrated to become challenges to the Draft Supplemental Environmental Impact Statement (Draft SEIS) after its publication.⁷ But it also dismissed these contentions because they were admitted as contentions of omission, and

² LBP-19-3, 89 NRC at 285-95. The Board also admitted similar contentions filed by Southern Alliance for Clean Energy (SACE), but SACE withdrew from the proceeding. *Id.* at 301; *Southern Alliance for Clean Energy's Notice of Withdrawal* (Apr. 9, 2019). We therefore only address the contentions submitted by the Petitioners in this decision.

³ LBP-19-3, 89 NRC at 287.

⁴ *Id.* at 293-94.

⁵ The Board based its determination on the admissibility of the contentions proffered on our contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(i)-(vi). LBP-19-3, 89 NRC at 286-95.

⁶ *Id.* at 273 n.46. Judge Abreu filed a separate opinion, in which she outlined her bases for disagreeing with the majority's conclusion that section 51.53(c)(3) applies to subsequent license renewal.

⁷ LBP-19-6, 90 NRC 17, 20 (2019).

- 3 -

the Draft SEIS addressed the omissions.⁸ Petitioners moved to submit amended and new contentions based on the Draft SEIS, in which they sought to either migrate or amend Contentions 1-E and 5-E and admit four new contentions challenging the adequacy of the Draft SEIS.⁹ The Board found these contentions inadmissible and terminated the proceeding.¹⁰

FPL appealed the decision¹¹ and later notified us that its appeal was moot.¹² As discussed below, we dismiss the appeal as moot, and we accept the Board's referral and uphold the Board's ruling on the interpretation of 10 C.F.R. § 51.53.

II. DISCUSSION

A. FPL's Appeal

In its appeal, FPL argued that the Board should not have admitted Contention 1-E and Contention 5-E.¹³ Following the Staff's issuance of the Draft SEIS, FPL asked the Board to dismiss those contentions as moot based on new information in the Draft SEIS.¹⁴ The Board concluded that the new information in the Draft SEIS cured the omissions identified in the

⁸ *Id.* at 21, 23-24.

⁹ *Natural Resources Defense Council's, Friends of the Earth's, and Miami Waterkeeper's Amended Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement* (revised June 28, 2019), at 1-2 (Motion to Migrate and Admit Amended and New Contentions).

¹⁰ LBP-19-8, 90 NRC 139 (2019).

¹¹ *Florida Power & Light Company's Notice of Appeal of LBP-19-3* (Apr. 1, 2019). Petitioners and the Staff opposed the appeal. *Opposition of Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper to Florida Power & Light Company's Appeal of the Atomic Safety and Licensing Board's Ruling in LBP-19-3* (Apr. 26, 2019); *NRC Staff's Brief in Response to Florida Power & Light Company's Appeal of LBP-19-3* (Apr. 26, 2019).

¹² *Notice Regarding Dismissal of Contentions* (July 15, 2019) (FPL Notice).

¹³ *Brief in Support of Florida Power & Light Company's Appeal of LBP-19-3* (Apr. 1, 2019), at 3.

¹⁴ *FPL's Motion to Dismiss Joint Petitioners' Contention 1-E As Moot* (May 20, 2019); *FPL's Motion to Dismiss Joint Petitioners' Contention 5-E As Moot* (May 20, 2019).

- 4 -

contentions and granted FPL's motion to dismiss.¹⁵ FPL then notified us that its appeal of LBP-19-3 was moot.¹⁶ We agree and therefore dismiss FPL's appeal.

B. Interpretation of Section 51.53

1. Background

This proceeding presents our first review of a subsequent license renewal application, but our safety regulations in Part 54 have long contemplated the possibility.¹⁷ Our license renewal regulations recognize that after accounting for the effects of aging, our existing "regulatory process [in Part 50] is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety so that operation will not be inimical to [the] public health and safety or [the] common defense and security."¹⁸ Apart from aging management issues, plant operation under a renewed license is sufficiently similar to operation during the previous term such that our existing oversight processes are adequate to ensure safety.¹⁹

In addition to a safety review, the renewal of a nuclear power plant operating license requires the preparation of an environmental impact statement (EIS) to comply with the National Environmental Policy Act (NEPA).²⁰ The EIS includes the Staff's analysis that considers and weighs the environmental effects of the proposed action. To support the preparation of EISs for

¹⁵ LBP-19-6, 90 NRC at 19.

¹⁶ FPL Notice at 1-2.

¹⁷ Nuclear Power Plant License Renewal, Revisions, 60 Fed. Reg. 22,461, 22,494 (May 8, 1995) (License Renewal Revisions); 10 C.F.R. § 54.31(d).

¹⁸ License Renewal Revisions, 60 Fed. Reg. at 22,464.

¹⁹ See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 491 (2010).

²⁰ See, e.g., 10 C.F.R. § 51.20(b)(2).

- 5 -

license renewal, the NRC Staff issued the GEIS in 1996.²¹ The 1996 GEIS for license renewal assessed the environmental impacts associated with the continued operation of nuclear power plants during the license renewal term. The NRC also promulgated a rule that codified the findings of the 1996 GEIS into its regulations in Table B-1.²² The intent of the GEIS was to improve the efficiency of license renewal by determining which environmental impacts would result in essentially the same impact at all nuclear power plants (i.e., generic or Category 1 issues) and which ones could result in different levels of impacts at different plants and would require a plant-specific analysis to determine the impacts.²³ In developing the GEIS, we relied on the following factors:

- (1) License renewal will involve nuclear power plants for which the environmental impacts of operation are well understood as a result of lessons learned and knowledge gained from operating experience and completed license renewals.
- (2) Activities associated with license renewal are expected to be within this range of operating experience; thus, environmental impacts can be reasonably predicted.
- (3) Changes in the environment around nuclear power plants are gradual and predictable.²⁴

For the issues that could not be generically addressed, also known as Category 2 issues, the Staff prepares plant-specific supplements to the GEIS (i.e., a plant-specific supplemental EIS (SEIS)).²⁵

²¹ “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (Final Report), NUREG-1437, vols. 1-2 (May 1996) (ML040690705, ML040690738) (1996 GEIS).

²² See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 61 Fed. Reg. 28,467 (June 5, 1996) (1996 Final Rule).

²³ See “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (Final Report), NUREG-1437, rev. 1, vols. 1-3 (June 2013), at S-1 (ML13106A241, ML13106A242, ML13106A244) (2013 GEIS).

²⁴ *Id.* at 1-2.

²⁵ *Id.*

- 6 -

While the agency is responsible for complying with NEPA, the process of creating an EIS begins with the license renewal applicant. Pursuant to sections 51.45(a) and 51.53(c)(1), license renewal applicants must submit an environmental report to the NRC “to aid the Commission in complying with section 102(2) of NEPA.”²⁶ The Staff reviews the environmental report submitted by the applicant and uses it to draft the plant-specific SEIS.

As stated in the 1996 final rule that incorporated the findings of the GEIS into Table B-1, the NRC recognized that environmental impact issues may change over time and that additional issues may require consideration.²⁷ The NRC indicated that it intended to review the material in Table B-1 on a ten-year cycle.²⁸ In 2013, the NRC issued a revision to the GEIS and updated the corresponding regulations.²⁹ The 2013 GEIS noted that plant-specific environmental reviews had been completed for approximately forty nuclear plant sites (seventy reactor units) since the publication of the original GEIS in 1996.³⁰ The 2013 GEIS revision “intended to incorporate lessons learned and knowledge gained from these plant-specific environmental reviews, as well as changes to Federal laws and new information and research published since the 1996 GEIS.”³¹ The Staff noted that the purpose of the review for the 2013 GEIS was to determine if the findings presented in the 1996 GEIS remained valid.³²

²⁶ 10 C.F.R. § 51.14(a).

²⁷ See 2013 GEIS at S-2.

²⁸ *Id.*; 10 C.F.R. pt. 51, subpt. A, app. B.

²⁹ The NRC began its ten-year cycle review in 2003. The final rule and GEIS were published in 2013. Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 78 Fed. Reg. 37,282, 37,284 (June 20, 2013) (2013 Final Rule).

³⁰ 2013 GEIS at S-2.

³¹ *Id.*

³² *Id.* at 1-7.

