LBP-19-3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. Sue H. Abreu

In the Matter of	Docket Nos. 50-250-SLR & 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	March 7, 2019

MEMORANDUM AND ORDER
(Granting the Hearing Requests of SACE and Joint Petitioners, Denying the Hearing Request of Albert Gomez, Granting Monroe County's Request to Participate as an Interested Governmental Participant, and Referring a Ruling to the Commission)

Pending before this Licensing Board are three hearing requests that challenge an application from Florida Power & Light Company (FPL) for a subsequent license renewal (i.e., a second twenty-year license renewal) for two nuclear power reactors, Turkey Point Units 3 and 4, located near Homestead, Florida. The hearing requests were filed by (1) Southern Alliance for Clean Energy (SACE); (2) Friends of the Earth, Inc., Natural Resources Defense Council, Inc., and Miami Waterkeeper, Inc. (collectively, Joint Petitioners); and (3) Albert Gomez. Additionally, Monroe County, Florida filed a request to participate in this proceeding as an interested governmental participant.

For the reasons discussed below, we conclude that (1) SACE has established standing and proffered two admissible contentions; (2) Joint Petitioners have established standing and proffered two admissible contentions; and (3) Mr. Gomez has failed to proffer an admissible contention. We therefore grant SACE's and Joint Petitioners' hearing requests, and we deny

Mr. Gomez's hearing request. We also grant Monroe County's request to participate as an interested governmental participant.

Additionally, pursuant to 10 C.F.R. § 2.323(f)(1), we refer to the Commission our ruling, infra Part III.A, that 10 C.F.R. § 51.53(c)(3) applies to the preparation of environmental reports (ERs) in subsequent license renewal proceedings. See infra note 46.[1]

I. PROCEDURAL BACKGROUND

On January 30, 2018, FPL submitted an application for a subsequent license renewal (SLR) for two nuclear power reactors, Turkey Point Units 3 and 4, located near Homestead, Florida. See Letter from Mano K. Nazar, President and Chief Nuclear Officer, FPL, to Document Control Desk, NRC (Jan. 30, 2018).[2] FPL submitted an ER with its application, as required.[3]

On May 2, 2018, the NRC issued a notice of opportunity to request a hearing and petition for leave to intervene, which provided members of the public sixty days from the date of publication to file a hearing request. See [FPL]; Turkey Point Nuclear Generating, Unit Nos. 3 and 4, 83 Fed. Reg. 19,304 (May 2, 2018). On June 29, 2018, in response to several requests to extend the filing deadline, the Commission granted a thirty-day extension, to and including August 1, 2018. See Commission Order (June 29, 2018) at 2 (unpublished).

---

[1] Appended to this Memorandum and Order is an opinion by Judge Abreu dissenting in part (with the majority's interpretation and application of section 51.53(c)(3)) and concurring in part (with those portions of the majority's decision that do not involve the interpretation or application of section 51.53(c)(3)).

[2] See [FPL], Turkey Point Nuclear Plant Units 3 and 4 [SLR] Application (rev. 1 Apr. 2018) [hereinafter SLRA]. The original licenses issued to FPL for Units 3 and 4 authorized forty years of operation, and the first renewal was for an additional twenty years of operation. The current licenses for the units will expire, respectively, on July 19, 2032 and April 10, 2033. Id. at 1-1.

[3] See [FPL] SLRA, App. E, Applicant's Environmental Report, Subsequent Operating License Renewal Stage, Turkey Point Nuclear Plant Units 3 and 4 (Jan. 2018) [hereinafter ER]. The purpose and content of an ER are discussed infra Part III.A.2.

On August 1, 2018, SACE filed a hearing request that proffered two multi-faceted environmental contentions,[4] and Joint Petitioners filed a hearing request that proffered five multi-faceted environmental contentions.[5] On August 2, 2018, Mr. Gomez, acting pro se, submitted a hearing request that proffered ten contentions consisting of safety and environmental challenges to FPL's application.[6]

FPL filed answers opposing all three hearing requests.[7] The NRC Staff filed an answer that (1) did not oppose granting SACE's hearing request and admitting, in part, both of SACE's environmental contentions;[8] and (2) did not oppose Joint Petitioners' hearing request and admitting, in part, two of Joint Petitioners' five environmental contentions.[9] In a separately filed answer, the NRC Staff opposed Mr. Gomez's hearing request.[10]

---

[4] See [SACE's] Request for Hearing and Petition to Intervene (Aug. 1, 2018) [hereinafter SACE Pet.].

[5] See Request for Hearing and Petition to Intervene Submitted by [Joint Petitioners] (Aug. 1, 2018) [hereinafter Joint Pet'rs Pet.].

[6] See Proposed Petition to Intervene and for Hearing Under 10 C.F.R. § 2.206, for Docket ID # NRC-2018-0074 (Aug. 2, 2018) [hereinafter Gomez Pet.].

[7] See Applicant's Answer Opposing [SACE's] Request for Hearing and Petition to Intervene (Aug. 27, 2018) [hereinafter FPL Answer to SACE Pet.]; Applicant's Answer Opposing Request for Hearing and Petition to Intervene Submitted by [Joint Petitioners] (Aug. 27, 2018) [hereinafter FPL Answer to Joint Pet'rs Pet.]; Applicant's Opposition to Albert Gomez's Petition to Intervene (Sept. 4, 2018) [hereinafter FPL Answer to Gomez Pet.].

[8] See NRC Staff's Corrected Response to Petitions to Intervene and Requests for Hearing Filed by (1) [Joint Petitioners], and (2) [SACE] (Aug. 27, 2018) at 57–69 [hereinafter NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet.].

[9] See id. at 28–57.

[10] See NRC Staff's Response to Petition to Intervene and Request for Hearing Filed by Albert Gomez (Sept. 4, 2018) [hereinafter NRC Staff Answer to Gomez Pet.].

On September 10, 2018, SACE and Joint Petitioners filed replies to FPL's and the NRC Staff's answers.[11] Mr. Gomez did not file a reply.

On September 20, 2018, FPL filed motions to strike certain portions of SACE's and Joint Petitioners' replies, or in the alternative, for leave to file an attached surreply.[12] Although SACE and Joint Petitioners opposed FPL's motions to strike, they did not oppose FPL's motion to file the surreply, and they requested permission to file an attached joint response to it.[13] On October 23, 2018, we (1) denied FPL's motions to strike, but granted its request to file the surreply; (2) granted the request of SACE and Joint Petitioners to file a joint response to FPL's surreply; and (3) authorized the NRC Staff to respond to these pleadings.[14] The NRC Staff filed a response on November 2, 2018.[15]

---

[11] See [SACE's] Reply to Oppositions by [FPL] and NRC Staff to SACE's Hearing Request (Sept. 10, 2018) [hereinafter SACE Reply]; Reply in Support of Request for Hearing and Petition to Intervene Submitted by [Joint Petitioners] (Sept. 10, 2018).

[12] See Applicant's Motion to Strike a Portion of the September 10, 2018 Reply Filed by [SACE] or, in the Alternative, for Leave to File a Surreply (Sept. 20, 2018); Applicant's Motion to Strike Portions of the September 10, 2018 Reply Filed by [Joint Petitioners] or, in the Alternative, for Leave to File a Surreply (Sept. 20, 2018); Applicant's Surreply to New Arguments Raised in Reply Pleadings (Sept. 20, 2018) [hereinafter FPL Surreply].

[13] See [SACE]'s Response to [FPL]'s Motion to Strike a Portion of SACE's September 10, 2018, Reply or, in the Alternative for Motion for Leave to File a Surreply (Oct. 1, 2018); [Joint Petitioners'] Answer in Opposition to Applicant's Motion to Strike Portions of the September 10, 2018 Reply Filed by Joint Petitioners or, in the Alternative, for Leave to File a Surreply (Oct. 1, 2018); Motion For Leave to Respond to Applicant's Surreply (Oct. 1, 2018); Petitioners' Response to Applicant's Surreply (Oct. 1, 2018) (corrected Oct. 4, 2018) [hereinafter Pet'rs Response to FPL Surreply].

[14] See Licensing Board Memorandum and Order (Denying FPL's Motion to Strike Portions of Replies, Granting FPL's Request to File a Surreply, Granting SACE and Joint Petitioners' Motion to File Response to Surreply, and Authorizing NRC Staff to File Response) (unpublished) (Oct. 23, 2018).

[15] See 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 [SLR] Applications (Nov. 2, 2018) [hereinafter NRC Staff Response to FPL Surreply].

Meanwhile, on September 20, 2018, Monroe County, Florida filed a request to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c), seeking to participate on the two environmental contentions proffered by SACE.[16] The NRC Staff did not oppose Monroe County's participation, provided that the Board admitted the two contentions specified by the County.[17]

On December 4, 2018, this Board held an oral argument in Homestead, Florida to assess SACE's and Joint Petitioners' standing and the admissibility of their proffered contentions. See Official Transcript of Proceedings, [FPL] Turkey Point Units 3 & 4 at 11–259 (Dec. 4, 2018) [hereinafter Tr.].[18] Pursuant to the Board's direction at oral argument, see Tr. at 257, the NRC Staff filed a supplemental brief on December 18, 2018 regarding its position on a contention proffered by SACE and Joint Petitioners,[19] and on January 7, 2019, the other participants filed timely responses. See id. at 258–59.[20]

---

16 See Monroe County, Florida's Request to Participate as Interested Governmental Participant (Sept. 20, 2018) [hereinafter Monroe County Request]. Section 2.315(c) permits a local governmental body that is not admitted as a party under section 2.309 an opportunity to participate in a hearing as an interested non-party.

17 See NRC Staff's Response to Monroe County, Florida's Request to Participate as an Interested Governmental Entity at 7 (Oct. 1, 2018).

18 Mr. Gomez's arguments on standing and contention admissibility were submitted on his written pleading. See Tr. at 15; Licensing Board Order (Providing Oral Argument Topics) at 2 n.3 (Nov. 14, 2018) (unpublished).

On December 21, 2018, this Board issued an order granting a joint motion requesting transcript corrections. See Licensing Board Order (Adopting Transcript Corrections) (Dec. 21, 2018) (unpublished).

19 See NRC Staff's Clarification of its Views Regarding the Admissibility of Joint Petitioners' Contention 1-E and SACE Contention 2 (Alternative Cooling Systems) (Dec. 18, 2018).

20 See Petitioners' Response to NRC Staff Clarification (Jan. 7, 2019); Applicant's Response to the NRC Staff's Clarification Regarding the Admissibility of Proposed Cooling Tower Contentions (Jan. 7, 2019).

II. LEGAL STANDARDS FOR STANDING AND CONTENTION ADMISSIBILITY

To participate in this proceeding as an intervenor, a petitioner must establish standing and proffer at least one admissible contention. See 10 C.F.R. § 2.309(a). We summarize the applicable legal standards below.

A. LEGAL STANDARDS GOVERNING STANDING

1. Individual Standing and the 50-Mile Proximity Presumption

In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner to "(1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision." Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015).[21] However, in the context of certain reactor licensing proceedings (e.g., reactor construction permit proceedings and new reactor operating license proceedings), the Commission has expressly authorized the use of a "proximity presumption," which presumes that a petitioner has standing if he or she resides, or otherwise has frequent contacts, within approximately 50 miles of the facility in question. See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138–39 (2010); Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915–16

---

[21] Under section 189a of the Atomic Energy Act, the NRC is required to "grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). Pursuant to the agency's regulation implementing general standing requirements, a petitioner's hearing request must state

> (i) The name, address and telephone number of the requestor or petitioner;
> (ii) The nature of the requestor's/petitioner's right under the [relevant statute] to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1).

(2009). This presumption "rests on [the] finding . . . that persons living within the roughly 50-mile radius of [a] facility face a realistic threat of harm if a release from the facility of radioactive material were to occur." Calvert Cliffs, CLI-09-20, 70 NRC at 917 (internal quotation marks omitted).

Licensing boards routinely have applied the 50-mile proximity presumption in reactor license renewal proceedings, reasoning that a renewal "allows operation of a reactor over an additional period of time during which the reactor could be subject to the same equipment failures and personnel errors as during operations over the original period of the license." Exelon Generation Co. (Limerick Generating Station, Units 1 & 2), LBP-12-8, 75 NRC 539, 547, rev'd in part on other grounds, CLI-12-19, 76 NRC 377 (2012). The Commission implicitly endorsed this approach when it cited with approval a licensing board's application of the proximity presumption in a reactor license renewal proceeding. See Calvert Cliffs, CLI-09-20, 70 NRC at 915 n.15 (citing Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 150, aff'd on other grounds, CLI-01-17, 54 NRC 3 (2001)).

We conclude that the 50-mile proximity presumption should apply in all reactor license renewal proceedings, including SLR proceedings. As the Commission explained in Calvert Cliffs, the 50-mile proximity presumption "is simply a shortcut for determining standing in certain cases." Calvert Cliffs, CLI-09-20, 70 NRC at 917. Applying this shortcut to reactor license renewal proceedings not only satisfies contemporaneous judicial concepts of standing, it provides clarity for litigants and licensing boards, thereby promoting efficiency in the adjudicatory process. See, e.g., Entergy Operations, Inc. (River Bend Station, Unit 1), LBP-18-1, 87 NRC 1, 7 n.4 (2018).

