UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

CLI-12-19

MEMORANDUM AND ORDER

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

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

[2] LBP-12-8, 75 NRC __ (Apr. 4, 2012) (slip op.).

I. BACKGROUND

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

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

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

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

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

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

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

II. DISCUSSION

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

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

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

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

[9] 10 C.F.R. § 2.311(d)(1).

[10] *See, e.g.*, *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC __, __ (Mar. 8, 2012) (slip op. at 8).

[11] 10 C.F.R. § 2.309(a).

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

A. Relevant History

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

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

[13] 10 C.F.R. § 51.53(c)(3)(ii)(L).

[14] *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989).

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

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

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

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

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

[19] 10 C.F.R. § 51.53(c)(3)(ii); GEIS at 1-5 to 1-6.

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

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

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

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

[21] Part 51 Amendments, 61 Fed. Reg. at 28,481. *See also* GEIS at 5-106 to 5-107.

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

[23] *See id.* at 28,488; 10 C.F.R. § 51.53(c)(3)(iv).

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

issues may be challenged in this license renewal proceeding despite the exception in section 51.53(c)(3)(ii)(L), because 10 C.F.R. § 51.53(c)(3)(iv), a subsection of the same regulation, requires Exelon to include in its environmental report any new and significant information.[25] NRDC asserts that Contention 1-E permissibly challenges the adequacy of the new information relating to severe accident mitigation that Exelon identified in its Environmental Report.[26]

B. Analysis of the Board's Ruling

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

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

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

[27] *See* Hearing Request at 16-19.

[28] LBP-12-8, 75 NRC at __ (slip op. at 40).

[29] *Id.* at __ (slip op. at 19-21, 23-25, 40).

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

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

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

[31] *See* LBP-12-8, 75 NRC at __ (slip op. at 11-27).

[32] *See, e.g.*, *id.* at __ (slip op. at 19) (observing that "[d]etermining whether information regarding SAMAs is 'new' and 'significant' does not involve . . . performing an entirely new SAMA analysis").

[33] *See id.* at __ (slip op. at 27).

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

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

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[34] *See* Exelon Appeal at 21; NRC Staff Appeal at 9-10.

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

[36] The petitioner filed the same contention in both proceedings. *Id.* at 16, 18.

[37] *Id.* at 16-17.

[38] *Id.* at 18-19.

[39] *See id.* at 20 ("Fundamentally, any contention on a 'Category 1' issue amounts to a challenge to our regulation that bars challenges to generic environmental findings.").

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

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

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[40] *See id.* at 21.

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

[42] *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 20.

[43] *Id.* at 19-21.

[44] *See* LBP-12-8, 75 NRC at __ (slip op. at 13).

[45] *Id.*

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

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

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

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[46] *Id.*

[47] *See id.* at __ (slip op. at 13-14).

[48] *Id.* at __ (slip op. at 14).

[49] *Id.* (emphasis omitted).

[50] *See id.* at __ (slip op. at 27).

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

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

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

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

[52] *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 18 n.15, 20.

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

At the same time, however, Exelon has put forward in its license renewal application new information regarding its SAMDA analysis. Exelon claims that this information—which it argues reinforces the validity of its existing SAMDA analysis—may not be challenged in this adjudication, given that no further analysis is permitted by rule. For its part, NRDC finds insufficient the information provided by Exelon, and therefore seeks to challenge the validity of the decades-old SAMDA analysis. To date, we have not been presented with precisely this factual scenario. In our view, NRDC may challenge the adequacy of the new information provided in the Limerick Environmental Report. However, based on the circumstances present here and given that our rules expressly provide that a supplemental SAMA analysis need not be performed in this case, the proper procedural avenue for NRDC to raise its concerns is to seek a waiver of the relevant provision in section 51.53(c)(3)(ii)(L).[54]

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[53] Part 51 Amendments, 61 Fed. Reg. at 28,481.

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

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

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

[56] *See* 10 C.F.R. § 2.802(a) ("Any interested person may petition the Commission to issue, amend or rescind any regulation.").

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

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

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

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

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

[59] *See generally* 10 C.F.R. §§ 2.311, 2.341.

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

In view of this ruling, we do not consider Exelon's or the Staff's remaining challenges to the Board's application of the general contention admissibility factors in 10 C.F.R. § 2.309(f)(1)—either Exelon's argument that NRDC's economic cost risk claim does not raise a genuine dispute with the application,[61] or the Staff's arguments that NRDC has not raised an issue material to the findings the NRC must make to support its decision on the application.[62] Until the waiver question has been decided, we dismiss these portions of Exelon's and the Staff's appeals without prejudice. Exelon and the Staff may renew their arguments following the decision on any waiver petition that may be filed by NRDC.

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

[61] *See* Exelon Appeal at 22-27 (citing 10 C.F.R. § 2.309(f)(1)(iv)).

[62] *See* NRC Staff Appeal at 10-19 (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

III. CONCLUSION

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

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of October, 2012.