- 7 -

In the 1996 GEIS, the Staff analyzed the impact of license renewal on ninety-two environmental issues organized by power plant systems and activities, of which sixty-eight were determined to be generic, or Category 1 issues.³³ The 1996 GEIS discussed these Category 1 issues, and therefore, these issues did not require a plant-specific assessment unless there was new and significant information that would change the conclusions in the GEIS.³⁴ The 2013 GEIS carried forward seventy-eight environmental impact issues for consideration and arranged them by resource area.³⁵

2. Referred Ruling

In determining the admissibility of the Petitioners' contentions, the Board found it necessary to determine the scope of section 51.53(c)(3), and, specifically, whether it may be applied to a subsequent license renewal applicant.³⁶ If so, the Board reasoned, then FPL and other subsequent license renewal applicants may rely on the GEIS and Appendix B and thereby exclude consideration of Category 1 issues from their environmental reports unless there is new and significant information that would change the conclusions in the GEIS.³⁷ Further, if section 51.53(c)(3) applies here, Petitioners would have been obligated to submit a rule waiver petition pursuant to section 2.335 to raise contentions challenging Category 1 issues.³⁸

³³ 1996 GEIS at xxxv; 2013 GEIS at 1-5.

³⁴ 1996 GEIS at xxxv; 2013 GEIS at 1-7; *see Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

³⁵ 2013 GEIS at 1-5, 1-7.

³⁶ LBP-19-3, 89 NRC at 263.

³⁷ *See* 2013 GEIS at 1-4.

³⁸ *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 387 (2012).

Section 51.53(c), “Operating license renewal stage,” requires an “applicant for renewal of a license to operate a nuclear power plant” to submit an environmental report with its application.³⁹ Section 51.53(c)(3) states:

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

- (i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.
- (ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part
- (iii) The report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues in appendix B to subpart A of this part. No such consideration is required for Category 1 issues in appendix B to subpart A of this part.
- (iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.⁴⁰

The Board found that the plain regulatory language does not resolve whether section 51.53(c)(3) can be applied to subsequent license renewal applicants; “it neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.”⁴¹ Because the Board found the regulations silent as to subsequent license renewal applicants, the Board looked to regulatory language and structure;

³⁹ 10 C.F.R. § 51.53(c)(1).

⁴⁰ *Id.* § 51.53(c)(3).

⁴¹ LBP-19-3, 89 NRC at 265.

- 9 -

regulatory purpose and history; the agency's interpretative rules; and administrative efficiency, logic, and practicality.⁴² Based on its analysis, the Board concluded that the Commission intended section 51.53(c)(3) to apply to all license renewal applicants, including those for subsequent license renewal.⁴³ Therefore, the Board concluded that FPL's environmental report did not need to consider Category 1 issues on a site-specific basis but could rely on the Category 1 findings in the GEIS and Table B-1.⁴⁴ The Board assessed Petitioners' contentions under this interpretation of the regulation.⁴⁵

The Board noted that the referred ruling is a significant legal issue of first impression, and it is likely to recur in other proceedings until resolved by the Commission.⁴⁶ We agree and address it now.

As noted above, the Board found that the plain regulatory language does not provide clear direction for subsequent license renewal applicants.⁴⁷ Therefore, the Board was "guided by the Supreme Court's approach in *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008), where in [determining] the scope of a regulatory provision in the face of regulatory silence, the Court conducted a holistic analysis."⁴⁸ The Board likewise conducted a holistic analysis of

⁴² *Id.* at 265, 272.

⁴³ *Id.*

⁴⁴ *Id.* at 272-73.

⁴⁵ *Id.* at 273.

⁴⁶ *Id.* at 273 n.46; see also 10 C.F.R. § 2.323(f)(1). The Board noted that the issue was pending before a licensing board in another subsequent license renewal proceeding, *Peach Bottom*. LBP-19-3, 89 NRC at 273 n.46. In light of the impact of our decision on this referred ruling to the *Peach Bottom* parties, we reviewed and considered the pleadings and arguments related to section 51.53(c)(3) in that case before reaching our decision here.

⁴⁷ LBP-19-3, 89 NRC at 265.

⁴⁸ *Id.*

- 10 -

section 51.53(c)(3) to determine the Commission's intent.⁴⁹ This holistic approach is consistent with our observation that "[i]n construing a regulation's meaning, it is necessary to examine the agency's entire regulatory scheme."⁵⁰ In the similar context of statutory interpretation, the Supreme Court has explained that

[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.⁵¹

We agree with the Board that the regulatory language is ambiguous because it "neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so."⁵² We concur that a holistic reading of Part 51 supports the conclusion that section 51.53(c)(3) covers all applicants for license renewal, including subsequent license renewal applicants.

The Board examined Petitioners' proposed reading of section 51.53(c)(3) in the broader context of Part 51. We agree with the Board's well-reasoned determination that application of section 51.53(c)(3) to only initial license renewal applicants would render that provision incompatible with the other license renewal provisions in Part 51.⁵³ The Board noted that while the environmental report assists the agency, the NRC has the ultimate responsibility to comply

⁴⁹ *Id.*

⁵⁰ *Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3)*, CLI-01-10, 53 NRC 353, 366 (2001).

⁵¹ *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

⁵² LBP-19-3, 89 NRC at 265.

⁵³ *Id.* at 274 (noting that "the dissent does not dispute that its restrictive reading of section 51.53(c) places that regulation in irreconcilable tension with 'sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B'").

- 11 -

with NEPA by preparing a SEIS in license renewal proceedings.⁵⁴ In preparing a SEIS for a license renewal, the Staff must follow the provisions of sections 51.71(d) and 51.95(c), which in turn refer to Table B-1. As explained below, the plain text of those regulations cannot be reconciled with Petitioners' reading of section 51.53(c).

a. Context and Structure of Part 51

(1) SECTION 51.95

Section 51.95, "Postconstruction Environmental Impact Statements," provides the requirement for the NRC to prepare an EIS at the initial operating license stage, license renewal stage, and the post-operating license stage. Section 51.95(c) provides, "[i]n connection with the renewal of an operating license or combined license for a nuclear power plant under 10 [C.F.R.] parts 52 or 54 of this chapter, the Commission shall prepare an environmental impact statement, which is a supplement to" the 2013 GEIS. With regard to Category 1 issues, the regulation sets forth the following requirement:

[i]n order to make recommendations and reach a final decision on the proposed action, the NRC [S]taff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information.⁵⁵

⁵⁴ *Id.* at 263.

⁵⁵ 10 C.F.R. § 51.95(c)(4). The reference to "new and significant information" reflects our ongoing obligation to supplement any final EIS prior to undertaking an agency action upon discovering information that provides a seriously different picture of the environmental consequences. See *Marsh*, 490 U.S. at 374; 10 C.F.R. § 51.92. Because the 2013 GEIS already resolves the Category 1 issues and the GEIS for Continued Storage of Spent Nuclear Fuel already evaluates storage of nuclear waste after the licensing term, this language reflects the agency's obligation to consider whether there is any new information with respect to those issues before taking final action. See "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vols. 1-2 (Sep. 2014) (ML14196A105, ML14196A107). Section 51.53(c)(3)(iv) is our only regulatory provision that implements the requirements for license renewal applicants to provide new and significant information in the environmental report, which further supports our reading that all license renewal applicants should reference section 51.53(c)(3).

- 12 -

Unlike section 51.53(c), section 51.95 does not refer to initial license renewals. Rather, by its terms it does not differentiate between initial and subsequent license renewals. And by its terms, the NRC must “integrate the conclusions in the generic environmental impact statement for issues designated as Category 1” into the agency’s final SEIS.⁵⁶ This requirement is inconsistent with interpreting section 51.53(c)(3) to prohibit subsequent license renewal applicants from relying on the findings in the 2013 GEIS for Category 1 issues.

Like the Board, we find section 51.95(c)(4)’s reference to section 51.53(c)(3)(ii) particularly instructive.⁵⁷ For all license renewal proceedings, including subsequent license renewals, section 51.95(c)(4) requires the NRC to rely on the information developed for Category 2 issues “applicable to the plant under § 51.53(c)(3)(ii).” As the Board observed, this language strongly suggests that the Commission did not intend to restrict section 51.53(c)(3) to initial license renewal applicants.⁵⁸ We agree with the Board that Petitioners’ interpretation, read in the broader context of Part 51, would not further the regulatory purpose of Part 51.

(2) SECTION 51.71

Similarly, Petitioners’ interpretation of section 51.53(c)(3) is inconsistent with section 51.71, “Draft Environmental Impact Statement – Contents.” Specifically, section 51.71(d) states that

[t]he draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in [Table B-1 and] must contain an analysis of those issues identified as Category 2 in [Table B-1].

Again, section 51.71(d) on its face does not differentiate between initial and subsequent license renewals. And like section 51.95(c), section 51.71(d) directs the agency to analyze Category 2

⁵⁶ 10 C.F.R. § 51.95(c)(4).

⁵⁷ See LBP-19-3, 89 NRC at 267.