2. Representational Standing

An organization that seeks to intervene on behalf of one or more of its members must demonstrate representational standing. To do so, the organization must show that (1) at least one of its members would otherwise have standing to sue in his or her own right; (2) the

member has authorized the organization to represent his or her interest; (3) the interests that the organization seeks to protect are germane to its purpose; and (4) neither the claim asserted nor the relief requested requires the member to participate in the adjudicatory proceeding. See Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

B. LEGAL STANDARDS GOVERNING CONTENTION ADMISSIBILITY

A timely-filed contention is admissible if it satisfies the six-factor contention admissibility criteria in 10 C.F.R. § 2.309(f)(1), which requires a petitioner to

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . , together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.309(f)(1)(i)–(vi). Additionally, pursuant to 10 C.F.R. § 2.335, a contention that challenges a Commission rule or regulation will be rejected unless the petitioner makes an appropriate prima facie showing supporting a rule waiver before the licensing board, which then must certify the waiver request to the Commission.

The Commission's contention-admissibility standard is "strict by design," Amergen Energy Co. (Oyster Creek Nuclear Generation Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)), and failure to comply with any admissibility requirement "renders

a contention inadmissible." Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

III. ANALYSIS

Because of its overarching significance to this and other SLR cases, we first examine a legal question relevant to the admissibility of contentions proffered by SACE and Joint Petitioners; namely, whether 10 C.F.R. § 51.53(c)(3) applies to an applicant's preparation of an ER in SLR proceedings. After resolving that issue in the affirmative, infra Part III.A, we then consider whether to grant the hearing requests of SACE, infra Part III.B, Joint Petitioners, infra Part III.C, and Mr. Gomez, infra Part III.D.

A. THE APPLICABILITY OF 10 C.F.R. § 51.53(c)(3) TO THE PREPARATION OF AN ER IN SLR PROCEEDINGS

Petitioners[22] proffer environmental contentions challenging the adequacy of FPL's ER. Before we address the admissibility of these contentions, we consider a legal issue of first impression raised by petitioners, the resolution of which will affect our contention admissibility analysis. Petitioners argue that 10 C.F.R. § 51.53(c)(3)—which provides, inter alia, that applicants for initial license renewals need not consider Category 1 issues in their ER[23]—does not apply to applicants who (like FPL) seek a subsequent license renewal.

To assist the reader in understanding the issue presented, we first discuss the statutory and regulatory scheme governing the NRC Staff's preparation of an environmental impact

---

[22] When we use the term "petitioners," we are referring collectively to SACE and Joint Petitioners.

[23] As explained infra Parts III.A.1 and III.A.2, Category 1 issues are those environmental issues with effects that (1) are generic to all existing nuclear power plants; (2) have been analyzed in the generic environmental impact statement (GEIS) and codified by notice and comment rulemaking in 10 C.F.R. Part 51; (3) are reviewed by the Commission on a 10-year cycle; and (4) need not be addressed by the NRC Staff on a site-specific basis in the draft supplemental environmental impact statement for license renewals.

statement (EIS) incident to its review of applications seeking the renewal of licenses to operate nuclear power plants.[24] We then analyze 10 C.F.R. § 51.53(c)(3) and its applicability to SLRs.

1. Statutory and Regulatory Background Governing the NRC Staff's Preparation of an EIS

In 10 C.F.R. Part 51, the NRC promulgated regulations implementing NEPA requirements. See 10 C.F.R. § 51.10. NEPA requires federal agencies to prepare an EIS for proposed major federal actions "significantly affecting the quality of the human environment," including a detailed discussion of "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." 42 U.S.C. § 4332(C)(i)–(iii).

NEPA's EIS requirement serves two purposes. "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (quotation marks omitted). "Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Id. Although NEPA requires the agency to take a "hard look" at environmental consequences of major federal actions, id., it "seeks to guarantee process, not specific outcomes." Massachusetts v. NRC, 708 F.3d 63, 67 (1st Cir. 2013).

Pursuant to NRC regulations, the renewal of a license to operate a nuclear power plant constitutes a "major Federal action" triggering the NRC's obligation under NEPA to prepare an EIS. See 10 C.F.R. § 51.20(a), (b)(2).

---

[24] The NRC has codified two sets of regulations governing license renewal applications: (1) 10 C.F.R. Part 54, which focuses on safety-related issues such as equipment aging, see 10 C.F.R. § 54.4 (describing scope of renewal requirements in 10 C.F.R. Part 54); and (2) 10 C.F.R. Part 51, which focuses on the NRC's obligations under the National Environmental Policy Act (NEPA), see id. § 51.10 (explaining the purpose of Part 51 regulations). For purposes of this discussion, we deal only with NEPA and the environmental regulations in Part 51.

Preparing an EIS that considers all of the significant environmental issues relevant to the renewal of a nuclear power plant on a site-specific basis is a demanding and time-consuming task. See Massachusetts v. NRC, 522 F.3d 115, 119 (1st Cir. 2008). In 1991, in anticipation of a wave of applications for initial reactor license renewals, the NRC published a proposed rule[25] and a draft generic environmental impact statement (GEIS)[26] that were designed to inject efficiencies into the agency's environmental review portion of the license renewal process. Both documents embodied the results of a comprehensive study conducted by the NRC to determine those NEPA-related issues that could be addressed generically (that is, issues that applied to all plants) and those that needed to be determined on a plant-by-plant basis. The agency characterized the first group as Category 1 issues and the second as Category 2 issues. See Massachusetts, 522 F.3d at 119; Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11 (2001).[27]

In 1996, the NRC issued a final GEIS that analyzed Category 1 issues as to all nuclear power plants,[28] and it codified these findings in 10 C.F.R. Part 51. See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996) [hereinafter 1996 Final Rule]; 10 C.F.R. pt. 51, subpt. A, app. B (listing

---

25 Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016 (Sept. 17, 1991) [hereinafter 1991 Proposed Rule].

26 Draft [GEIS] for License Renewal of Nuclear Plants, NUREG-1437 (Aug. 1991).

27 For a more comprehensive definition of what constitutes a generic Category 1 issue, see Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,283–84 n.2 (June 20, 2013) [hereinafter 2013 Final Rule]. The Supreme Court has upheld the NRC's authority to make generic determinations to meet its NEPA obligations. See Balt. Gas & Elec. Co., 462 U.S. at 101 (stating that the generic method is "clearly an appropriate method of conducting the hard look required by NEPA").

28 See Office of Nuclear Regulatory Research, NUREG-1437, [GEIS] for License Renewal of Nuclear Plants at 1-3 to 1-6 (May 1996).

"NEPA issues for license renewal of nuclear power plants" and assigning them to either Category 1 or Category 2); Massachusetts, 522 F.3d at 120.

As the Commission explained in the context of an initial license renewal application proceeding, there are several steps in the NRC Staff's preparation of an EIS. See Turkey Point, CLI-01-17, 54 NRC at 12. First, the Staff prepares a draft supplemental EIS (SEIS), which is a site-specific supplement to the GEIS addressing Category 2 issues, and then the Staff seeks public comments on that draft. See id. The final SEIS adopts all applicable Category 1 environmental impact findings from the GEIS, and it also "takes account of public comments, including plant-specific claims and new information on generic findings. Part 51 requires the final SEIS to weigh all of the expected environmental impacts of license renewal, both those for which there are generic findings and those described in plant-specific analyses." Id. (internal citation omitted).[29]

In sum, the governing regulations establish that for all nuclear plant license renewal applications, the SEIS must include a plant-specific analysis of all Category 2 issues, but that it need not discuss Category 1 issues because those issues have already been addressed

---

[29] Because Category 1 issues have been addressed and codified in Part 51, "they cannot be litigated in individual adjudications, such as license renewal proceedings for individual plants." Massachusetts, 522 F.3d at 120; see also 10 C.F.R. § 2.335. Instead, the NRC has provided the following avenues for reviewing, changing, or challenging GEIS findings regarding Category 1 issues: (1) the Commission reviews GEIS findings on a ten-year basis to ensure their continuing validity; (2) the NRC Staff can request that the Commission suspend a generic rule or that a particular adjudication be delayed until the GEIS and accompanying rule are amended; (3) the NRC Staff can request that a generic rule be suspended with respect to a particular plant; (4) a party to an adjudicatory proceeding can invoke 10 C.F.R. § 2.335 and request that an NRC rule (i.e., a GEIS finding for a Category 1 issue) be waived with respect to that proceeding; and (5) any member of the public can petition the agency for a rulemaking proceeding for the purpose of changing the GEIS findings. See Massachusetts, 522 F.3d at 120–21; Turkey Point, CLI-01-17, 54 NRC at 12, 23 n.14.

Category 2 issues, unlike Category 1 issues, can be litigated in NRC adjudicatory proceedings. As the United States Court of Appeals for the First Circuit stated, this "divergent treatment of generic and site-specific issues is reasonable and consistent with the purpose of promoting efficiency in handling license renewal decisions." Massachusetts, 522 F.3d at 120.

globally in the GEIS and codified in 10 C.F.R. Part 51. See 10 C.F.R. pt. 51, subpt. A, app. B; id. §§ 51.71(d), 51.95(c)(4). "When the GEIS and SEIS are combined, they cover all issues that NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding." Massachusetts, 522 F.3d at 120.[30]

2. The Applicability of 10 C.F.R. § 51.53(c)(3) to SLR Proceedings

Although preparing an EIS that complies with NEPA is ultimately the NRC's responsibility, the process of creating an EIS begins with the license renewal applicant. See Massachusetts, 522 F.3d at 120. Pursuant to 10 C.F.R. §§ 51.45 and 51.53(c)(1), license renewal applicants must submit an ER, the purpose of which is "to aid the Commission in complying with section 102(2) of NEPA." 10 C.F.R. § 51.14.[31] The NRC Staff, in turn, reviews the ER and "draw[s] upon [it] to produce a draft [SEIS]." Massachusetts, 522 F.3d at 120.

As previously mentioned, this case raises the question of Commission intent regarding the scope of section 51.53(c)(3); more specifically, this case requires us to determine whether section 51.53(c)(3) may be construed as applying to an SLR applicant. The regulation states in pertinent part:

> (c) *Operating license renewal stage.* (1) Each applicant for renewal of a license to operate a nuclear power plant under part 54 of this chapter shall submit with its application a separate document entitled "Applicant's Environmental Report—Operating License Renewal Stage."
>
> (2) . . . This report must describe in detail the affected environment around the plant, the modifications directly affecting the environment or any plant

[30] SACE makes a passing argument in its brief that the NRC Staff may not rely on the GEIS for addressing Category 1 issues in preparing a draft EIS for SLR applications. See Pet'rs Response to FPL Surreply at 16; see also Tr. at 24. We disagree. Such an argument flies in the face of the 1996 regulatory language and structure, see 10 C.F.R. §§ 51.71(d), 51.95(c)(4); infra note 35 and accompanying text, as well as the plain language of the 2013 GEIS, which is a progeny of the 1996 regulations and which states that "[f]or [Category 1 issues] . . . no additional plant-specific analysis is required in future . . . SEISs unless new and significant information is identified." Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, at 4-3 (Vol. 1, Rev. 1 June 2013) [hereinafter 2013 GEIS].

[31] Accord 10 C.F.R. § 51.41; see also id. § 51.45(c) ("The [ER] should contain sufficient data to aid the Commission in its development of an independent analysis [in the EIS].").

> effluents, and any planned refurbishment activities. In addition, the applicant shall discuss in this report the environmental impacts of alternatives and any other matters described in § 51.45. . . .
>
> (3) For those applicants seeking an initial renewed license and holding an operating 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.

10 C.F.R. § 51.53(c) (emphasis added).

Section 51.53(c)(3) thus identifies a particular category of license renewal applicants (i.e., those seeking "an initial renewed license"), and it states that their ERs shall include the information required in section 51.53(c)(2) subject to certain "conditions and considerations," including the following: (1) the ER need not contain analyses of generic Category 1 issues but, instead, may reference and adopt the Commission's generic findings in 10 C.F.R. Part 51 and the GEIS, id. § 51.53(c)(3)(i); (2) the ER must provide a site-specific review of the non-generic Category 2 issues, id. § 51.53(c)(3)(ii); and (3) the ER must address any new and significant information regarding environmental impacts, of which the applicant is aware, that might render the Commission's generic Category 1 determinations incorrect in that proceeding. Id. § 51.53(c)(3)(iv); see also Turkey Point, CLI-01-17, 54 NRC at 3, 11.

In considering petitioners' assertion that section 51.53(c)(3) does not apply to SLRs, our starting point is the regulatory language. See Ne. Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001) ("[Regulatory] interpretation begins with the language and structure of the provision itself."). Although section 51.53(c)(3) directs applicants seeking an initial renewed license to prepare ERs in accordance with certain regulatory prescriptions, it (1) is silent as to SLR applicants; and (2) imposes no restrictions on the Commission's authority to allow SLR applicants to utilize these regulatory prescriptions when preparing ERs. Restated, the plain regulatory language does not answer the question presented, because it neither directs the Commission to apply section 51.53(c)(3) to SLR applicants, nor does it forbid the Commission from doing so. Given this regulatory silence, we must look beyond the plain language to discern the Commission's intent.

In our effort to ascertain Commission intent, we are guided by the Supreme Court's approach in Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008), where, in limning the scope of a regulatory provision in the face of regulatory silence, the Court conducted a holistic analysis that considered (1) the regulatory structure; (2) the agency's interpretative rules; and (3) administrative efficiency, logic, and practicality. In our judgment, a holistic analysis of section 51.53(c)(3) counsels emphatically against the restrictive interpretation urged by petitioners, and reveals, instead, that the Commission intended section 51.53(c)(3) to apply to all license renewal applications, including SLRs. Cf. Christensen v. Harris Cty., 529 U.S. 576, 583–88 (2000) (rejecting petitioners' invitation to put a restrictive gloss on a silent statutory provision when that gloss is not supported by the statutory or regulatory scheme).[32]

---

[32] In Shook v. D.C. Fin. Responsibility and Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998), the court of appeals recognized that "[s]ometimes Congress drafts statutory provisions that appear preclusive of other unmentioned possibilities . . . without meaning to exclude the unmentioned ones." Agencies are likewise susceptible of such drafting imprecision, and in such circumstances, a tribunal is obliged to give effect to agency intent in a manner that comports with the regulatory text, purpose, and structure.

At the outset, we observe that the regulatory history accompanying the 1991 proposed rule stated that the rule was intended to apply "to one renewal of the initial license for up to 20 years beyond the expiration of the initial license." See 1991 Proposed Rule, 56 Fed. Reg. at 47,017. Significantly, however, the proposed rule itself did not include the above restrictive phrase, and when the final rule was issued in 1996, neither it nor its regulatory history included this phrase. See 1996 Final Rule, 61 Fed. Reg. at 28,467. The omission of this phrase supports a conclusion that the Commission did not intend to limit section 51.53(c)(3) to initial license renewals. See Tr. at 62. This conclusion is buttressed by the regulatory structure, including Appendix B to Subpart A of Part 51—to which section 51.53(c)(3)(ii) refers and that codifies the GEIS's findings—that does not refer to "initial" renewals, but speaks more broadly about applying to "a renewed operating license for a nuclear power plant," and as "represent[ing] the analysis of the environmental impacts associated with renewal of any operating license . . . ." 10 C.F.R. pt. 51, subpt. A, app. B.[33]

---

[33] As discussed supra Part III.A.1, a singular purpose of the rule was to promote efficiency in the license renewal process for the wave of initial license renewal applications that was expected to arrive shortly after the rule's promulgation in 1996. FPL and the NRC Staff state that the NRC was, quite understandably, then focused on initial license renewals. See FPL Surreply at 5–6; Tr. at 37. In FPL's view, the word "initial" in section 51.53(c)(3) is properly viewed as a non-restrictive reference to the category of renewals the agency was then contemplating. See FPL Surreply at 6; Tr. at 38. They argue that this non-restrictive reference—although still operative—does not perforce indicate a Commission intent to limit section 51.53(c)(3) to initial license renewals. We agree.

Despite numerous regulatory revisions to section 51.53 since its initial issuance, we found nothing in the regulatory history indicating that the scope of section 51.53(c)(3)—in 1996 or thereafter—was intended to be restricted to initial license renewals, nor do petitioners identify any such history. See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed Reg. 66,537 (Dec. 18, 1996) (making minor clarifying and conforming changes and adding language to Table B-1 that had been omitted); Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352 (Aug. 28, 2007) (modifying section 51.53(c)(3) to clarify its applicability to combined license applications); 2013 Final Rule, 78 Fed. Reg. at 37,282 ("[R]edefin[ing] the number and scope of the environmental impact issues that must be addressed by the NRC and applicants during license renewal environmental reviews"); Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,253 (Sept. 19, 2014) (amending section 51.53 "to improve readability and to clarify how the generic determination will be used in future NEPA documents for power

That the Commission did not intend to restrict section 51.53(c)(3) to initial license renewals is also consistent with an explicitly stated regulatory purpose, which is to promote efficiency in the environmental review process for license renewal applications.[34] Accepting petitioners' argument would result in an environmental review process where SLR applicants would be required to analyze Category 1 issues on a plant-specific basis, despite the fact that these generic issues have already been analyzed in the GEIS and codified in Appendix B to Subpart A of Part 51. In other words, accepting petitioners' cabined interpretation of section 51.53(c)(3) would compel SLR applicants to perform a time-consuming and unnecessary act, in derogation of the regulatory purpose. This we are unwilling to do. See Exxon Nuclear Co. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 878 (1977) ("It is an elementary canon of construction that we 'cannot interpret federal statutes to negate their own stated purposes.'") (quoting N.Y. Dep't of Social Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

Accepting petitioners' restricted interpretation of section 51.53(c)(3) is also incompatible with the purpose of an ER, which is designed to aid the NRC Staff in preparing a draft SEIS. See supra note 31. When the NRC Staff prepares a draft SEIS, unambiguous regulations require it to apply the GEIS to Category 1 issues.[35] Because an ER is "essentially the

---

reactors and ISFSIs"); Final Rule, Miscellaneous Corrections, 79 Fed. Reg. 66,598, 66,599 (Nov. 10, 2014) (correcting typographical errors in section 51.53(d)).

[34] See 1996 Final Rule, 61 Fed. Reg. at 28,467 (explaining that the Commission's intent behind 10 C.F.R. Part 51 is to "improve the efficiency of the process of environmental review for applicants seeking to renew an operating license").

[35] See 10 C.F.R. § 51.95(c)(4) (stating that the SEIS prepared by the NRC incident to the renewal of an operating license "shall integrate the conclusions in the [GEIS] for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant"); id. § 51.71(d) (stating that the draft SEIS "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 appendix B to subpart A of this part"); id. pt. 51, subpt. A, app. B (identifying Category 1 issues applicable to "license renewal of nuclear power plants").

applicant's proposal" for the NRC Staff's supplemental SEIS,[36] it logically follows that an SLR applicant should, like an applicant for an initial renewal, prepare an ER in accordance with section 51.53(c)(3) and, accordingly, apply the GEIS to Category 1 issues rather than analyzing them on a plant-specific basis. Otherwise, its ER would contain an overwhelming amount of information that would be of no assistance to the NRC Staff in its preparation of the draft SEIS. Absent persuasive indicators to the contrary, we are unwilling to impute to the Commission an intent to have an SLR applicant prepare an ER that does not serve its regulatory purpose.

Accepting petitioners' argument would not only undermine the regulatory purpose, it would ignore an express regulatory mandate in section 51.95(c)(4). In license renewal proceedings, the NRC Staff is required to integrate into the draft SEIS "information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii)." 10 C.F.R. § 51.95(c)(4) (emphasis added). In other words, section 51.95(c)(4), which applies broadly to all license renewal proceedings, see supra note 35, commands the NRC to consider the "information developed" by an SLR applicant "under § 51.53(c)(3)(ii)" in its preparation of the draft SEIS. In our view, this regulatory command is persuasive evidence that, contrary to petitioners' argument, the Commission did not intend to restrict section 51.53(c)(3) to initial license renewal applicants.

This conclusion is strengthened by the fact that Part 51 requires periodic reviews of the GEIS findings to ensure that the environmental analyses for Category 1 issues remain current. The regulation states in pertinent part: "On a 10-year cycle, the Commission intends to review the material in [Appendix B] and update it if necessary. A scoping notice must be published in the Federal Register indicating the results of the NRC's review and inviting public comments and proposals for other areas that should be updated." 10 C.F.R. pt. 51, subpt. A, app. B. This

---

[36] See Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

regulatory requirement for periodic reviews and updates of the GEIS would not be necessary unless the Commission contemplated that the NRC Staff, as well as all license renewal applicants, could rely on the generic findings in the GEIS instead of engaging in the wholly unnecessary process of considering Category 1 issues on a site-specific basis.

The most recent update of the GEIS occurred in June 2013. See 2013 GEIS.[37] The following extract from the final regulatory analysis for that update expressly considered SLR applications in its cost-benefit analysis, signifying that the Commission intended the 2013 GEIS and Appendix B to apply to SLRs:

> Some plants will become eligible for a second 20-year license extension after [fiscal year (FY)] 2013. While the NRC understands that the possibility exists for license holders to submit a second license renewal application, no letters of intent have been received as of the issuance date of this document. The NRC estimates receiving 3 applications per year from FY 2015 through FY 2022. The NRC estimates that a total of 30 license renewal applications (including applications for a second license renewal) will be received in the 10-year cycle following the effective date of the rule.

See SECY-12-0063, Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, encl. 2 at 25 (Apr. 20, 2012).[38] Nowhere in the regulatory

---

[37] Notably, the NRC's scoping report for the 2013 update to the GEIS stated that "[t]he NRC's current plan is to apply the revised GEIS to all license renewal applications submitted after the date [of] the Record of Decision for the revised GEIS is printed in the Federal Register." [EIS] Scoping Process Summary Report, Update of the [GEIS] for License Renewal of Nuclear Plants at 67 (May 2009) (emphasis added). This scoping summary report was referenced in the proposed rule to update Part 51. See Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,119 (July 31, 2009) (describing the scoping process). For a full description of the reasons public comments were sought, see Notice of Intent to Prepare an [EIS] for the License Renewal of Nuclear Power Plants and to Conduct Scoping Process, 68 Fed. Reg. 33,209, 33,210 (June 3, 2003).

[38] We acknowledge that this SECY paper (which is a formal memorandum to the Commissioners from the Executive Director for Operations that seeks Commission approval for the specified Staff action) "lack[s] the force of law" and, accordingly, cannot serve to alter a regulation. Christensen, 529 U.S. at 587. Here, however, we seek to discern Commission intent regarding the scope of a silent regulation. In our judgment, this SECY paper, which was the basis for Commission action on the final rule, see SRM-SECY-12-0063, Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses

history of the 2013 rulemaking (or, for that matter, in any of the post-1996 rulemakings, see supra note 33), was there any discussion of an intent to restrict the application of section 51.53(c)(3) to initial license renewals. Rather, it discussed license renewals in general, without differentiating between initial renewals and SLRs, giving rise to a persuasive inference that the Commission intended the updated GEIS—and therefore section 51.53(c)(3)—to apply to all applicants.

After completion of the 2013 rulemaking, the NRC Staff informed the Commission that, with regard to SLR applications, "[t]he staff does not recommend updating the environmental regulatory framework under 10 CFR Part 51 . . . , because environmental issues can be adequately addressed by the existing GEIS and through future GEIS revisions." SECY-14-0016, Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor [SLR], at 5 (Jan. 31, 2014). The Commission accepted that recommendation, which is further evidence of the Commission's intention to apply the 2013 GEIS and Appendix B—and, hence, section 51.53(c)(3)—to SLR applicants. See SRM-SECY-14-0016, Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor [SLR] (Aug. 29, 2014) (disapproving the NRC Staff's recommendation to initiate a rulemaking pursuant to Part 54, but refraining—consistent with the NRC Staff's recommendation—from updating the Part 51 regulatory framework for SLR applications).

(Dec. 6, 2012), provides insight into the Commission's view regarding the continuing applicability of the GEIS to license renewals and, hence, the applicability of section 51.53(c)(3) to SLR applications. In other words, as we have shown, when the regulations were issued in 1996, the regulatory purpose and structure reveal that the Commission did not intend section 51.53(c)(3) to be restrictive in its scope, and that intent has remained constant with the passage of time.

The 2013 GEIS itself discusses license renewals in general and non-restrictive terms, from which it may be inferred that SLR applicants may rely on the GEIS and Appendix B and, accordingly, need not consider Category 1 issues on a site-specific basis in their ER.[39]

Petitioners nevertheless assert that the agency intended the 1996 GEIS and the 2013 GEIS to be limited to initial license renewals. See Pet'rs Response to FPL Surreply at 5–8. But petitioners fail to identify any provision in the 1996 GEIS that compels us to accept their argument. And regarding the 2013 GEIS, petitioners' argument fails to account for the following language in the GEIS: (1) the "purpose and need for the proposed action (issuance of a renewed license) is to provide an option [to continue plant operations] beyond the term of the current . . . operating license," 2013 GEIS at 1-3; (2) the "decisions to be [] supported by the GEIS are whether or not to renew the operating licenses of . . . power plants for an additional 20 years," id. at 1-7; and (3) "[t]here are no specific limitations in the Atomic Energy Act or the NRC's regulations restricting the number of times a license may be renewed." Id. at S-1. The 2013 GEIS clearly indicates that it assesses "environmental consequences of renewing the licenses . . . and operating the plants for an additional 20 years beyond the current license term." Id. at S-4 (emphasis added). Additionally, the 2013 GEIS states that the proposed action

---

[39] See, e.g., 2013 GEIS at 1-4 ("The GEIS serves to facilitate NRC's environmental review process by identifying and evaluating environmental impacts that are considered generic and common to all nuclear power plants. . . . Generic impacts will be reconsidered in SEISs only if there is new and significant information that would change the conclusions in the GEIS."); id. at 1-7 to1-8 ("The decisions to be [] supported by the GEIS are whether or not to renew the operating licenses of individual commercial nuclear power plants for an additional 20 years. The GEIS was developed to support these decisions and to serve as a basis from which future NEPA analyses for the license renewal of individual nuclear power plants would tier."); id. at 1-8 ("The GEIS provides the NRC decision-maker with important environmental information considered common to all nuclear power plants and allows greater focus to be placed on plant-specific (i.e., Category 2) issues."); id. at 1-17 ("The applicant is not required to assess the environmental impacts of Category 1 issues listed in Table B-1 unless the applicant is aware of new and significant information that would change the conclusions in the GEIS."); id. at 4-3 ("For [Category 1 issues], no additional plant-specific analysis is required in future supplemental EISs . . . unless new and significant information is identified.").

includes the activities associated with the "license renewal term," id. at 4-2, and this term is used throughout the GEIS in assessing the impacts of these activities, as well as in various impact findings codified in Table B-1. The 2013 GEIS defines the "license renewal term" as "[t]hat period of time past the original or current license term for which the renewed license is in force." Id. at 7-27 (emphasis added).