⁵⁸ *Id.*

- 13 -

issues in the Draft SEIS, but to rely on the 2013 GEIS for Category 1 issues. Here too, Petitioners' reading of section 51.53(c)(3) is inconsistent with other provisions in our regulations as it would require an applicant to provide analyses of Category 1 issues that the agency may not use in preparing the Draft SEIS because section 51.71(d) already requires the agency to consider the codified conclusions in Table B-1 for Category 1 issues.⁵⁹

Further, those codified conclusions, located in Table B-1, apply to all license renewals. Appendix B to Part 51 states that "[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995." The appendix further specifies that "Table B-1 summarizes the Commission's findings on the scope and magnitude of environmental impacts of renewing the operating license for a nuclear power plant." Table B-1 "represents the analysis of the environmental impacts associated with the renewal of *any* operating license and is to be used in accordance with § 51.95(c)."⁶⁰ Once more, a plain reading of Appendix B demonstrates that Petitioners' interpretation of section 51.53(c)(3) is not compatible with other Part 51 provisions on license renewal. Those provisions require the NRC to rely on the Category 1 findings in the 2013 GEIS when preparing the Draft and Final SEIS for any license renewal. Petitioners' interpretation would require subsequent license renewal applicants to prepare additional analysis of these same issues that the agency could not consider when preparing its own environmental analysis.

The dissenting Board opinion suggests that one way to address this infirmity in Petitioners' interpretation could be to read the word "initial" into sections 51.71(d) and 51.95(c)

⁵⁹ While some portion of this analysis would address whether new and significant information impacts any Category 1 issues, most of the analysis would simply reconsider information that the 2013 GEIS already thoroughly addressed.

⁶⁰ 10 C.F.R. pt. 51, subpt. A, app. B (emphasis added).

- 14 -

as well as Appendix B.⁶¹ But this solution would have us read more into other regulations than the Petitioners' assert the Staff's and Applicant's interpretations read out of section 51.53(c)(3). Moreover, this solution limits the applicability of these provisions to initial license renewal, contrary to the intent and context of Part 51 discussed below.

(3) SECTION 51.53

Additionally, we have previously stated that regulatory interpretation should be informed by "the language and structure of the provision itself."⁶² The language and structure of section 51.53(c)(3) further supports the Board's nonrestrictive reading. As noted above, the body of section 51.53(c)(3) states that applicants for initial license renewals must address its four subsections. Subsection (c)(3)(i) excuses applicants from analyzing Category 1 issues, subsection (c)(3)(ii) identifies Category 2 issues that applicants must analyze for specific plant designs, subsection (c)(3)(iii) directs applicants to evaluate mitigation for Category 2 issues, and subsection (c)(3)(iv) requires the applicants to consider new and significant information related to license renewal.

While the parties strongly disagree over whether subsequent license renewal applications generally should address Category 1 issues, the parties agree that all license renewal applicants, subsequent and initial, must address Category 2 issues.⁶³ But, the discussion on Category 2 issues in subsection (c)(3)(ii) notes that applicants for certain plants

⁶¹ LBP-19-3, 89 NRC at 308-09 (Abreu, J., concurring in part and dissenting in part).

⁶² *Millstone*, CLI-01-10, 53 NRC at 361.

⁶³ Compare *Reply in Support of Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper* (Sept. 10, 2018), at 4-5 (Reply), with *Applicant's Surreply to New Arguments Raised in Reply Pleadings* (Sept. 20, 2018), at 4 (FPL Surreply), and *NRC Staff's Response to the Applicant's Surreply and the Petitioners' Response, Regarding the Applicability of 10 C.F.R. § 51.53(c)(3) to Subsequent License Renewal Applications* (Nov. 2, 2018) at 5-6 (Staff Response).

- 15 -

need only analyze certain issues based on plant design. For example, subsection (c)(3)(ii)(A) reads,

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

Thus, this subsection reflects the sensible observation that plants that have a design that will have certain impacts on water resources should analyze those impacts while other plant designs that do not have such impacts need not analyze them. In contrast, other subsections in (c)(3)(ii) indicate that all applicants should analyze impacts that will occur during the renewal period regardless of design, such as potential impacts to historic and cultural resources.⁶⁴ In this manner, subsection (c)(3)(ii) provides an essential roadmap for both initial and subsequent license renewal applicants with respect to which Category 2 issues should be analyzed based on the design of the plant. Indeed, before the Board, Petitioners argued that the applicant was required to meet the terms of section 51.53(c)(3)(ii) and (iii).⁶⁵ But, Petitioners have not explained how the word "initial" in section 51.53(c)(3) would restrict the applicability of subsection (i) to subsequent license renewals but not subsections (ii) and (iii), and we are unable to do so. As a result, the regulatory language and structure of section 51.53(c)(3) itself further supports the Board's holistic reading.⁶⁶

⁶⁴ *E.g.* 10 C.F.R. § 51.53(c)(3)(ii)(K).

⁶⁵ Reply at 14, 17, 19, 21, 40-41 n.148, 41 n.152, 52 n.194.

⁶⁶ See *Millstone*, CLI-01-10, 53 NRC at 361.

b. Regulatory History

(1) REGULATORY UPDATE FROM 2013

On balance, the regulatory history of Part 51 also supports our conclusion that applicants for a subsequent license renewal may utilize section 51.53(c)(3) and the GEIS. The regulatory history also confirms that the NRC considered subsequent license renewal in its analysis of Category 1 issues in the 2013 updates to the GEIS and provided the public with notice and an opportunity to comment.

Section 51.53(c)(3) directs license renewal applicants to analyze Category 2 issues, and it states that applicants are not required to analyze Category 1 issues, which are analyzed in the GEIS. As noted above, the agency most recently updated the GEIS and correspondingly amended its regulations in 2013.⁶⁷ Consequently, the 2013 GEIS and its accompanying rulemaking documents are the most current and reliable sources for interpreting the meaning of the regulations.

Among other things, the 2013 rulemaking reorganized, consolidated, and reclassified certain Category 1 and 2 issues.⁶⁸ There, the agency set forth the requirement for an applicant and the Staff to perform site-specific environmental analyses of Category 2 issues “[f]or *each* license renewal application.”⁶⁹ This statement does not differentiate between initial and subsequent license renewals; instead, it directs such analysis for every license renewal.

Additionally, the text of the 2013 GEIS update also supports our determination that the GEIS covers the generic environmental impacts of all license renewals. Section 7 of the 2013 GEIS provides a glossary, which defines key words and phrases used in the document. The

⁶⁷ See *generally* 2013 Final Rule.

⁶⁸ See *id.* at 37,282-83.

⁶⁹ *Id.* at 37,282 (emphasis added).

- 17 -

GEIS defines “License renewal term” as “[t]hat period of time past *the original or current license term* for which the renewed license is in force.”⁷⁰ We agree with the Board that in light of this statement, the 2013 GEIS “explicitly purports to assess the environmental impacts associated with a [twenty-year] renewal period, regardless of whether this period follows the original license or a current renewed license.”⁷¹ A plain reading of the 2013 GEIS shows that the agency understood the subject of the GEIS—environmental impacts during a license renewal term—to include both impacts from an initial license renewal or a subsequent license renewal.⁷² The Staff solicited extensive public comments on the 2013 GEIS by, among other methods, issuing notice in the *Federal Register*; holding public meetings; extending the comment period; and distributing the draft revised GEIS to stakeholders including environmental groups, representatives of American Indian Tribes, and various government agencies.⁷³

Moreover, the documentation supporting the 2013 GEIS also supports a conclusion that the NRC intended to consider the impacts of subsequent license renewal in that document. Consistent with Executive Order 12,866, “Regulatory Planning and Review,” the Staff prepared a Regulatory Analysis and provided it for Commission approval for the GEIS update and associated revision to Part 51 to reflect the revised GEIS.⁷⁴ That Regulatory Analysis compared the costs of the rulemaking with the expected benefits and concluded that the action was cost-

⁷⁰ 2013 GEIS at 7-27 (emphasis added).

⁷¹ LBP-19-3, 89 NRC at 270.

⁷² *E.g.*, 2013 GEIS at 7-27, 1-2 (“The GEIS for license renewal of nuclear power plants assesses the environmental impacts that could be associated with license renewal and an additional [twenty] years of power plant operation.”).

⁷³ 2013 GEIS, app. A § A.2.

⁷⁴ See “Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” Commission Paper SECY-12-0063 (Apr. 20, 2012) (ML110760045 (package)), Encl. 2 (ML110760321) (Regulatory Analysis); see *also* Exec. Order No. 12,866, 3 C.F.R. 1993 Comp. at 638-49 (1994).