In short, the 2013 GEIS—which is an express regulatory product of the 1996 regulations—explicitly purports to assess the environmental impacts associated with a 20-year renewal period, regardless of whether this period follows the original license or a current renewed license. And the 2013 revisions to the Part 51 rules codify in Table B-1 the findings from the 2013 GEIS on the impacts associated with the "license renewal term."[40]

In our judgment, the Part 51 regulatory structure—commencing with the proposed 1991 regulations, and continuing to present (including the 2013 GEIS)—is compelling evidence that the Commission intended for all license renewal applicants to comply with the requirements of 10 C.F.R. § 51.53(c)(3) when preparing an ER. More specifically, consistent with section 51.53(c)(3), an SLR applicant "is not required to assess the environmental impacts of Category 1 issues listed in Table B-1 unless the applicant is aware of new and significant information that would change the conclusions in the GEIS." 2013 GEIS at 1-17.

---

[40] Despite the above regulatory language, petitioners argue that the 2013 GEIS should not apply to SLRs because it fails to adequately consider the environmental impacts associated with SLRs (i.e., with a plant life of 80 years) for, e.g., occupational radiation exposures, public radiation doses, and decommissioning. See Pet'rs Response to FPL Surreply at 7–8. In light of our conclusion above that the 2013 GEIS aims to assess the environmental impacts associated with SLRs, and because Part 51 commands the NRC Staff to use the GEIS in preparing the SEIS for a license renewal, see supra note 35, we summarily reject petitioners' argument, concluding that it is essentially an impermissible attempt to challenge Category 1 findings in an adjudicatory proceeding without having first sought a waiver. See 10 C.F.R. § 2.335(a).

NRC guidance documents support this conclusion.[41] For example, NRC Regulatory Guide 4.2 provides instructions for license renewal applicants for the "preparation of [ERs] that are submitted as part of an application for the renewal of a nuclear power plant operating license in accordance with [10 C.F.R. Part 54]." Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications, Regulatory Guide 4.2, at 1 (supp. 1, rev. 1 June 2013) [hereinafter Reg. Guide 4.2]. This Regulatory Guide does not distinguish between initial and subsequent license renewal applicants; rather, because it repeatedly refers broadly to "applicants" and "license renewal applicants," it is reasonably construed as applying to both categories of applicants. See, e.g., Reg. Guide 4.2 at 1, 5, 6, 7, 8, 10.[42]

Moreover, and most significantly, Reg. Guide 4.2 repeatedly states that issues "identified as Category 1 issues in the GEIS, are adequately addressed for all applicable nuclear plants. The NRC will not require additional analysis in plant-specific [ERs] unless new and significant information has been identified . . . The applicant may adopt the findings in the GEIS for Category 1 issues if no new and significant information is discovered." Id. at 25 (emphasis added); see also id. at 2, 7.

According "special weight" to Reg. Guide 4.2 as directed by the Commission, Indian Point, CLI-15-6, 81 NRC at 356, and recognizing that it "reflect[s] a body of experience and informed judgment" developed by the NRC Staff, Holowecki, 522 U.S. at 399, we find that it

---

[41] The Supreme Court has stated that an agency's interpretative statements "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance. As such, they are entitled to a measure of respect . . . ." Holowecki, 552 U.S. at 399 (internal citations omitted); see also Entergy Nuclear Operations, Inc. (Indian Point, Units 2 & 3), CLI-15-6, 81 NRC 340, 356 (2015) ("Guidance documents that are developed to assist in compliance with applicable regulations are . . . entitled to special weight.") (internal citation omitted).

[42] Accord Standard Review Plans for Environmental Reviews for Nuclear Power Plants: Operating License Renewal, NUREG-1555, at iii (supp. 1, rev. 1, June 2013) (providing instructions for NRC Staff in "conducting an environmental review for the renewal of a nuclear power plant operating license") (emphasis added).

provides strong support for concluding that "[a]pplicants for renewal of power reactor operating licenses," including SLR applicants, may "use the guidance in [Reg. Guide 4.2] to develop the [ER] required under 10 C.F.R. 51.53(c)." Reg. Guide 4.2 at 56. Accordingly, SLR applicants need "not [conduct] additional analysis in . . . [ERs for Category 1 issues] unless new and significant information is identified." Id. at 25.[43]

A contrary conclusion—in addition to being discordant with the regulatory purpose, regulatory structure, and Reg. Guide 4.2—would result in the following untenable interplay between the NRC's environmental review procedures in 10 C.F.R. Part 51 and its adjudicatory procedures in 10 C.F.R. Part 2. First, assume that we accept petitioners' argument that section 51.53(c)(3) does not apply to SLRs and, accordingly, that we admit a contention alleging that FPL's ER is deficient because it fails to consider a Category 1 issue on a plant-specific basis. Further, assume that thereafter the NRC Staff issues a draft SEIS that, consistent with regulatory requirements, likewise does not consider that Category 1 issue on a plant-specific basis. Pursuant to the agency's contention-migration tenet,[44] the admitted contention would become a challenge to the NRC Staff's draft SEIS. Because the NRC Staff's non-consideration of the Category 1 issue on a plant-specific basis fully comports with its environmental review responsibilities under NEPA and Part 51, see Balt. Gas & Elec. Co., 462 U.S. at 101; supra note 35 and accompanying text, the contention would be subject to summary dismissal on the

---

[43] The Supreme Court has instructed that in assessing the deference to be accorded to an interpretative rule, a tribunal should "consider whether the agency has applied its position with consistency." Holowecki, 552 U.S. at 399–400. The current version of Reg. Guide 4.2 has been applied by the agency and relied upon by the nuclear industry for over five years. Plainly, FPL relied upon it when preparing this ER, see ER at 1-7, and FPL's reliance was consistent with the agency's expectation embodied in NUREG-1555. See supra note 42.

[44] "[A] contention 'migrates' when a licensing board construes a contention challenging [an ER] as a challenge to a subsequently issued Staff NEPA document without the petitioner amending the contention." Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC 33, 42 n.58 (2015).

alternative grounds that it was (1) outside the scope of the proceeding, see 10 C.F.R. § 2.309(f)(1)(iii); or (2) an impermissible challenge to an agency regulation. See id. § 2.335(a). We do not believe that the Commission intended to craft a regulatory scheme that would require litigants and licensing boards to engage in a senseless adjudicatory process that, in practice, would result in the wasteful expenditure of private and governmental resources in derogation of the public interest. We therefore decline to credit petitioners' interpretation of section 51.53(c)(3), which would compel this absurd result.[45]

In sum, based on a holistic review of 10 C.F.R. § 51.53(c)(3) that considers (1) regulatory language and structure; (2) regulatory purpose and history; (3) interpretative rules; and (4) efficiency, logic, and practicality, we are persuaded that the Commission did not intend to restrict section 51.53(c)(3) to initial license renewals. Accordingly, we conclude that FPL's ER need not consider generic Category 1 issues on a site-specific basis but, instead, may rely on the Category 1 findings in the GEIS and Table B-1, and we will assess petitioners' contentions in that light.[46]

---

[45] Cf. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

[46] Given the significance of this legal issue of first impression, we will refer our ruling on this matter to the Commission pursuant to 10 C.F.R. § 2.323(f)(1). We note that this issue is pending before a licensing board in another SLR proceeding, signifying that it will likely be a recurring issue until resolved by the Commission. See Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene, Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 & 3), Nos. 50-277/278-SLR (Nov. 19, 2018).

3. A Response to the Dissent

The dissent would lead this Licensing Board to an irrational result based on its conviction that section 51.53(c)(3), by its plain and (allegedly) unambiguous language, excludes SLRs and necessarily applies only to initial license renewals. See Dissent at 1–3, 18. With respect, the dissent is incorrect.[47]

To support its restrictive reading of section 51.53(c)(3), the dissent cites the canon of statutory interpretation expressio unius est exclusio alterius, see Dissent at 3, which means "the mention of one thing implies the exclusion of another." Shook, 132 F.3d at 782. The dissent views the Commission's use of the word "initial" as necessarily precluding SLRs. See Dissent at 4 ("Something is either 'initial,' . . . or it is not. No room exists for anything else.").

However, the expressio unius canon is not an inflexible rule of law commanding that the mere mention of one thing means the exclusion of another; rather, it is "used as a starting point in [regulatory] construction" to ascertain the intent of the drafter. Shook, 132 F.3d at 782. The force of the canon in a particular case, like "[t]he force of any negative implication, . . . depends on context." NLRB v. Sw. Gen., Inc., __ U.S. __, __, 137 S. Ct. 929, 940 (2017) (internal quotations omitted). Thus, whether the word "initial" in section 51.53(c)(3) necessarily excludes SLRs from the regulation's scope is a matter of Commission intent, to be determined by considering "whether or not the [Commission's] mention of one thing . . . does really necessarily, or at least reasonably, imply the preclusion of alternatives." Shook, 132 F.3d at 782; accord Sw. Gen., Inc., __ U.S. at __, 137 S. Ct. at 940 (applying expressio unius "only when circumstances support [] a sensible inference that the term left out must have been meant to be excluded") (internal citation omitted). Our review of the circumstances surrounding the proposal and

---

[47] To be clear, we agree with the dissent's statement that, pursuant to its plain language, section 51.53(c)(3) applies to applicants seeking an "initial renewed license." Dissent at 2. Our interpretation of section 51.53(c)(3) gives full (but not preclusive) effect to this phrase.

issuance of the Part 51 regulatory amendments, see supra Part III.A.2, reveals that the mention of initial license renewals in section 51.53(c)(3) does not support a reasonable inference (much less a necessary one) that the Commission intended to exclude SLRs.[48]

Significantly, the dissent does not dispute that its restrictive reading of section 51.53(c)(3) 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," Dissent at 8, which all refer broadly to "license renewals" rather than restrictively to "initial" license renewals. To harmonize its interpretation with these other portions of Part 51 in light of the 1991 regulatory history, the dissent suggests (but "do[es] not advocate", id. at 9 n.38) that "the word 'initial' would need to be read into [these regulatory provisions]." Id. at 8. That the dissent's interpretation would result in the de facto revision of three regulations powerfully illustrates the infirmity of its analysis. Such a wholesale adjudicatory revision to the Part 51 regulatory structure in derogation of Commission intent is both unsupportable and impermissible.[49]

According to the dissent, the fact that Part 51 provides for periodic updates of the GEIS does not mean that an SLR applicant can rely on the GEIS to prepare its ER; rather, "it simply means that when the GEIS is used [by the NRC Staff to prepare an SEIS,] the information it contains is reasonably up-to-date." Dissent at 7 n.32. In our view, however, it is nonsensical—indeed, absurd—to conclude that Part 51 authorizes the NRC Staff to rely on the GEIS when

---

[48] The dissent's analysis relies significantly on the snippet of regulatory history in the 1991 proposed rule that stated the rule would apply "to one renewal of the initial license for up to 20 years beyond [its] expiration." Dissent at 4. However, this phrase was omitted from the regulatory history in the 1996 final rule—and with good reason. It did not comport with the regulatory purpose and structure, both of which supported a conclusion that the Commission did not intend to restrict section 51.53(c)(3) to initial license renewals. See supra Part III.A.2.

[49] In addition to suggesting an extensive regulatory revision in the guise of interpreting section 51.53(c)(3), the dissent proposes a "short-term [procedural] solution" for SLR applicants and the NRC Staff to follow in conducting their Part 51 environmental review. See Dissent at 16. This "short-term [procedural] solution," however, would also constitute an impermissible adjudicatory revision of Part 51 in derogation of Commission intent.

preparing an SEIS, but prohibits an SLR applicant from doing so when preparing an ER. After all, in light of the periodic update of the GEIS, now, as in 1996, "[w]hen the GEIS and SEIS are combined, they cover all issues that NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding." Massachusetts, 522 F.3d at 120. Moreover, because (as we have shown) the Commission did not intend to exclude SLR applicants from using section 51.53(c)(3) in the preparation of ERs, it necessarily follows that the Commission did not intend to preclude SLR applicants from relying on the updated GEIS in the preparation of ERs. The updated GEIS (including its codification and regulatory history) as well as the agency's interpretative rules support this conclusion.

Notably, if there were any question in 1991 and 1996 about whether updated GEIS findings, as codified in Part 51, could validly be applied to SLRs, an affirmative answer could be gleaned from the following discussion in the regulatory history:

> (1) License renewal will involve nuclear power plants for which the environmental impacts of operation are well understood as a result of data evaluated from operating experience to date; (2) activities and requirements associated with license renewal are anticipated to be within this range of operating experience, thus environmental impacts can reasonably be predicted; and (3) changes in the environment around nuclear power plants are generally gradual and predictable with respect to characteristics important to environmental impact analyses.

1991 Proposed Rule, 56 Fed. Reg. at 47,016 (emphasis added); accord 1996 Final Rule, 61 Fed. Reg. at 28,467–68. The above principles, which explain the creation of Category 1 issues and justify their use in ERs and SEISs, apply with equal force to initial license renewals and SLRs. The dissent's contrary view is not tenable.

The dissent also expresses concern that our interpretation of section 51.53(c)(3) runs afoul of the Administrative Procedure Act (APA) by (1) effecting a de facto change to the regulation, see Dissent at 1; (2) side-stepping the rulemaking process, thereby denying the public an opportunity to comment on the rule change, see id. at 14; and (3) prejudicing petitioners who, due to their uncertainty about whether section 51.53(c)(3) applies to SLRs, fail

to invoke section 2.335 to seek a waiver of a GEIS finding codified in Part 51. See id. These concerns are unfounded.

First, our interpretation does not effect a de facto regulatory change; rather, it gives effect to Commission intent that has been rooted in the Part 51 regulatory purpose and structure from the outset. See supra Part III.A.2. Nothing in the APA forbids a regulatory interpretation that is permitted by the regulatory language, consistent with the regulatory purpose, supported by the regulatory structure, reinforced by published regulatory guidance, and reasonably relied upon by the industry.[50]

Nor is there merit to the dissent's concern that our interpretation improperly side-steps the rulemaking process and denies the public the opportunity to comment on a rule change. For the reasons already discussed, our interpretation does not effect a rule change and, accordingly, the public was not improperly denied an opportunity to comment. Rather, the public had an opportunity to comment between the rule's proposal in 1991 and its issuance in 1996. We note, moreover, that immediately before the agency issued the final rule in 1996, it gave the public an additional 30-day comment period, announcing that "[t]he NRC is soliciting public comment on this rule for a period of 30 days. . . . Absent a determination by the NRC that the rule should be modified, based on comments received, the final rule shall be effective on August 5, 1996. The comment period expires on July 5, 1996." 1996 Final Rule, 61 Fed. Reg. at 28,467.

---

[50] The dissent asserts that "the majority's application of the regulation creates . . . a significant uncertainty about what regulatory standards are applicable" to SLRS. Dissent at 1. However, nothing in the instant record suggests that the regulated industry has any uncertainty about the regulatory standards that apply to SLRs. When FPL prepared its ER, it did so in accordance with the prescribed process in section 51.53(c)(3) in reasonable reliance on (1) the Part 51 regulatory purpose and structure; (2) the guidance statements in Reg. Guide 4.2; and (3) the agency's expectation embodied in NUREG-1555. See supra note 43.

Nor does this record support the dissent's claim, Dissent at 1, that "the majority's application of the regulation creates . . . an obstacle to a petitioner's ability to know how to properly frame its contentions." See infra note 51 and accompanying text.

Although it is true that SACE and Joint Petitioners did not invoke section 2.335 to seek a waiver of a GEIS finding, their failure to do so was not based on any misapprehension regarding the applicability of section 51.53(c)(3) to FPL's SLR. To the contrary, these petitioners recognized that the applicability of section 51.53(c)(3) to SLRs was an open question, see, e.g., Joint Pet'rs Pet. at 16 n.71; SACE Reply at 3–9, and they made a conscious litigation choice not to take the precautionary step of invoking section 2.335. Petitioners were not unfairly prejudiced.[51]

Finally, the dissent opines that, unless its interpretation is accepted, the NRC might be encouraged to take improper "short cuts to amending its regulations in future adjudicatory proceedings." Dissent at 15. This concern lacks merit because it is grounded on the erroneous premise that section 51.53(c)(3) applies only to initial license renewal applicants. Moreover, although we decline to base our regulatory analysis on the notion that the NRC might engage in administrative misconduct in future adjudicatory proceedings, see Nat'l Small Shipment Traffics Conference, Inc. v. Interstate Commerce Comm'n, 725 F.2d 1442, 1450 (D.C. Cir. 1984), we nevertheless note that "the APA contains a variety of constraints" and remedies that serve to prevent agencies from taking improper short cuts when revising their regulations. Perez v. Mortg. Bankers Ass'n, __ U.S. __, __, 135 S. Ct. 1199, 1209 (2015).

---

[51] In the litigation context, it is axiomatic that when a regulation (or statute) lacks clarity, it is incumbent on a party or its representative to (1) identify the uncertainty; and (2) pursue a litigation strategy that protects the party's interests. Where, as here, a party refrains from advancing an argument, that argument is deemed to be waived. See e.g., Hormel v. Helvering, 312 U.S. 552, 556 (1941); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1084–85 (D.C. Cir. 1984).

B. SACE ESTABLISHES STANDING, AND EACH OF ITS TWO PROFFERED CONTENTIONS IS ADMISSIBLE IN PART

1. SACE Establishes Standing

SACE satisfies the requirements for representational standing, which are discussed supra Part II.A.[52] SACE states that it is "a nonprofit, nonpartisan membership organization that promotes responsible energy choices that solve global warming problems and ensure clean, safe and healthy communities throughout the Southeast." SACE Pet. at 3. The environmental interests it seeks to protect in this proceeding are thus germane to its organizational purpose. Further, SACE provides declarations from three members who (1) live within 50 miles of the Turkey Point site and therefore have standing in their own right pursuant to the proximity presumption; and (2) authorize SACE to represent their interest in this proceeding, thus rendering it unnecessary for them to participate as individuals. See id., attach. 1, Decl. of Dan Kipnis ¶¶ 2, 4 (June 19, 2018); id., attach. 2, Decl. of Mark P. Oncavage ¶¶ 2, 4 (June 25, 2018); id., attach. 3, Decl. of Richard Reynolds ¶¶ 2, 4 (June 20, 2018).

2. Each of SACE's Two Proffered Contentions is Admissible in Part

SACE proffers two contentions alleging deficiencies in FPL's ER, and both are admissible in part. The Board admits Contention 1 to the extent it challenges the adequacy of the ER's discussion of the impacts of continued operation of the cooling canal system (CCS) on the American crocodile and its critical seagrass habitat. The Board admits Contention 2 to the extent it claims that the ER improperly fails to consider as a reasonable alternative to the proposed action a scenario under which the existing CCS is replaced with draft mechanical cooling towers. We reject as inadmissible the other portions of Contentions 1 and 2.

[52] Neither FPL nor the NRC Staff challenges SACE's representational standing. See FPL Answer to SACE Pet. at 2; NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 10–11.

a. Contention 1 Is Admissible in Part

In Contention 1, SACE asserts that the ER contains an inadequate discussion of the environmental impacts of the CCS and, accordingly, that there is no basis for its conclusion that the environmental effects of operating the CCS through the subsequent renewal term will be small. See SACE Pet. at 6, 8. In support of this assertion, SACE identifies three putative defects in the ER (which we designate as Contentions 1A, 1B, and 1C), each of which involves an alleged inadequate discussion of the environmental impacts of the CCS. See id. at 6–7. We examine each alleged defect in turn.

i. Contention 1A: Inadequate Analysis of Environmental Impacts of CCS on Crocodile Habitat, Biscayne Aquifer, and Biscayne Bay

SACE claims that the ER underestimates or ignores "the environmental impacts to the surrounding water resources by continuing to use the [CCS] for cooling of Turkey Point Units 3 and 4." SACE Pet. at 6. This part of the contention challenges the ER's alleged failure "to provide an adequate analysis of the environmental impacts of the CCS on the chemistry of groundwater, surface water and its aquatic life, and the CCS'[s] own ecosystem." Id. SACE asserts that the ER incorrectly minimizes the significance of the CCS's environmental impacts on (1) the American crocodile habitat and, as a result, on the crocodile population, id. at 19–20; (2) the Biscayne Aquifer related to the hypersaline plume, id. at 17–18; and (3) the Biscayne Bay related to nutrient releases. Id. at 18–19.

The NRC Staff does not oppose admission of Contention 1A insofar as it challenges the adequacy of the ER's "analysis of the impacts of continued CCS operation on the critical habitat of the American crocodile." NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 59. FPL disagrees, arguing that SACE provides no factual support to show that "the decline in American crocodile nest and hatchling numbers observed in 2015 and 2016 (as reported in the ER) indicate a long-term trend that will somehow be exacerbated by continued CCS operations and extend through the SLR period." FPL Answer to SACE Pet. at 36. Further, FPL cites a

newspaper article that reported substantial increases in the number of nests and hatchlings in the CCS for 2018. Id. at 35.[53] Finally, FPL argues that this aspect of the contention fails to raise a genuine dispute because it ignores the ER's discussion of FPL's crocodile management plan. Id. at 36.

We agree with the NRC Staff that this aspect of the contention is admissible. Although the ER discusses a crocodile management plan, we conclude that SACE raises a genuine factual dispute as to whether the ER adequately assesses the impacts of continued operation of the CCS on the American crocodile and its critical seagrass habitat. As the NRC Staff pointed out, see NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 60, SACE does not dispute the adequacy of FPL's crocodile monitoring and protection plan, but rather challenges the ER's conclusion that "the American crocodile population continues to remain in a much stronger position than before the . . . CCS was established." SACE Pet. at 19 (citing ER at 3-195). The impacts of a license renewal on threatened species is a factual issue that is within the scope of this proceeding, and SACE has provided expert support for its claim that the CCS is degrading the seagrass habitat by exposing it to excessive levels of salt and nutrients. See SACE Pet. at 20 (citing attach. 8, Expert Report of James Fourqurean, Ph.D. at 1–3 (May 14, 2018)). Although the ER acknowledges that a decline in the crocodile population has occurred in recent years, SACE argues that it must also take a hard look at the fact that this decline signals a critical loss of seagrass bed habitat for a threatened species caused by operation of the CCS, see SACE Pet. at 19, and that it must address the "cumulative effects of the CCS on the American Crocodile." Id. at 27. We agree. We therefore admit Contention 1A as follows: The ER fails adequately to analyze the impacts (including cumulative) of continued CCS operation on the American Crocodile and its critical seagrass habitat.

---

[53] FPL cites the following newspaper article: Theresa Java, Turkey Point's Canal Berms Ideal for Crocodile Clutches, Keysnews.com (Aug. 8, 2018), https://keysnews.com/article/story/turkey-points-canal-berms-ideal-for-crocodile-clutches/.

We conclude that all other aspects of Contention 1A are not admissible. First, to the extent Contention 1A claims that the ER underestimates the impacts related to tritium releases to groundwater, it is inadmissible because (1) it lacks the requisite support, see 10 C.F.R. § 2.309(f)(1)(v); and (2) it fails to raise a genuine dispute with the ER. See id. § 2.309(f)(1)(vi). Although SACE's experts provide support regarding tritium releases to Biscayne Bay, see SACE Reply at 12–13, they fail to do so regarding tritium releases to groundwater. Moreover, although SACE's petition states that the hypersaline plume includes radioactive tritium, and that tritium, among other pollutants, affects "the underlying Biscayne Aquifer and its protected G-II groundwater," SACE Pet. at 6, SACE provides no explanation for why releases of "tritium as one of numerous contaminants . . . pose[s] an unacceptable environmental risk" to groundwater. SACE Reply at 10. The ER acknowledges that "tritium is routinely released to the cooling canals and migrates into the groundwater," but states that the releases are "in concentrations that do not present an environment or health risk either onsite or offsite." ER at 3-114. SACE does not specifically dispute this, and its experts do not provide support for the claim that the environmental impacts of tritium releases on groundwater have been understated or that measured tritium concentrations are above permissible levels. This aspect of the contention is therefore inadmissible pursuant to section 2.309(f)(1)(v) and (vi).

With regard to the other aspects of Contention 1A relating to impacts to the Biscayne Bay and Aquifer, the NRC Staff and FPL argue that they constitute impermissible challenges to the regulations. Specifically, the NRC Staff states, and FPL agrees, that the following environmental impacts challenged by SACE constitute Category 1 issues that cannot be challenged in this litigation in the absence of a waiver, which SACE has not sought:

> [T]he environmental impacts . . . [regarding] (1) altered salinity gradients in surface waters, (2) groundwater quality degradation, (3) exposure of aquatic organisms to radionuclides, (4) the effects of non-radiological contaminants on aquatic organisms, (5) cooling system impacts on terrestrial resources, and (6) radiation (tritium) exposures to the public.

NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 62, 63; see FPL Answer to SACE Pet. at 14–15. We agree that SACE's challenges in Contention 1A relating to the above impacts implicate Category 1 issues, and are thus outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii). Because SACE did not seek a waiver, these challenges must also be rejected pursuant to 10 C.F.R. § 2.335.[54]

ii. Contention 1B: Inadequate Analysis of Mitigation Measures to Reduce Salinity Resulting from Operation of CCS

In Contention 1B, SACE argues that the ER overstates the "effectiveness of existing and planned mitigative measures to reduce and remove the hypersaline plume," SACE Pet. at 21–22, and fails to account for the "[n]egative impacts of mitigation measures to reduce salt levels in the CCS." Id. at 23–24; see also id. at 7 (alleging that the ER fails to consider that FPL's mitigative efforts to "freshen" the CCS to reduce its salinity will negatively impact FPL's attempts to reduce the hypersaline plume).