- 18 -

justified.⁷⁵ The 2009 Federal Register notice providing the draft GEIS for public comment contained a specific request for public comment on the draft Regulatory Analysis.⁷⁶ The draft Regulatory Analysis evaluated the costs of both initial and subsequent license renewal.⁷⁷ That evaluation carried forward to the Regulatory Analysis of the final GEIS, in which the Staff estimated “that a total of [thirty] license renewal applications (including applications for a second license renewal) will be received in the [ten-year] cycle following the effective date of the rule.”⁷⁸ Therefore, the Staff’s cost-justification recommendation—and the Commission’s approval of that recommendation—was based on an understanding that the 2013 GEIS would cover all license renewal applications, both initial and subsequent.

Petitioners have identified select portions of the 2013 GEIS that appear to consider only one license renewal term in the “discussion of specific types of environmental impacts.”⁷⁹ But

⁷⁵ Regulatory Analysis at 68.

⁷⁶ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,132 (July 31, 2009).

⁷⁷ “Proposed Rulemaking – Environmental Protection Regarding the Update of the 1996 Generic Environmental Impact Statement for Nuclear Power Plant License Renewal,” Commissioner Paper SECY-09-0034 (Mar. 3, 2009) (ML091050197 (package)), Encl. 2, at 15 (ML083460087) (“Some plants will become eligible for a second 20-year license extension after FY 2013. While the NRC understands that the possibility exists for license holders to submit a second 20-year license renewal application, no letters of intent have been received as of the issuance date of this document. The NRC conservatively estimates receiving 4 applications per year from FY 2014 through FY 2020.”).

⁷⁸ *Id.* at 25.

⁷⁹ *Petitioners’ Response to Applicant’s Surreply* (Oct. 1, 2018), at 7-8. See 2013 GEIS at 4-138 to 4-139 (“If the reactor operates for [sixty] years, the cumulative increase in fatal cancer to an individual worker is estimated to be 3.6×10^{-3} (a [fifty] percent increase over the baseline of [forty] years of operations.”); *id.* at 4-145 (“If the reactor operates for [sixty] years, it is estimated that the increase in fatal cancer risk to the [Maximumly Exposed Individual (MEI)] would range from 6×10^{-7} to 4.6×10^{-4} (a [fifty] percent increase over the baseline of [forty] years of operation); *id.* at 4-217 (“As discussed in the 1996 GEIS, the dose to the public from long-lived radionuclides after [forty] years of plant operation is expected to be negligible, and the increase in quantities of long-lived radionuclides after an additional [twenty] years would result in a negligible does (less than 0.1 person-rem.”). Similarly, the dissenting opinion notes that the analysis of the impacts of severe accidents in the 2013 GEIS “expressly states that ‘the revision

- 19 -

the 2013 GEIS is hundreds of pages long and analyzed seventy-eight issues; and as the Board noted, the 2013 GEIS generally used terminology that could apply to either an initial or subsequent license renewal.⁸⁰ Therefore, in determining the scope of the 2013 GEIS, the general definition of license renewal term (supported by the discussion in the Regulatory Analysis) provides the most accurate insight into the agency's understanding.

Additionally, we agree with the Staff that the Petitioners' arguments do not render the analysis in the GEIS inapplicable to subsequent license renewal. The Staff argues that instead, "the analyses in the GEIS concern the *incremental* effects of an additional [twenty] years of operation—regardless of whether the plant had operated for [forty] years or [sixty] years prior to the requested license renewal."⁸¹ The Staff's insight is correct: the 2013 GEIS is not predicated on any particular feature of operation between years forty and sixty that would differ from years sixty to eighty. Moreover, in anticipation of the first subsequent license renewal applications, the Staff prepared an assessment of the agency's readiness to review the applications and provided a policy paper to the Commission.⁸² That paper notes that the 2013 GEIS "is adequate for a future subsequent license renewal application."⁸³ Thus, the Staff, to whom we have delegated the responsibility to conduct environmental reviews for license renewal

only covers one initial license renewal period for each plant (as did the 1996 GEIS).” LBP-19-3, 89 NRC at 308 (Abreu, J., concurring in part and dissenting in part) (quoting 2013 GEIS, app. E, at E-2).

⁸⁰ LBP-19-3, 89 NRC at 265-66.

⁸¹ Staff Response at 14-15.

⁸² “Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal,” Commission Paper SECY-14-0016 (Jan. 31, 2014), at 1 (ML14050A306).

⁸³ *Id.* at 3.

- 20 -

proceedings, has informed us on three separate occasions that the 2013 GEIS covers subsequent license renewals.⁸⁴

(2) THE 1991 PROPOSED RULE AND THE 1996 FINAL RULE

The Board and the dissent disagreed over the meaning of the regulatory history supporting prior versions of the rule, given that some language in the regulatory history suggests that at one time the Commission may have intended to limit the applicability of the earlier version of the GEIS to initial license renewals.⁸⁵ We have previously observed that “[a]s the latest expression of the rulemakers’ intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation.”⁸⁶ Because the regulations at issue codify the 2013 GEIS, the prior regulatory history is a less reliable guide than that accompanying the 2013 rulemaking, which is the “latest expression of the rulemakers’ intent.”⁸⁷

Nevertheless, some features of that rulemaking process provide additional insight into the agency’s intent. The Board noted that while certain language *accompanying* the 1991 proposed rule purported to limit the application of the rule “to one renewal of the initial license

⁸⁴ *Id.*; Staff Response at 14-15; Regulatory Analysis at 25. As noted previously, the Staff sought and received public comment on the rulemaking documents, including the 2013 GEIS. See, e.g., 2013 GEIS, app. A § A.2.

⁸⁵ *Compare* LBP-19-3, 89 NRC at 265-66, *with id.* at 305-07 (Abreu, J., concurring in part and dissenting in part).

⁸⁶ *Millstone*, CLI-01-10, 53 NRC at 367 (*citing* 2B SUTHERLAND, STATUTORY CONSTRUCTION § 51.02 (1992)).

⁸⁷ See *id.* While the rulemaking accompanying the 2013 GEIS did not remove the word “initial” from section 51.53(c)(3), this does not necessarily contradict our determination to consider both subsequent and initial license renewals in the 2013 GEIS. Rather, the word “initial” reflects the possibility that while all initial license renewal applicants must address the conditions and considerations in section 51.53(c)(3), some subsequent license renewal applicants may take a different approach or use the same approach required for initial license renewal applicants. See 10 C.F.R. § 51.53(a). And ultimately the more significant determination, from a NEPA standpoint, is preparation of the Draft SEIS and Final SEIS pursuant to Table B-1, for which agency regulations do not distinguish between subsequent and initial renewals.

- 21 -

for up to [twenty] years beyond the expiration of the initial license,” *the language in the proposed rule itself* did not include such a restriction to an initial license renewal.⁸⁸ The Board observed that neither the 1996 final rule nor any accompanying language included the restrictive phrase.⁸⁹ The Board determined that the omission of the limiting language supported a conclusion that the agency did not intend to limit the applicability of section 51.53(c)(3) to initial license renewal applications when it was promulgated.⁹⁰

We note that certain aspects of the regulatory history support the Board’s determination. For example, while the final rule was “consistent with the generic approach and scope” of the proposed rule, it also featured “several significant modifications.”⁹¹ Significantly, the proposed rule contained a generic “favorable cost-benefit balance for license renewal” found in proposed Appendix B.⁹² In support of this finding, Appendix B in the proposed rule determined, “[l]icense renewal of an individual nuclear power plant is found to be preferable to replacement of the generating capacity with a new facility to the year 2020.”⁹³ However, the final rule abandoned this approach. Instead, it introduced a “new standard that will require a determination of whether or not the adverse environmental impacts of license renewal are so great, compared with the set of alternatives, that preserving the option of license renewal for future decisionmakers would be unreasonable.”⁹⁴ The final rule explained, “[c]onsideration of and

⁸⁸ LBP-19-3, 89 NRC at 265 (citing Environmental Review for Renewal of Operating Licenses; Proposed Rule, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (1991 Proposed Rule)).

⁸⁹ *Id.* (citing 1996 Final Rule, 61 Fed. Reg. at 28,467).

⁹⁰ *Id.*

⁹¹ 1996 Final Rule, 61 Fed. Reg. at 28,468.

⁹² 1991 Proposed Rule, 56 Fed. Reg. at 47,018.

⁹³ *Id.* at 47,030.

⁹⁴ 1996 Final Rule, 61 Fed. Reg. at 28,468.