The NRC Staff responds that SACE's argument essentially challenges the adequacy of the ER's discussions related to "altered salinity gradients in surface waters" and "groundwater quality degradation," both of which are Category 1 issues and, therefore, not subject to direct or indirect challenge absent a waiver pursuant to 10 C.F.R. § 2.335. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 62–63. FPL makes a similar argument, stating that this

---

[54] FPL further argues that SACE's claims regarding these impacts to the Biscayne Aquifer and Bay lack factual support. See FPL Answer to SACE Pet at 15. Specifically, FPL argues that the ER has "fully recognized and disclosed" the plume migration and its impacts to the Biscayne Aquifer, and that FPL is in compliance with the relevant Florida Department of Environmental Protection (FDEP) Consent Order and Miami-Dade County Department of Regulatory and Economic Resources (DERM) Consent Agreement, which were entered into specifically to address CCS-related groundwater impacts. Id. at 18–20. As to any alleged CCS impacts to the Biscayne Bay, FPL argues that "the impairment status of Biscayne Bay/Card Sound is unrelated to the operation of the CCS[, and] SACE and its experts provide no facts to support a contrary conclusion, or their claim that alleged 'nutrient seepage from the CCS' is having significant adverse impacts on Biscayne Bay water quality." Id. at 22 (quoting SACE Pet. at 19). We agree with FPL that this provides an alternative ground for inadmissibility pursuant to 10 C.F.R. § 2.309(f)(1)(v).

aspect of the contention is inadmissible pursuant to Commission precedent establishing that license renewal applicants "'need not address mitigation for issues' designated Category 1." See FPL Answer to SACE Pet. at 22–23 (quoting Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 471 (2010)). FPL thus argues that "SACE's challenges to the adequacy of FPL's CCS-related mitigation measures (which involve Category 1 issues) are outside the scope of this proceeding as a matter of law." Id. at 23. We agree that Contention 1B is inadmissible for the alternative reasons that (1) it is an impermissible challenge to a Category 1 issue pursuant to section 2.335; and (2) it is outside the scope of this proceeding pursuant to section 2.309(f)(1)(iii).[55]

iii. Contention 1C: Inadequate Analysis of Cumulative Environmental Impacts

Finally, SACE argues that the ER "ignores or underestimates the cumulative impacts of past and future operations of the CCS." SACE Pet. at 7. In particular, SACE objects to the ER's failure to examine several issues within its cumulative impact analysis, including:

(1) FPL's efforts to contain pollutants from the CCS, including an examination of the "effectiveness and adverse effects of all of its mitigation measures, past, present, and proposed," id. at 25;

(2) The "combined effects of the L-31E levee and evaporation from the CCS on the degree to which the CCS and the underlying aquifer have become hypersaline and contaminated other parts of the aquifer and Biscayne Bay," id. at 26;

(3) The "cumulative impacts of the CCS, combined with other environmental factors, on hypersalinity in the CCS and the

[55] The NRC Staff and FPL also oppose admission of the challenge to mitigation measures because it depends on the following unsupported assumptions: FDEP's and/or DERM's mitigation measures are inadequate; FPL will not comply with FDEP's Consent Order and/or DERM's Consent Agreement; and FDEP and/or DERM will not enforce their own legal requirements. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 64–65; FPL Answer to SACE Pet. at 23–26. FPL further argues that SACE's claims about mitigation measures are factually incorrect, unsupported, and require the NRC Staff to reexamine and/or overrule the judgments of state regulators. See FPL Answer to SACE Pet. at 26–29. We agree that the above arguments constitute alternative grounds for inadmissibility.

aquifer beneath," including the "interaction of environmental factors such as salinity, turbidity, and algal concentrations with the operation of the CCS," id.;

(4) The "degree to which FPL, by attempting to mitigate one environmental problem (hypersalinity in the CCS) has seriously aggravated another environmental problem: groundwater and surface water pollution," including the "net result of increasing the hydraulic head on the hypersaline plume by pumping more water into the CCS at the same time that FPL attempts to draw the plume back to the site boundary by pumping out the aquifer," id. at 27;

(5) The impacts due to "demand for water to cool or freshen the CCS . . . in relation to the demand for water to restore the Everglades, such as the water in the L-31E Canal." Id.

Additionally, SACE challenges the ER's conclusion that the cumulative impacts "will be small because FPL will comply with its permits for the CCS" because "the history of Turkey Point's operation shows that FPL is not in compliance with its permits." Id. at 24.

We conclude that Contention 1C is not admissible. First, regarding the cumulative impacts related to hypersalinity and mitigation measures, as with Contention 1B, each of the alleged omissions relates to environmental impacts that involve Category 1 issues (i.e., altered salinity gradient and groundwater degradation). This aspect of Contention 1C is inadmissible for the alternative reasons that it is (1) an impermissible challenge to a Category 1 issue pursuant to section 2.335; and (2) outside the scope of this proceeding pursuant to section 2.309(f)(1)(iii). See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 62; FPL Answer to SACE Pet. at 8–12.

Second, the aspect of Contention 1C that attacks the adequacy of the ER's analysis of cumulative impacts in light of FPL's history of noncompliance with its permits relating to the CCS is inadmissible for failing to raise a genuine dispute pursuant to section 2.309(f)(1)(vi). The ER's conclusion that cumulative impacts will be small is based on the mitigation measures imposed by FDEP in a Consent Order and by DERM in a Consent Agreement. See FPL Answer to SACE Pet. at 42. Notably, SACE does not assert that FPL currently is violating any

requirement imposed by these regulatory agencies. Nor does SACE make any credible showing that (1) FDEP or DERM will fail to enforce State of Florida and local environmental requirements; or (2) FPL will commit a future violation that would alter the cumulative impacts analysis in the ER. Rather, SACE essentially argues that FPL's past violations of permit requirements, standing alone, are sufficient to raise a genuine dispute with the ER's conclusion that cumulative environmental impacts of the CCS will be small because FPL will comply with its current permit. We disagree. Pursuant to binding case law, we accord "substantial weight" to the determination of FDEP and DERM that FPL will comply with its legal obligations. See Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 527 (1977) (holding that a finding of environmental acceptability made by a competent state authority [pursuant to a thorough hearing] "is properly entitled to substantial weight in the conduct of our own NEPA analysis.") (internal quotation marks omitted); cf. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003) (absent evidence to the contrary, Commission will assume that licensee will comply with license obligations). FPL's past violations in this case, standing alone, do not constitute sufficient information to give rise to a genuine dispute with the assumption that FDEP and DERM will enforce, and FPL will comply with, the legally mandated mitigation measures in the permits. See Fla. Power & Light Co. (Turkey Point Nuclear Generating Units 3 & 4), CLI-16-18, 84 NRC 167, 174–75 n.38 (2016).[56]

Finally, we conclude that SACE's argument concerning the potential water use conflict between freshening the CCS and other programs like the Central Everglades Restoration Program (CERP) lacks factual support and does not raise a genuine dispute with FPL's license renewal application. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 61. SACE argues that because FPL has been allowed "to remove water from the L-31E Canal on an

[56] This is not to say that the NRC Staff, in compiling the draft SEIS, is absolved from conducting an independent review of the relevant permits pursuant to its assessment of cumulative impacts. See Tr. at 131–33, 215–16. SACE provides no basis for concluding that the NRC Staff would fail to conduct such a review.

emergency basis to reduce salinity levels in the CCS" there is the potential for "conflict with the use of canal water reserved for the CERP." SACE Pet. at 15. SACE therefore argues, on this basis alone, that the ER was required to analyze the cumulative impacts of the demand for water to freshen the CCS in relation to the demand for water to restore the Everglades. Id. at 27. This possible use of water on an emergency basis at some unspecified point in the future is too speculative a concern to raise a genuine dispute. Moreover, SACE does not provide the required facts or expert opinions to support admission of this aspect of Contention 1C. The only factual support it provides is that the L-31E canal was once used to supply water to the CCS, and it might be used again at some time in the future because the ER does not fully rule out the possibility of using that canal for freshening. See SACE Reply at 19. SACE cites to its expert report for the proposition that there may be conflicts over the need for water from the L-31E Canal for the CERP and the CCS's freshening program. SACE Pet. at 13–14 (citing attach. 4, Expert Report of William Nuttle at 10 [hereinafter Nuttle Report]). But that portion of the report does not discuss use of the L-31E Canal for freshening CCS water; instead, it discusses the potential for the hydraulic plume to reach and impact the quality of the L-31E Canal, which is a different issue. See Nuttle Report at 10. Therefore, Contention 1C is not admitted.[57]

b. Contention 2 Is Admissible in Part

In Contention 2, SACE argues that FPL's ER improperly "failed to consider the reasonable alternative of cooling the Turkey Point Units 3 and 4 reactors with mechanical draft cooling towers." SACE Pet. at 29. SACE asserts that FPL is required to consider reasonable mitigation alternatives pursuant to 10 C.F.R. §§ 51.45 and 51.53(c)(2), see id., and SACE provides the report of an expert who opined that mechanical cooling towers would (1) eliminate the adverse environmental impacts of the CCS; (2) allow the CCS to be restored to a thriving

[57] SACE also argues that the ER fails to discuss the "cumulative effects of the CCS on the American Crocodile." SACE Pet. at 27. This argument is included in the portion of Contention 1A that we found to be admissible. See supra Part III.B.2.a.i.

seagrass community and wildlife habitat; and (3) be a feasible and cost-effective alternative to the CCS. See id. at 30–31 (citing attach. 10, Expert Report of Bill Powers (May 14, 2018) [hereinafter Powers Report]).

The NRC Staff acknowledges that it has a regulatory obligation to consider reasonable "alternatives available for reducing or avoiding adverse environmental effects." NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 68–69 (quoting 10 C.F.R. § 51.71(d)). The Staff does not dispute that SACE provides an adequate factual basis for its assertion that mechanical draft towers are a reasonable alternative to the CCS, nor does the Staff dispute SACE's statement that FPL's ER "omits consideration of a cooling tower alternative." Id. at 68. The Staff therefore does not oppose admitting Contention 2 "insofar as it asserts that the Applicant's [ER] omits consideration of mechanical draft cooling towers in connection with license renewal of Turkey Point Units 3 and 4, as a reasonable alternative to [the existing CCS]." Id.

We conclude that Contention 2 is an admissible contention of omission. Contrary to FPL's assertion, see FPL Answer to SACE Pet. at 51, Contention 2 is within the scope of the proceeding, and it raises a genuine dispute on a material fact to the extent it alleges that FPL's ER improperly fails to consider mechanical draft cooling towers as a reasonable alternative for reducing or avoiding adverse impacts on the threatened American Crocodile and its critical seagrass habitat. See SACE Pet. at 30; Powers Report at 1–5; supra Part III.B.2.a.i. Although neither the NRC Staff nor FPL is required to select the most environmentally superior alternative, NRC regulations require the ER and the EIS to consider "alternatives available for reducing or avoiding adverse environmental impacts." 10 C.F.R. §§ 51.45(c) and 51.71(d); see S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 259–

261, 280 (2007) (admitting a contention regarding dry cooling as a NEPA alternative in light of the sensitive biological resources affected).[58]

We therefore admit Contention 2 as follows: In light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4.[59]

---

[58] To be clear, Contention 2 focuses on the ER's failure to consider mechanical draft cooling towers as a reasonable and feasible alternative to the existing CCS for reducing or avoiding adverse environmental effects to sensitive biota. The NRC Staff states, and we agree, that the admissible scope of Contention 2 does not extend to requiring a discussion of the environmental impacts resulting from operation of the CCS, because Contention 2 does not point to any alleged deficiencies in the ER regarding its discussion of environmental impacts of CCS operation. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 69.

[59] Prior to oral argument, we understood the Staff to acknowledge that Contention 2 satisfied the admissibility requirements in 10 C.F.R. § 2.309(f)(1) as a contention of omission. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 68–69. At oral argument, however, the Staff seemed to take the position that, on the one hand, it did not oppose admission of Contention 2 as a contention of omission, see Tr. at 156, but that, on the other hand, neither NEPA nor NRC regulations requires FPL or the NRC Staff to consider mechanical cooling towers as a reasonable alternative to the CCS. See, e.g., id. at 156, 158, 159. In petitioners' view, the position taken by the NRC Staff at oral argument was "very different" from the position it took in its brief. See id. at 255. Petitioners therefore requested that the NRC Staff be required to provide its seemingly new views in writing so the other participants would have the opportunity to respond. See id. We granted petitioners' request, id. at 257; supra notes 19 and 20, and based on our review of the supplemental briefs, we conclude that the NRC Staff's "clarified position" has no material impact on its position (or our determination) that Contention 2 satisfies the admissibility criteria as a contention of omission.

After the supplemental briefs had been filed, petitioners moved for leave to respond to what they perceived as a newly raised argument in FPL's brief. See Petitioners' Motion for Leave to Respond to Applicant's Response to the NRC Staff's Clarification Regarding the Admissibility of Proposed Cooling Tower Contentions (Jan. 15, 2019); Petitioners' Response to Applicant's New Arguments on the Admissibility of Petitioners' Cooling Tower Contentions (Jan. 15, 2019). FPL and the NRC Staff opposed petitioners' motion. See Applicant's Answer to Petitioners' Joint Motion for Leave to Respond to Applicant's Response to the NRC Staff's Clarification (Jan. 22, 2019); NRC Staff's Answer to Petitioners' Motion for Leave to Respond to Applicant's Response to the NRC Staff's Clarification (Jan. 25, 2019). Given our ruling on the admissibility of Contention 2, we deny petitioners' motion as moot.