- 22 -

decisions regarding alternatives will occur at the site-specific stage.”⁹⁵ Therefore, the proposed rule could only have applied to initial license renewals because it relied on a generic finding that no alternative to license renewal would be preferable through 2020 and most facilities would be unable to apply for subsequent license renewal until after that point in time.⁹⁶

Further, the Board found that a regulatory purpose of Part 51 revisions was “to promote efficiency in the environmental review process for license renewal applications.”⁹⁷ It noted that requiring subsequent license renewal applicants to analyze Category 1 issues (already covered by the GEIS and codified in Table B-1), on a site-specific basis would negate the regulatory purpose behind these Part 51 revisions.⁹⁸ We agree with the Board that Petitioners’ interpretation of section 51.53(c)(3) as inapplicable to subsequent license renewal applicants is inconsistent with an “explicitly stated regulatory purpose” of Part 51—the promotion of efficient environmental reviews for license renewal applications.

c. Agency Guidance

In reaching its conclusion on section 51.53(c)(3), the Board also relied on agency guidance, which it appropriately accorded “special weight.”⁹⁹ The Board noted that “[t]he Supreme Court has stated that an agency’s interpretive statements ‘reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance’” and that

⁹⁵ *Id.* at 28,484.

⁹⁶ 10 C.F.R. § 54.17(c) (“An application for a renewed license may not be submitted to the Commission earlier than [twenty] years before the expiration of the operating license or combined license currently in effect.”).

⁹⁷ *Id.* at 266 (citing 1996 Final Rule, 61 Fed. Reg. at 28,467).

⁹⁸ *Id.*

⁹⁹ *Id.* at 271 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 356 (2015) (noting that guidance documents developed to assist in compliance with applicable regulations are entitled to special weight)).

- 23 -

“as such, they are entitled to a measure of respect.”¹⁰⁰ The Board pointed to Supplement 1 to Regulatory Guide 4.2, which provides instructions for license renewal applicants for preparation of environmental reports.¹⁰¹ The Board noted that Reg. Guide 4.2 “does *not* distinguish between initial and subsequent license renewal applicants” and that it “repeatedly states that issues ‘identified as Category 1 issues in the GEIS . . . are adequately addressed for *all* applicable nuclear plants.’”¹⁰² The Staff sought and received public comment on this Regulatory Guide as part of the revisions to the regulations in 2013.¹⁰³ We agree that our guidance supports the Board’s interpretation of section 51.53(c)(3).

d. Future GEIS Updates

The Board pointed to the periodic reviews and updates to the GEIS mandated by Part 51 as further support for its interpretation of section 51.53(c)(3).¹⁰⁴ In the Board’s view, periodic reviews and updates to the GEIS would not be necessary unless the Commission intended for all license renewal applicants going forward, as well as the Staff, to rely on the GEIS’s generic findings rather than performing site-specific analyses of Category 1, as well as Category 2, issues.¹⁰⁵ We agree with the Board’s conclusion and note that since the majority of initial license renewals occurred between 2000 and 2010, an ongoing obligation to update the GEIS

¹⁰⁰ *Id.* at 271 n.41 (quoting *Holowecki*, 552 U.S. at 399).

¹⁰¹ *Id.* (citing “Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications,” Regulatory Guide 4.2, supp. 1, rev. 1 (June 2013) (ML13067A354) (Reg. Guide 4.2)).

¹⁰² *Id.* (quoting Reg. Guide 4.2 at 25).

¹⁰³ See NRC Response to Public Comments Related to Draft Regulatory Guide DG-4015 (Proposed Revision 1 of Regulatory Guide 4.2, Supplement 1), Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications (June 20, 2013) (ML13067A355).

¹⁰⁴ LBP-19-3, 89 NRC at 267-68.

¹⁰⁵ *Id.* at 268.

- 24 -

every ten years would not promote the principles of economy and efficiency that the GEIS was supposed to further if it only applied to initial license renewals.

e. *Licensing Experience*

As discussed above, “[t]he NRC’s review of a license renewal application proceeds along two independent regulatory tracks: one for safety issues and another for environmental issues.”¹⁰⁶ We have made clear that “license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity” and that “operational matters . . . are appropriately addressed under the Staff’s ongoing regulatory oversight process.”¹⁰⁷ Our safety review of license renewal applications is based on detailed information that an applicant provides “to confirm whether the design assumptions used for the original licensing basis will continue to be valid throughout the period of extended operation.”¹⁰⁸

Similarly, our environmental analysis of license renewal is based on licensees’ operating experience and our understanding of environmental impacts of operation. As noted previously, we based the framework of the environmental analysis for license renewal on the following factors: data from operating experience, the fact that environmental impacts of license renewal are expected to be bounded by data from operating experience given that license renewal is twenty additional years of continued operation, and our understanding that changes in the environment around nuclear plants are gradual and predictable.¹⁰⁹ For these reasons, the NRC has concluded that the environmental impacts from operation during a license renewal term

¹⁰⁶ 2013 Final Rule, 78 Fed. Reg. at 37,282.

¹⁰⁷ *Prairie Island*, CLI-10-27, 72 NRC at 490-91 (quoting Nuclear Power Plant License Renewal; Final Rule, 56 Fed. Reg. 64,943, 64,952) (Dec. 13, 1991)).

¹⁰⁸ 2013 Final Rule, 78 Fed. Reg. at 37,282.

¹⁰⁹ 1996 Final Rule, 61 Fed. Reg. at 28,467-68.

- 25 -

would be similar to those during the current license term¹¹⁰ and our site-specific environmental analysis of license renewal applications is limited to Category 2 issues—that is, those issues that would not “essentially be the same at all nuclear power plants.”¹¹¹ In fact, this lengthy history of plant operation enabled us to make Category 1 findings in the first place.¹¹² Given that we and our licensees have amassed decades more operating experience since we first promulgated our 1996 Final Rule and that experience has been consistent with the assumptions underlying license renewal, we see no reason why subsequent license renewal should not be treated similarly. All of these factors support our understanding that the 2013 GEIS considered both initial and subsequent license renewal terms.

It should not be suggested that this approach allows the Staff to abrogate its responsibility to take a “hard look” at new and significant information.¹¹³ The Staff retains its ongoing responsibility to analyze and incorporate into the SEIS any new and significant information regarding both Category 1 and Category 2 issues.¹¹⁴ Licensees, petitioners, or other members of the public may also have information that would modify the analysis of a Category 1 issue for a subsequent license renewal in the 2013 GEIS either with respect to a specific facility or generically. Consequently, NRC regulations provide several mechanisms for the public to inform us of such information. Specifically, for general information, any person may file a petition for rulemaking to appropriately amend the codification of Category 1 issues in the

¹¹⁰ 2013 GEIS at 1-2.

¹¹¹ 2013 Final Rule, 78 Fed. Reg. at 37,282.

¹¹² *Id.*

¹¹³ *See Marsh*, 490 U.S. at 374.

¹¹⁴ *See id.*

2013 GEIS.¹¹⁵ With regard to a specific facility, members of the public may seek a waiver of our regulations to challenge the analysis in the 2013 GEIS on a Category 1 issue.¹¹⁶ And perhaps most significantly, the Staff must update the GEIS on a ten-year cycle.¹¹⁷ The agency has already begun pre-rulemaking activities to support this update, and the public will have an opportunity to comment as part of that rulemaking.¹¹⁸ But, litigation in adjudicatory proceedings without a waiver is simply not one such mechanism; rather, "[a]djudicating category 1 issues site-by-site . . . would defeat the purpose of resolving generic issues in a GEIS."¹¹⁹

f. Response to the Dissenting Opinion

Commissioner Baran raises two challenges to this decision. First, he contends that the majority adopts "an unreasonable interpretation of 10 C.F.R. § 51.53(c)(3)."¹²⁰ Commissioner Baran would uphold the Petitioners' interpretation of 10 C.F.R. § 51.53(c)(3) because in his view "the plain and unambiguous language of the regulation limits its applicability to *initial* license renewal."¹²¹ But we find the text of the regulation less clear. Section 51.53(c)(3) states that "[f]or those applicants seeking an initial renewed license . . . the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following

¹¹⁵ 10 C.F.R. § 2.802.

¹¹⁶ 10 C.F.R. § 2.335; see also 1996 Final Rule, 61 Fed. Reg. at 28,470 (noting that if the Staff receives information calling into question the validity of a Category 1 finding, either generically or with respect to a specific site, it will seek Commission approval to waive the rule as appropriate).

¹¹⁷ 10 C.F.R. pt. 51, subpt. A, app. B.

¹¹⁸ Planned Rulemaking Activities – Rules, <https://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/active/RuleIndex.html> (last visited March 10, 2020).

¹¹⁹ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 21 (2007).

¹²⁰ Commissioner Baran, Dissenting, at 1.

¹²¹ *Id.* at 2.

- 27 -

conditions and considerations.”¹²² We agree that the plain language of section 51.53(c) requires environmental reports for an initial license renewal to address the provisions of subsection (c)(2) subject to the “conditions and considerations” in subsection (c)(3). But we do not agree that the regulation prevents subsequent license renewal applicants from doing the same. The regulation does not explicitly prohibit other license renewal applicants from also subjecting their environmental reports to those terms and conditions. Therefore, a literal reading of subsection (c)(3) does not bar applicants for subsequent license renewal from subjecting their environmental reports to the conditions and considerations in that subsection.

In contrast, the interpretation of section 51.53(c)(3) advanced by Commissioner Baran would require us to read more into the regulation than we find in its plain text. He claims, “[t]he explicit language of the regulation states that the provisions of 51.53(c)(1) and (c)(2) apply to all license renewal applicants, including those for subsequent license renewal, while section 51.53(c)(3) applies only to initial license renewal applicants.”¹²³ But Commissioner Baran’s analysis inserts the word “only” into section 51.53(c)(3). Therefore, we agree with the Board that a reasonable reading of the regulation is that it neither explicitly includes nor excludes subsequent license renewal applicants.¹²⁴

Commissioner Baran’s re-write of Part 51 would not stop at section 51.53(c). Rather than try to reconcile his reading of section 51.53(c)(3) with the rest of Part 51, he observes that “the regulatory direction to rely on the GEIS can only apply to the extent that the GEIS actually

¹²² 10 C.F.R. § 51.53(c)(3).

¹²³ Commissioner Baran, Dissenting, at 3.

¹²⁴ While Commissioner Baran invokes the doctrine of *expressio unius est exclusio alterius* to support his reading of section 51.53(c)(3), *id.*, we agree with the Board’s observation that this principle is not an “inflexible rule of law” but a starting point in regulatory construction, LBP-19-3, 89 NRC at 273.

- 28 -

evaluated the environmental impacts of subsequent license renewal. I find that it did not.”¹²⁵

Thus, the dissent concludes that “the Category 1 findings in Table B-1 do not apply to subsequent license renewal applications.”¹²⁶ However, this reading of Part 51 would similarly re-write Part 51 to limit Table B-1 to initial license renewals. Further, this interpretation also impacts sections 51.95(c) and 51.71(d), which build on Table B-1’s incorporation of the findings in the 2013 GEIS. Consequently, we disagree with our colleague’s interpretation of section 51.53(c)(3) because we conclude that it does not reconcile the regulation with the other provisions in Part 51.

Second, Commissioner Baran claims that the majority “mischaracterizes the scope of the GEIS.”¹²⁷ Commissioner Baran asserts that “[n]either the original GEIS nor the 2013 GEIS revision analyzed the environmental impacts of subsequent license renewal periods.”¹²⁸ He rejects the Board’s conclusion that the 2013 GEIS applies to subsequent license renewals because he claims the Board relied “on some ambiguous statements in the text of the 2013 GEIS.”¹²⁹ Again, we disagree. In reaching its conclusion, the Board cited the glossary in the 2013 GEIS.¹³⁰ The glossary defines “License renewal term” as “[t]hat period of time past *the original or current license term* for which the renewed license is in force.”¹³¹ This statement

¹²⁵ Commissioner Baran, Dissenting, at 6.

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 6.

¹²⁹ *Id.* at 10.

¹³⁰ LBP-19-3, 89 NRC at 270.

¹³¹ 2013 GEIS at 7-27 (emphasis added).

- 29 -

indicates that the agency intended for the 2013 GEIS to cover initial and subsequent license renewals.

Commissioner Baran points to several other quotations from the 2013 GEIS and 1996 GEIS and supporting rulemaking documents for support.¹³² We address much of this material above and acknowledge that some of it supports Petitioners' interpretation. Ultimately, like the Board, we find the definition of "License renewal term" in the 2013 GEIS itself is a more probative guide into understanding what license renewal terms the 2013 GEIS considered.

Finally, Commissioner Baran states that "[i]t would be a violation of NEPA for the agency to attempt to retroactively expand the scope of an environmental review completed seven years ago."¹³³ Because our interpretation of the 2013 GEIS rests on our review of contemporaneous statements regarding its scope, it is not a retroactive expansion. As a result, we disagree with our colleague that the agency's environmental review was inadequate for this license renewal.

For the reasons discussed above, we find that the regulatory history supporting Part 51 indicates that the NRC intended for the analysis of Category 1 issues in the 2013 GEIS to apply to subsequent license renewals. Because the primary purpose of section 51.53(c)(3)(i) is to enable applicants for license renewal to rely exclusively on the GEIS for Category 1 issues, our conclusion supports the proposition that section 51.53(c)(3) applies to subsequent license renewals. Thus, in response to the referred question, we agree with the Board that subsequent license renewal applicants may rely on the GEIS and thereby exclude consideration of Category 1 issues from their environmental reports, absent new and significant information that would change the conclusions in the GEIS.¹³⁴ Therefore, any challenge to Category 1 issues in

¹³² Commissioner Baran, Dissenting, at 7-10.

¹³³ *Id.* at 10.

¹³⁴ See 2013 GEIS at 1-4.

- 30 -

this or any other a subsequent license renewal proceeding would need to be accompanied by a rule waiver petition.¹³⁵

III. CONCLUSION

For the foregoing reasons, we *dismiss* FPL's appeal; *accept* the Board's referral under section 2.323(f)(1) and *affirm* its ruling on the interpretation of section 51.53.

IT IS SO ORDERED.

For the Commission

NRC Seal

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April 2020.

¹³⁵ See 10 C.F.R. § 2.335.

Additional Views of Chairman Svinicki and Commissioner Caputo

We fully join the majority's response to the referred question, whether the agency "intend[ed] to restrict section 51.53(c)(3) to initial license renewals."¹ Given the procedural posture of this case when the issue arose, litigating contention admissibility based on the analysis in the environmental report, the parties and Board's focus on this issue is understandable.² However, we write separately to emphasize that when considered in the larger context of our regulations, the answer to this referral does not resolve the more significant question of whether parties may litigate Category 1 issues in a subsequent license renewal proceeding without filing a waiver petition.

Petitioners presume that if section 51.53(c)(3) does not apply to subsequent license renewal applicants, then they may not rely on Category 1 issues in the 2013 GEIS. The above analysis assumes that Petitioners' premise is true and concludes that this position would lead to untenable results. But, fundamentally, Petitioners' premise is flawed. As explained below, even if section 51.53(c)(3) did not apply to subsequent license renewal applicants, our regulations would still allow subsequent license renewal applicants to rely on the 2013 GEIS's analysis of Category 1 issues and would prohibit challenges to those findings in adjudicatory proceedings absent a waiver.

Section 51.53(a) provides that "[a]ny environmental report prepared under the provisions of this section may incorporate by reference any information contained in a . . . final environmental document previously prepared by the NRC staff that relates to the production or utilization facility or site." That section specifically includes "NRC staff-prepared final generic environmental impact statements," such as the 2013 GEIS, in the list of documents that applicants may incorporate by reference into their environmental reports. Significantly,

¹ LBP-19-3, 89 NRC at ___ (slip op. at 25 & n.46).

² *Id.* at 269.

- 2 -

“incorporate by reference” is identical language to the phrase the Commission used to describe the effect of section 51.53(c)(3) on Category 1 issues when it was promulgated: “the analyses for certain impacts codified by this rulemaking need only be *incorporated by reference* in an applicant’s environmental report for license renewal.”³ Consequently, regardless of the scope of 51.53(c)(3), our regulations already allow applicants for subsequent license renewal to rely on Category 1 findings in preparing their environmental reports.

Additionally, in reviewing subsequent license renewal reports environmental reports, the Staff will be guided by Table B-1 in Appendix B. Table B-1 applies to all license renewal proceedings through sections 51.71(d) and 51.95(c). As the United States Court of Appeals for the First Circuit has observed, “[b]ecause Category 1 issues have already been addressed globally by 10 C.F.R. pt. 51, subpt. A, app. B, they cannot be litigated in individual adjudications, such as license renewal proceedings for individual plants.”⁴ In other words, the codification of Category 1 issues rests in a different section of Part 51 than section 51.53(c). Therefore, even if Section 51.53(c)(3) did not apply to subsequent license renewal applicants, a contention regarding a Category 1 issue in a license renewal proceeding would still be a challenge to section 51.71(d), section 51.95(c), and Table B-1 and hence inadmissible without a waiver.⁵

³ 1996 Final Rule, 61 Fed. Reg. at 28,482 (emphasis added).

⁴ *Massachusetts v. NRC*, 522 F.3d 115, 120 (2008).

⁵ See 10 C.F.R. § 2.335.