C. JOINT PETITIONERS ESTABLISH STANDING, AND PROFFER TWO CONTENTIONS THAT ARE ADMISSIBLE IN PART

1. Joint Petitioners Establish Standing

Joint Petitioners consist of the following three organizations: (1) Friends of the Earth, Inc. (FOE); (2) Natural Resources Defense Council, Inc. (NRDC); and (3) Miami Waterkeeper, Inc. (Waterkeeper). All three organizations have demonstrated that the interests they seek to protect in this proceeding are germane to their organizational purposes.[60] Further, all three organizations provide declarations from members who (1) live within 50 miles of the Turkey Point site and therefore have standing in their own right pursuant to the proximity presumption; and (2) authorize their respective organizations to represent their interests in this proceeding, thus rendering it unnecessary for them to participate as individuals. See, e.g., Joint. Pet., attach. B, Decl. of Anne Hemingway Feuer ¶¶ 1, 4, 14 (June 29, 2018) (member of FOE); id., attach. H, Decl. of Phillip Stoddard ¶¶ 1, 3, 13 (July 24, 2018) (member of NRDC); id., attach. J, Decl. of Daniel Parobok ¶¶ 4, 7 (July 30, 2018) (member of Waterkeeper). Joint Petitioners, therefore, satisfy the requirements for representational standing. See supra Part II.A.[61]

2. Joint Petitioners Proffer Two Contentions that are Admissible in Part

Joint Petitioners proffer five contentions (Contentions 1-E though 5-E) alleging deficiencies in FPL's ER. We conclude that Contentions 1-E and 5-E are admissible in part. Specifically, we admit Contention 1-E to the extent it claims that the ER improperly failed to

---

[60] See Joint Pet'rs Pet. at 2 (FOE's mission includes "defend[ing] the environment" and "minimiz[ing] the risks that nuclear facilities pose to its members and to the general public."); id. at 5 (NRDC's mission includes "maintain[ing] and enhanc[ing] environmental quality" by working to "minimize the risks that nuclear facilities pose to its members and to the general public."); id. at 6–7 (Waterkeeper's mission includes "defend[ing], protect[ing], and preserv[ing] the aquatic integrity of South Florida's watershed and wildlife.").

[61] Neither FPL nor the NRC Staff challenges Joint Petitioner's representational standing. See FPL Answer to Joint Pet'rs Pet. at 2; NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 9–10.

consider mechanical draft cooling towers as a reasonable alternative to the CCS.[62] We also admit Contention 5-E to the extent it challenges the ER's failure to recognize Turkey Point Units 3 and 4 as a source of ammonia in surrounding freshwater wetlands, as well as its failure to consider the impacts of ammonia discharges on threatened and endangered species and their critical habitat. We reject as inadmissible the other portions of Contentions 1-E and 5-E, and all of Contentions 2-E, 3-E, and 4-E.

a. Contention 1-E Is Admissible in Part

In Contention 1-E, Joint Petitioners assert that the ER "fails to consider a reasonable range of alternatives to the proposed action, as required by NEPA and NRC implementing regulations." Joint Pet'rs Pet. at 15–16. More particularly, they argue that the ER improperly omits consideration of the "reasonable and feasible" alternative of replacing the CCS with mechanical draft cooling towers to reduce the adverse environmental impacts of the CCS. Id. at 16, 19. Joint Petitioners provide factual information in support of their assertion that mechanical draft cooling towers would be a reasonable and feasible alternative, see id. at 19–22, and they claim that failing to discuss this alternative violates 10 C.F.R. § 51.45(c), which requires the ER to include a discussion of "'alternatives available for reducing or avoiding adverse environmental effects,'" including impacts on "American crocodiles, an endangered species," and the "American crocodile habitat." Id. at 18, 23, 24.

Consistent with its position concerning SACE's Contention 2, the NRC Staff does not oppose admitting this contention "insofar as it asserts that [FPL's ER] omits consideration of mechanical draft cooling towers in connection with license renewal of Turkey Point Units 3 and 4, as a reasonable alternative to use of the plants' [CCS]." NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 29–30. FPL, on the other hand, argues that Contention 1-E is

[62] This admissible portion of Contention 1-E is identical to the portion of SACE Contention 2 that we found to be admissible. See supra Part III.B.2.b.

inadmissible in its entirety for essentially the same reasons it argued against admitting SACE Contention 2. See FPL Answer to Joint Pet'rs Pet. at 8–9.

For the reasons we admitted SACE Contention 2, and subject to the same limitations, see supra Part III.B.2.b, we admit Contention 1-E as follows: In light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4.[63]

b. Contention 2-E Is Not Admissible

In Contention 2-E, Joint Petitioners allege that "the [ER] fails to adequately consider the cumulative impacts of continued operation of Units 3 and 4." Joint Pet'rs Pet. at 30. Specifically, they argue that section 4.12 of the ER does not adequately address the cumulative impacts on water resources from the reasonably foreseeable effects of climate change on the

[63] Contention 1-E also appears to challenge the ER's (1) discussion of the environmental impacts of continued CCS operation, see Joint Pet'rs Pet. at 19, 23–24, and (2) failure to consider other unspecified "alternatives to the proposed action." Id. at 15. Those aspects of the contention are not admissible because, contrary to 10 C.F.R § 2.309(f)(1)(v) and (vi), they fail to provide support sufficient to demonstrate a genuine dispute on a material issue of law or fact, or to include references to specific portions of the ER that they dispute. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 30–31.

CCS, including sea level rise[64] and increasing air temperature.[65] Id. at 30–31. Joint Petitioners assert that the "reasonably foreseeable impacts from sea level rise will increase the risk of flooding at Turkey Point, including the potential for overtopping or breach[ing] of the canal system, leading to direct discharges of polluted canal water into surface water resources, including Biscayne Bay." Id. at 38. The "[h]igher air temperatures," they assert, "will increase the rate of evaporation in the [CCS] leading to more saline conditions. Higher salinity in the [CCS] will . . . adversely impact groundwater resources." Id.

We agree with the NRC Staff and FPL that this contention is not admissible. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 34–41; FPL Answer to Joint Pet'rs Pet. at 27–36. First, even accepting Joint Petitioners' claims regarding future increases in sea level and air temperature, they fail to link those changes to the impacts of Turkey Point's continued operation. Joint Petitioners make conclusory assertions that (1) "sea level rise will increase the risk of flooding . . . , including the potential for overtopping or breach[ing] of the [CCS], leading to direct discharges of polluted canal water into surface water resources," Joint Pet'rs Pet. at 38; and (2) hotter air temperature will "increase the rate of evaporation in the [CCS] leading to more

---

[64] In support of their arguments regarding sea level rise, Joint Petitioners rely on the expert opinion of Dr. Robert Kopp, who states, inter alia, that "[t]hrough 2060, . . . there is between a 68 percent chance and a 95 percent chance that average sea-level rise at Key West [which Dr. Kopp posits as a comparable location to Turkey Point] will exceed 1 foot above the National Tidal Datum Epoch." Joint Pet'rs Pet., attach. N, Decl. of Dr. Robert Kopp at 12 (July 26, 2018). Dr. Kopp provides several probability estimates of future sea level rise, using a number of alternative assumptions. He states that, assuming storm characteristics do not change, the frequency and extent of extreme flooding associated with coast storms will increase because "a tide or storm of a given magnitude will produce a more extreme total water level than it would have with lower average sea level." Id. at 13. Consequently, "[i]f the sea level rises by one foot, . . . the probability of storms increasing water levels to the height of 2.0 feet becomes 50 [percent] rather than 1 [percent]." Joint Pet'rs Pet. at 35.

[65] With respect to increasing temperature, Joint Petitioners aver that in the Southeast United States for the 2036–2065 time period, air temperature increases are projected to range from 3.4 to 4.3 degrees Fahrenheit, Joint Pet'rs Pet. at 35, and changes in temperature extremes are projected to be 5.79 degrees Fahrenheit for the warmest day of the year and 11.09 degrees Fahrenheit for the "warmest 5-day, 1-in-10-year event" compared to the 1976–2005 period. Id. at 35–36.

saline conditions." Id. But they provide no support for their claims regarding putative environmental impacts. For example, they fail to discuss such necessary information as the relationship between their projected sea levels and the relevant elevations of the Turkey Point site, its sea level barriers, or the CCS, to support their claim that the site will be flooded and the CCS will be overtopped or breached. Similarly, although an increase in air temperature can lead to increased evaporation in the CCS, Joint Petitioners provide no support to demonstrate that the higher temperatures they postulate would increase evaporation in the CCS to any particular extent, much less to an extent that would be sufficient to increase the CCS salinity such that it would, in turn, affect the environment. Their failure to provide adequate support for these assertions renders the contention inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).

Additionally, to the extent Contention 2-E expresses concerns about overtopping and increased salinity of the CCS, it is also inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to provide sufficient information to show a genuine dispute on a material issue of fact. Specifically, Joint Petitioners do not discuss how these impacts are reasonably foreseeable in light of the 2016 consent order between FPL and the FDEP that requires FPL to (1) "prevent releases of groundwater from the CCS to surface waters connected to Biscayne Bay that result in exceedances of surface water quality standards in Biscayne Bay"; and (2) perform a "thorough inspection of the CCS periphery" and "address any material breaches or structural defects." FDEP v. FPL, OGC File No. 16-0241 (Consent Order), at 7, 10–12 (June 20, 2016) [hereinafter Consent Order]. Even if overtopping were to occur, Joint Petitioners do not explain how it would impair the environment given that the consent order requires FPL to maintain an average annual CCS salinity at or below 34 practical salinity units (PSU) and to submit a detailed report outlining the potential sources of the nutrients found in the CCS and to implement a plan to minimize these nutrient levels. See id. at 7–10. Similarly, with respect to their argument that increased air temperature will result in higher CCS salinity, Joint Petitioners fail to explain why it is reasonably foreseeable that a temperature rise will lead to increased

CCS salinity in light of the consent order's requirement that FPL achieve an average annual CCS salinity at or below 34 PSU at the completion of the fourth year of freshening activities, and maintain that salinity thereafter. See id. at 7. Joint Petitioners' failure to address the above features of FPL's consent order renders Contention 2-E's concerns about overtopping and increased salinity inadmissible pursuant to section 2.309(f)(1)(vi).[66]

Finally, to the extent that Contention 2-E asserts that the ER fails adequately to address cumulative impacts on groundwater from the continued operation of the CCS during the renewal period, see Joint Pet'rs Pet. at 31, the contention ignores that FPL's ER discusses the cumulative impacts to groundwater resulting from the operation of Turkey Point Units 3 and 4 in combination with impacts to groundwater resulting from operation of "the other Turkey Point facilities and . . . from other projects and activities in the surrounding area," by incorporating by reference the cumulative impacts discussion in the 2016 EIS that was prepared for the combined licenses for Turkey Point Units 6 and 7. See ER at 4-68.[67] The ER concludes that the cumulative impacts to groundwater will be small and are managed because "FPL continues to comply with its permits for groundwater withdrawals and injection, the FDEP [consent order]

---

[66] As discussed supra Part III.B.2.a.iii, any past incidents of FPL's failure to comply with the consent order do not, standing alone, constitute sufficient information to give rise to a genuine dispute in light of the case-law supported assumptions that FDEP will enforce, and FPL will comply with, the mandated obligations in the consent order.

[67] The 2016 EIS discusses the contribution from Turkey Point Units 3 and 4, as well as the effect of FPL's consent order with FDEP requiring freshening of the CCS, and the 2015 consent agreement with Miami-Dade County for remediating the hypersaline plume. See [EIS] for Combined Licenses (COLs) for Turkey Point Nuclear Plant Units 6 and 7, NUREG-2176, Vol. 2, at table 7-1 (Oct. 2016) [hereinafter Turkey Point Units 6 & 7 EIS].

It appears that FPL's ER does not cite to a specific page of the 2016 EIS. The Commission has admonished that it does not expect a litigant to merely reference large portions of material where doing so would force a tribunal to "sift through it in search of asserted factual support." NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012). In our view, this admonition applies with equal force to an applicant's preparation of an ER. FPL's failure to provide a page-specific cite, however, does not change the Board's conclusion as to this contention's admissibility.

for freshening of the cooling canals, and the [consent agreement] with Miami-Dade County for remediation of the hypersaline plume." Id. at 4-69. Further, the ER cites NRC Reg. Guide 4.2, stating that for resource areas that are regulated through a permitting process "it may be assumed that cumulative impacts are managed as long as facility operations are in compliance with their respective permits." Id. Contention 2-E fails to provide sufficient information to raise a genuine dispute regarding these determinations in the ER, and for this reason it is not admissible pursuant to section 2.309(f)(1)(vi).

c. Contention 3-E Is Not Admissible

In Contention 3-E, Joint Petitioners claim that "[t]he [ER] (§§ 3 and 5) fails to comply with 10 C.F.R. § 51.53(c)(3)(iv) because it fails to analyze new and significant information regarding the effect of sea level rise on [the following] Category 1 and 2 issues," Joint Pet'rs Pet. at 39: (1) termination of plant operations and the decommissioning process (Category 1 issue), see id. at 45; (2) cumulative impacts on affected resources (Category 2 issue), see id. at 43–44; and (3) surface and groundwater use conflicts collectively labelled as "water resources" (Category 2 issues). See id. at 44.

The NRC Staff and FPL argue that this contention is not admissible. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 43–46; FPL Answer to Joint Pet'rs Pet. at 36–45. We agree.

First, as Joint Petitioners concede, Joint Pet'rs Pet. at 40, the aspect of Contention 3-E that implicates "[t]ermination of plant operations and decommissioning" constitutes a challenge to a Category 1 issue. See 10 C.F.R. pt. 51, subpt. A, app. B, table B-1. This aspect of Contention 3-E is not admissible because it (1) is not subject to challenge in this adjudicatory proceeding where Joint Petitioners have failed to seek a rule waiver, see id. § 2.335; Entergy

Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 18 n.15 (2007); and (2) is outside the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii).[68]

Second, as to the portion of Contention 3-E that asserts the ER's "cumulative effects analysis . . . fails entirely to discuss the sea level rise-related impacts upon affected resources," Joint Pet'rs Pet. at 43–44, this aspect of the contention—which is reasonably characterized as a contention of omission—is not admissible, because it ignores that the ER incorporates by reference the Turkey Point 6 and 7 EIS, which does analyze the cumulative impacts of continued operation of nuclear reactors at the site in combination with climate change and sea level rise. See ER at 4-68; Turkey Point Units 6 & 7 EIS at I-5 to I-6. This aspect of Contention 3-E fails to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).