Commissioner Baran, dissenting

I respectfully dissent from the majority opinion because it adopts an unreasonable interpretation of 10 C.F.R. § 51.53(c)(3) and mischaracterizes the scope of the agency's Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS). Contrary to the majority's assertions, Section 51.53(c)(3) does not apply to subsequent license renewal, and the GEIS did not evaluate the environmental impacts of subsequent license renewal. I would reverse the Board's ruling and hold that subsequent license renewal applicants and the NRC Staff may not exclusively rely on the GEIS and 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 to evaluate environmental impacts of Category 1 issues.

I. INTERPRETATION OF SECTION 51.53(c)(3)

Section 51.53(c) requires an "applicant for renewal of a license to operate a nuclear power plant" to submit an environmental report with its application.¹ Section 51.53(c)(3) provides:

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

- (i) The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.
- (ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part
- (iii) The report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues in appendix B to subpart A of this part. No such consideration is required for Category 1 issues in appendix B to subpart A of this part.

¹ 10 C.F.R. § 51.53(c)(1).

- 2 -

- (iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.²

The Board majority found that this regulatory text does not answer the question of whether section 51.53(c)(3) can be applied to subsequent license renewal applicants, stating that “it neither directs the Commission to apply section 51.53(c)(3) to [subsequent license renewal] applicants, nor does it forbid the Commission from doing so.”³ In the Board’s judgment, the Commission intended section 51.53(c)(3) to apply to all license renewal applicants, including those for subsequent license renewal.⁴ According to the Board, FPL’s environmental report did not need to consider Category 1 issues on a site-specific basis because it could rely on the Category 1 findings in the GEIS and Table B-1.⁵

I disagree with the Board’s interpretation of section 51.53(c)(3) and would hold that the provision applies only to applicants for initial license renewal. The plain and unambiguous language of the regulation limits its applicability to *initial* license renewal. Statements in subsequent NRC documents that were not part of the notice and comment rulemaking process cannot change the explicit language of the regulation.⁶

Section 51.53(c)(1) applies to “[e]ach applicant for renewal of a license to operate a nuclear power plant under part 54,” and section 51.53(c)(2) contains requirements for the

² 10 C.F.R. § 51.53(c)(3).

³ LBP-19-3, 89 NRC 245, 265.

⁴ *Id.*

⁵ *Id.* at 272-73.

⁶ See *Perez v. Mortg. Bankers Ass’n*, 135 S.Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009) (describing the Administrative Procedure Act’s “mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

- 3 -

environmental report that must be submitted by any such applicant.⁷ By contrast, section 51.53(c)(3) narrows the scope of license renewal applicants to which it applies and speaks only of “those applicants seeking an *initial* renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995.”⁸ Contrary to the Board’s assertion, the regulation is not silent as to whether subsequent license renewal applicants can take advantage of the provisions of section 51.53(c)(3).⁹ The explicit language of the regulation states that the provisions of 51.53(c)(1) and (c)(2) apply to all license renewal applicants, including those for subsequent license renewal, while section 51.53(c)(3) applies only to initial license renewal applicants. A basic canon of statutory construction is that the express mention of one thing excludes all others (*expressio unius est exclusio alterius*). When the regulatory text of section 51.53(c)(3) specifically addresses “those applicants seeking an initial renewed license,” it is properly read as not addressing applicants seeking other license renewal terms.

The history of the rule provides additional support for the conclusion that section 51.53(c)(3) applies only to initial renewal applicants. In 1991, the NRC initiated the revisions to Part 51 that promulgated section 51.53. In the Statements of Consideration (SOC) for the proposed rule, the Commission explained that “the part 51 amendments apply to one renewal of the initial license for up to 20 years beyond the expiration of the initial license.”¹⁰ The final rule summarized the changes to the rule—none of which affect the scope stated in the proposed rule’s SOC.¹¹ In fact, the SOC for the final rule, issued in 1996, stated that the final rule “is

⁷ 10 C.F.R. § 51.53(c)(1)-(2).

⁸ *Id.* § 51.53(c)(3) (emphasis added).

⁹ See LBP-19-3, 89 NRC at 265.

¹⁰ Environmental Review for Renewal of Operating Licenses; Proposed Rule, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (1991 Proposed Rule).

¹¹ See 1996 Final Rule, 61 Fed. Reg. at 28,468-69.

- 4 -

consistent with the generic approach and scope of the proposed” rule.¹² Moreover, the final rule (as well as a subsequent 2007 version of the rule) retained the restriction that only “applicants seeking an *initial* renewal license” need not consider alternatives for reducing adverse environmental impacts for Category 1 issues in Table B-1.¹³

Later revisions to section 51.53, which were proposed in 2009 and finalized in 2013, did not remove the word “initial” in section 51.53(c)(3), despite making other changes to the subsection.¹⁴ In fact, the SOC for the 2013 final rule revisions noted that the Atomic Energy Act authorizes the NRC to issue operating licenses for up to forty years and that the NRC regulations allow for renewal of these licenses for up to an additional twenty years.¹⁵ Neither the proposed rule or final rule SOC mentioned subsequent license renewal periods.

Thus, the plain language of the regulation is clear that it applies only to applications for initial license renewal. However, FPL and the Staff argue that we may reject the plain meaning if it would produce an “absurd” result.”¹⁶ They contend that this exception to a basic canon of

¹² See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 61 Fed. Reg. 28,467, 28,468 (June 5, 1996).

¹³ *Id.* at 28,487 (emphasis added). When section 51.53 was modified in 2007 to clarify its applicability to combined license applications, there was also a slight phrasing change from “those applicants seeking an initial *renewal* license” to “those applicants seeking an initial *renewed* license.” Compare *id.* with Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 49,352, 49,513 (Aug. 28, 2007) (emphasis added). The 2007 amendments further support the plain language interpretation of the rule—if “initial” was not intended to be a restriction, the NRC had an opportunity to remove it while it was already revising the same phrase in 51.53(c)(3).

¹⁴ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Proposed Rule, 74 Fed. Reg. 38,117, 38,117 (July 31, 2009).

¹⁵ 2013 Revisions, 78 Fed. Reg. at 37,282.

¹⁶ *Applicant's Surreply to New Arguments Raised in Reply Pleadings* (Sept. 20, 2018), at 4 (FPL Surreply); *NRC Staff's Response to the Applicant's Surreply and the Petitioners' Response, Regarding the Applicability of 10 C.F.R. § 51.53(c)(3) to Subsequent License Renewal Applications* (Nov. 2, 2018), at 15-21 (Staff Response to FPL Surreply).

- 5 -

statutory construction applies because the NRC intended for the substantial efficiencies gained by the GEIS and codified in Table B-1 to apply to plants seeking subsequent license renewal.¹⁷

I find this argument unpersuasive. As I discuss below, the GEIS did not address the environmental impacts of subsequent license renewal. Moreover, the GEIS still serves an important function for subsequent license renewal because the Staff may use the GEIS, through tiering and incorporation by reference, in its development of subsequent license renewal NEPA documents.

Similarly, the Board majority opined that it would be “nonsensical” to conclude that Part 51 authorizes the Staff to rely on the GEIS when preparing an SEIS but prohibits a subsequent license renewal applicant from doing so when preparing an environmental report.¹⁸ The Board stated that Petitioners’ interpretation of section 51.53(c)(3) is “incompatible with the purpose of an [environmental report], which is designed to aid the NRC Staff in preparing a draft SEIS,” and “unambiguous regulations require [the Staff] to apply the GEIS to Category 1 issues” when the Staff drafts an SEIS for subsequent license renewal.¹⁹ Specifically, the Board cited to sections 51.95(c)(4) and 51.71(d), and to Subpart A, Appendix B to Part 51 — regulatory language directing staff to integrate conclusions from, and rely on information found in, the GEIS. But the Board’s conclusion rests on the inaccurate premise that the Staff could rely exclusively on the GEIS and Table B-1 when preparing an SEIS for subsequent license renewal. The regulatory direction to rely on the GEIS can only apply to the extent that the GEIS actually evaluated the environmental impacts of subsequent license renewal. I find that it did not.

¹⁷ FPL Surreply at 4; Staff Response to FPL Surreply at 19 & n.73.

¹⁸ LBP-19-3, 89 NRC at 274.

¹⁹ LBP-19-3, 89 NRC at 267 & n.35.

II. SCOPE OF THE GEIS

Neither the original GEIS nor the 2013 GEIS revision analyzed the environmental impacts of subsequent license renewal periods. The SOC for the 1991 proposed rule was very clear, stating that the GEIS would “characterize the nature and magnitude of impacts and other issues that will result from the refurbishments necessary for license renewal and the potential environmental impacts of operating plants for 20 years beyond their current 40-year licensing limit.”²⁰ Additionally, in Appendix E—the appendix devoted to postulated accidents—the 2013 GEIS definitively states that its scope is limited to an initial period of license renewal:

Since the NRC’s understanding of severe accident risk has evolved since issuance of the 1996 GEIS, this appendix assesses more recent information on severe accidents that might alter the conclusions in Chapter 5 of the 1996 GEIS. This revision considers how these developments would affect the conclusions in the 1996 GEIS and provides comparative data where appropriate. This revision does not attempt to provide new quantitative estimates of severe accident impacts. In addition, *the revision only covers one initial license renewal period for each plant (as did the 1996 GEIS)*. Thus, the population projections, meteorology, and exposure indices used in the 1996 GEIS are assumed to remain unchanged for purposes of this analysis.²¹

The 1996 GEIS also stated that it “examines how [the currently operating commercial nuclear power] plants and their interactions with the environment would change if such plants were allowed to operate (under the proposed license renewal regulation 10 CFR Part 54) for a maximum of 20 years past the term of the original plant license of 40 years.”²² In addition, the 1996 GEIS contained an illustrative license renewal schedule, which contemplates an initial license and a single, renewed license: “The new license would go into effect at that point,

²⁰ *Id.* at 47,020.

²¹ 2013 GEIS, app. E, at E-2 (emphasis added).

²² 1996 GEIS at 2-1.

- 7 -

covering the balance of the original 40-year term, as well as the additional 20-year term.”²³

There was no mention of a potential subsequent license renewal term. Furthermore, in response to a comment on the draft rule related to decommissioning, the Commission stated that “[t]he analysis in the GEIS for license renewal examines the physical requirements and attendant effects of decommissioning after a 20-year license renewal compared with decommissioning at the end of 40 years of operation and finds little difference in effects.”²⁴

The 2013 GEIS also stated that it “documents the results of the systematic approach NRC used to evaluate the environmental consequences of renewing the licenses of commercial nuclear power plants and operating the plants for an additional 20 years beyond the current license term.”²⁵ This statement of scope said nothing about subsequent license renewal terms. Similarly, in the section “Decisions to Be Supported by the GEIS,” the 2013 GEIS focused solely on whether to renew operating licenses “for an additional 20 years.”²⁶ Furthermore, in the discussion of the impacts of termination of operations and decommissioning with respect to land use, the 2013 GEIS stated, “[t]here would be no difference in offsite land use impacts whether decommissioning occurred at the end of its current 40-year operating license or following a 20-year license renewal term.”²⁷

FPL argues that the NRC’s intent to review and update the GEIS and Table B-1 on a ten-year cycle does not make sense if their applicability was limited to initial license renewals.²⁸

²³ *Id.* at 2-36. This sixty-year schedule is supported by additional information in Appendix B to the GEIS, where the Staff also assumed a total plant life of sixty years. *Id.* at B-52.

²⁴ 1996 Final Rule, 61 Fed. Reg. at 28,482.

²⁵ 2013 GEIS at S-4.

²⁶ *Id.* at 1-7 to 1-8.

²⁷ *Id.* at 4-202.

²⁸ FPL Surreply at 6.

- 8 -

I disagree. It made sense to prepare for applications for initial license renewal submitted ten years or more after the Part 51 revisions were finalized in 1996. In fact, plants at thirty-three sites applied for initial license renewal in 2006 or later, with the most recent application submitted in 2017.²⁹ Therefore, updating the GEIS and Table B-1 served the important purpose of ensuring that the agency was relying on current information when preparing SEISs for initial license renewal applications that were submitted in 2006 or later.³⁰ Moreover, Table B-1 is a codification of the GEIS's findings, and its scope cannot be broader than the scope of the GEIS.

FPL and the Staff point to the regulatory cost-benefit analysis accompanying the 2013 GEIS to support their interpretation of the rule.³¹ In that document, the Staff described prospective subsequent license renewal applicants as “affected licensees.”³² But the regulatory analysis is neither the rule nor the agency's NEPA environmental review. It cannot change the meaning of NRC's regulations or expand the scope of a NEPA review conducted by the Staff.

The Board relies on some ambiguous statements in the text of the 2013 GEIS to conclude that the GEIS analyzed the environmental impacts of subsequent license renewal.

²⁹ NRC, Status of Initial License Renewal Applications and Industry Initiatives, <https://www.nrc.gov/reactors/operating/licensing/renewal/applications.html> (last visited Oct. 4, 2019).

³⁰ The preamble to Table B-1 states “[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant to a licensee who holds either an operating license or construction permit as of June 30, 1995.” See 10 C.F.R. pt. 51, subpt. A, app. B. FPL argues that this language does not include the word “initial” before “renewed operating license,” and that, therefore, it should be interpreted as applying to either initial or subsequent renewed operating licenses. See FPL Surreply at 3 n.9, 8. But in 1996, no applications for subsequent license renewal had been submitted or were even on the horizon. Twenty-two years later, FPL's application for Turkey Point was the first subsequent license renewal application. There was no need to specify in the appendix that Table B-1 only applied to “initial” license renewals because initial license renewals were the only type of renewal facing the agency in the foreseeable future.

³¹ FPL Surreply at 11-12 (citing Regulatory Analysis at 25); Staff Response to FPL Surreply at 8-9, 11-12.

³² Regulatory Analysis at 25.

- 9 -

But these isolated cases of ambiguous text are clearly outweighed by the numerous definitive statements in the GEIS that the document only examined the environmental impacts of a single, twenty-year license renewal. Even if the Staff had intended to address subsequent license renewal in the 2013 GEIS, the occasional ambiguous phrasing could not possibly put the public on notice of such an intention.³³ It is not reasonable to place the burden on the public to detect and divine the meaning of any ambiguities buried in the staff's NEPA document.

In sum, the 2013 GEIS did not evaluate the environmental impacts of subsequent license renewal. Referencing or building on this document could assist the Staff in preparing an EIS for Turkey Point's subsequent license renewal application, but the 2013 GEIS alone does not provide the required environmental review for operating a reactor beyond the initial twenty-year license renewal period. It would be a violation of NEPA for the agency to attempt to retroactively expand the scope of an environmental review completed seven years ago.

To be clear, the majority's retroactive expansion of the scope of the GEIS is essentially unlimited. The natural conclusion of the majority's flawed chain-of-reasoning is that "the GEIS covers the generic environmental impacts of all license renewals." If that were the case, the GEIS could be referenced to definitively address every Category 1 issue for a license renewal from 80 to 100 years, from 100 to 120 years, or even from 200 to 220 years. Yet, there is no basis to conclude that the Staff actually evaluated the environmental impacts of every potential future twenty-year license renewal term in the GEIS.

³³ NEPA obligates an 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 decisionmaking process." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). See also 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."); *id.* § 1502.1 ("[The EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.").

- 10 -

Because the plain language of section 51.53(c) applies only to applications for initial license renewal and neither the original license renewal GEIS nor the 2013 GEIS revision evaluated the environmental impacts of subsequent license renewal, the Category 1 findings in Table B-1 do not apply to subsequent license renewal applications. As a result, Petitioners wishing to submit contentions related to topics addressed in Table B-1 should not need to submit petitions for rule waivers, even if the applicant or Staff incorporates the GEIS by reference.

III. THE BOARD'S CONTENTION ADMISSIBILITY DETERMINATIONS

Some of the Board's admissibility determinations in LBP-19-3 and LBP-19-8 turned on whether section 51.53(c)(3) applies to subsequent license renewal applications. With respect to any contentions, or portions thereof, that the Board excluded solely based on its interpretation of this regulation, the Commission should find those determinations to be in error. The Commission should remand this proceeding to the Board to consider any of the dismissed contentions, or portions thereof, that were dismissed for reasons related to the interpretation of section 51.53(c)(3).

IV. DIRECTION TO STAFF

Because the Staff cannot rely exclusively on Table B-1 to address the Category 1 environmental impacts of subsequent license renewal, the Commission should direct the Staff to ensure that the Final SEIS for the subsequent license renewal of Turkey Point meets the requirements of NEPA by adequately addressing the impacts of subsequent license renewal.

V. CONCLUSION

For these reasons, I respectfully dissent. I would *reverse* the Board's ruling on the interpretation of section 51.53(c); *remand* Petitioners' contentions to the Board for further consideration consistent with this decision; and *direct* the Staff to ensure that the Turkey Point SEIS complies with NEPA.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating
Units 3 & 4)

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)
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Docket Nos. 50-250-SLR
50-251-SLR

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-20-03)** have been served upon the following persons by Electronic Information.

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Dated at Rockville, Maryland,
this 23rd day of April 2020.