Finally, the portion of Contention 3-E alleging that the ER improperly ignores water resource conflicts insofar as it fails to "account for the effect sea level rise will have on freshwater availability, ground water resources, and release of polluted cooling water into Biscayne Bay," Joint Pet'rs Pet. at 44, fails to raise a genuine dispute. Although Joint Petitioners allege "frequent interchange of water from Biscayne Bay and the [CCS]," id. at 45, they provide no explanation for why this would cause conflicts in water use for either surface or groundwater resources. Instead, Joint Petitioners simply assert that sea level rise will eliminate the "closed-loop" nature of the CCS, but they do not explain why this would create or

---

[68] FPL argues that this aspect of Contention 3-E is also inadmissible pursuant to section 2.309(f)(1)(v) because Joint Petitioners offer no support for their claim that sea level rise will affect FPL's ability to terminate plant operations and decommission the plant. See FPL Answer to Joint Pet'rs Pet. at 40. The NRC Staff argues that this aspect of Contention 3-E constitutes a challenge to an operating licensing issue that is beyond the scope of this SLR proceeding and, hence, is inadmissible pursuant to section 2.309(f)(1)(iii). NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 46. We agree with both arguments.

exacerbate water use conflicts for either resource, thus rendering this aspect of Contention 3-E inadmissible pursuant to section 2.309(f)(1)(vi).[69]

d. Contention 4-E Is Not Admissible

In Contention 4-E, Joint Petitioners argue that the "[ER] (§ 3) erroneously fails to describe the reasonably foreseeable affected environment during the subsequent license renewal period (2032–2053) in violation of 10 C.F.R. § 51.53(c)(2)," which "renders Applicant's analyses of environmental impacts (§ 4), mitigating actions (§ 6), and alternatives analysis (§ 8) legally insufficient." Joint Pet'rs Pet. at 47. In particular, Joint Petitioners assert that the ER "fails to discuss the changes [caused by climate change] in the surrounding environment and their effects on Turkey Point, including sea level rise, increased air temperature, increased surface water temperature, acidification, annual precipitation, drought, and increased storm intensity." Id. at 48.

The NRC Staff and FPL argue that Contention 4-E is not admissible. See NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 46–51; FPL Answer to Joint Pet'rs Pet. at 46–54. We agree.

Joint Petitioners are simply incorrect in asserting that the ER fails to address the effects of climate change during the license renewal period. The 2013 GEIS contains the potential effects of climate change that Joint Petitioners claim are missing from the ER, including sea level rise, increased air temperature, increased water temperature, increased water acidity,

---

[69] Joint Petitioners also do not explain how sea level rise will eliminate the "closed loop" nature of the CCS in light of FPL's consent order with FDEP, which requires that FPL conduct a "thorough inspection of the CCS periphery" and "address any material breaches or structural defects." Consent Order at 7, 10–12. Nor do they explain how any overtopping of the CCS would result in any significant environmental impacts in light of the consent order's requirements that FPL (1) maintain an average annual CCS salinity at or below 34 PSU; (2) submit a detailed report outlining the potential sources of nutrients in the CCS, and implement a plan to minimize these nutrient levels; and (3) prevent releases of groundwater from the CCS to surface waters connected to Biscayne Bay that result in exceeding of surface water quality standards in Biscayne Bay. See id. at 7–12; see also NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 45; FPL Answer to Joint Pet'rs Pet. at 44.

increased precipitation, drought, and more intense hurricanes. See 2013 GEIS at 4-237 to 4-241.[70] The ER, in turn, describes the effects of climate change when combined with the effects of the proposed action. See ER at 4-69, 4-71. Additionally, the ER cites the Staff's EIS for the Turkey Point Units 6 and 7 combined licenses, which also discusses the effects of climate change at the site. See ER at 4-68. Contention 4-E is thus based on an erroneous factual premise, which renders it inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi).[71]

e. Contention 5-E Is Admissible in Part

In Contention 5-E, Joint Petitioners allege the ER "fails to address the adverse effect of operating the [CCS] for an additional 20 years on surface waters, freshwater wetlands, and endangered species present in those wetlands" in violation of 10 C.F.R. § 51.53(c)(3)(ii)(E). Joint Pet'rs Pet. at 58–59. Specifically, Joint Petitioners fault the ER for giving "no consideration to how the salinization of freshwater wetlands caused by the [CCS] will impact threatened or endangered species, and otherwise harm important plant and animal habitats," id. at 59, and for failing "to consider the impacts of ammonia discharges on threatened and endangered species and important habitat." Id. at 63. Regarding the latter assertion, Joint Petitioners provide factual support for concluding that (1) violations of surface water ammonia standards have been

---

[70] Section 4.12.3.2 of the 2013 license renewal GEIS describes the environmental impacts that could occur from changes in global and regional climate conditions, including generic descriptions of potential long-term impacts with examples of resource changes that could occur due to climate change. See GEIS at 4-237 to 4-241. Section 4.13 of the GEIS describes the cumulative impacts of the proposed action, focusing on resources that could be affected by the incremental impacts from continued operations associated with license renewal. See id. at 4-243 to 4-249.

[71] Moreover, to the extent Joint Petitioners assert in Contention 4-E that section 51.53(c)(2) requires the ER to describe the "reasonably foreseeable affected environment during the subsequent license renewal period," Joint Pet'rs Pet. at 47, they are incorrect as a matter of law. The regulation requires that ERs "describe in detail the affected environment around the plant," not the "reasonably foreseeable" environment. 10 C.F.R. § 51.53(c)(2). This legal error also renders Contention 4-E inadmissible pursuant to section 2.309(f)(1)(iv) for failing to show that the issue raised is material to the findings the NRC must make to support the action in this proceeding.

observed in canals near Turkey Point; and (2) Turkey Point is a key source of that ammonia. See id. at 62 (citing attach. P, Letter from Wilbur Mayorga, Chief of Environmental Monitoring and Restoration Division, DERM, to Matthew J. Raffenberg, Senior Director of Environmental Licensing and Permitting, FPL (July 10, 2018)).

FPL opposes admission of Contention 5-E in its entirety as outside the scope, immaterial, unsupported, and failing to demonstrate a genuine dispute with the ER. See FPL Answer to Joint Pet'rs Pet. at 54–60.

The NRC Staff does not oppose admitting the portion of Contention 5-E that relates to "the impact of ammonia releases from Turkey Point Units 3 and 4 on endangered and threatened species." NRC Staff Answer to Joint Pet'rs Pet. and SACE Pet. at 54. The NRC Staff "recognizes that the impacts of continued operation of the CCS on threatened and endangered species and critical habitat is a Category 2 issue" that must be analyzed in the supplemental EIS on a site-specific basis, id. & n.225, and in the Staff's view, Joint Petitioners submitted sufficient supporting information to raise a genuine dispute with the ER regarding their assertions that "Turkey Point is a source of ammonia in freshwater wetlands surrounding the site, and that the potential impacts of such ammonia releases during the period of continued operation on threatened and endangered species should be analyzed." Id. at 54. The Staff opposes admitting all other portions of Contention 5-E. See id.

For the reasons stated by the NRC Staff, we conclude that Contention 5-E satisfies the admissibility requirements in 10 C.F.R. § 2.309(f)(1) to the extent it relates to the impact of ammonia releases from Turkey Point Units 3 and 4 on endangered and threatened species and their critical habitat. We therefore admit Contention 5-E as follows: The ER is deficient in its failure to recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding

the site, and in its failure to analyze the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat.[72]

The remaining portions of Contention 5-E are not admissible. First, to the extent that Contention 5-E asserts that the ER improperly fails to consider the impact of salinization on surface waters and freshwater wetlands caused by the CCS, see Joint Pet'rs Pet. at 59, it raises an impermissible challenge to a Category 1 issue. See 10 C.F.R. pt. 51, app. B, Table B-1 (identifying as Category 1 issues the impacts of license renewal to altered salinity gradients in surface waters, groundwater quality degradation at plants with cooling ponds in salt marshes (including Turkey Point, see 2013 GEIS at 4-50), and cooling system impacts on terrestrial resources in wetlands). This aspect of Contention 5-E is (1) not litigable in this adjudicatory proceeding where Joint Petitioners have failed to seek a waiver, see 10 C.F.R. § 2.335; and (2) outside the scope of this proceeding. See id. § 2.309(f)(1)(iii).[73]

Likewise inadmissible is the portion of Contention 5-E concerning the impacts of salinization on threatened and endangered species in the wetlands. That aspect of Contention 5-E assumes that (1) FDEP's 2016 Consent Order does not establish adequate mitigation measures to address the salinity issues caused by the CCS; (2) FPL will fail to comply with the

---

[72] Joint Petitioners also assert that the CCS causes unspecified "other pollutants" to migrate into nearby surface waters and adversely impact the habitats of threatened and endangered species. See Joint Pet'rs Pet. at 59. Their failure to identify these putative "other pollutants" or to provide specific facts or expert opinion to support their claim renders this aspect of Contention 5-E inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).

[73] Joint Petitioners may not circumvent the regulatory bar against challenging a Category 1 issue by alleging the existence of new and significant information. See Joint Pet'rs Pet. at 60–62 (alleging significant migration of salt intrusion). As the Commission has held, "the new and significant information requirement in 10 C.F.R. § 51.53(c)(3)(iv) [does] not override, for the purposes of litigating the issues in an adjudicatory proceeding, the exclusion of Category 1 issues in 10 C.F.R. § 51.53(c)(3)(i) from site-specific review. . . . [A] waiver [is] required to litigate any new and significant information relating to a Category 1 issue." Limerick, CLI-12-19, 76 NRC at 384.

Consent Order; and/or (3) FDEP will fail to enforce the Consent Order and its regulations.[74] As we previously explained, absent evidence to the contrary (which Joint Petitioners fail to provide), we presume that FDEP will enforce, and FPL will comply with, the legally mandated measures in the Consent Order. See supra Part III.B.2.a.iii; see also supra note 55. We thus conclude that this aspect of Contention 5-E is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi) for failing to provide sufficient information to give rise to a genuine dispute.

D. MR. GOMEZ FAILS TO PROFFER AN ADMISSIBLE CONTENTION

FPL argues that Mr. Gomez's petition should be rejected as a threshold matter because (1) it is untimely; (2) it does not comply with the NRC's mandatory E-Filing requirements; and (3) it fails to demonstrate standing. See FPL Answer to Gomez Pet. at 4–13. The NRC Staff disagrees with FPL regarding Mr. Gomez's standing, stating that he "has shown that he has standing to intervene, based on the proximity presumption." NRC Staff Answer to Gomez Pet. at 9. However, the Staff agrees that Mr. Gomez's petition should be denied because it was late and improperly filed and served. See id. at 26–29.

We need not address any of these threshold issues, because we agree with the NRC Staff and FPL that none of the contentions proffered by Mr. Gomez is admissible. See NRC Staff Answer to Gomez Pet. at 26–43; FPL Answer to Gomez Pet. at 13–24.[75]

---

[74] The 2016 Consent Order requires FPL to submit and implement a plan that will "halt the westward migration of the hypersaline plume within 3 years of commencement of the remediation project and retract the hypersaline plume to the L-31E canal within 10 years." Consent Order at 9. FPL must report on the effectiveness of this plan at the conclusion of the fifth year of the plan's implementation. If the plan is ineffective, FPL must provide an alternative plan for FDEP approval, and then implement the FDEP-sanctioned plan. See id. at 10.

[75] The ten contentions proffered by Mr. Gomez are located in ten numbered paragraphs and subparagraphs in the section of his Petition entitled "Petitioner[']s Contentions." See Gomez Pet. at unnumbered pp. 1–7.

1. Contentions 1 and 2 Are Not Admissible

The first two putative contentions in Mr. Gomez's Petition constitute requests for extensions of time. First, Mr. Gomez opines that FPL's application was not available to the public for a sufficient time to allow adequate review, and he therefore requests an extension of sixty days beyond August 1, 2018, to allow "petitions for hearing, submissions of contention and limited appearance statements." Gomez Pet. at unnumbered p. 2. Second, Mr. Gomez asserts that there "are current municipal board & committee motions in process within [the] City of Miami in support of an extension to the public comment period and to enable a formal response by the City of Miami Commission." Id. Mr. Gomez therefore requests that "an [unspecified] extension [of time for] public comments be allowed in order to reasonably accommodate the City of Miami Commission with an opportunity to review the active motion[s] . . . and comment if [it] rules in favor of entering said comment." Id.

Mr. Gomez's requests for extensions of time do not constitute contentions challenging FPL's license renewal application, and they fail on their face to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). See NRC Staff Answer to Gomez Pet. at 31–32.[76]

2. Contention 3 Is Not Before This Board

In Contention 3, Mr. Gomez requests "an [unspecified] extension [of time] in order to have sufficient opportunity to submit formal environmental scoping comments on issues arising under [NEPA]." Gomez Pet. at unnumbered p. 2. This portion of Mr. Gomez's Petition is not before us, because in its referral memorandum of Mr. Gomez's Petition to the Atomic Safety and Licensing Board Panel, the Office of the Secretary excluded this particular request and,

[76] Mr. Gomez's requests would not have fared any better if he had characterized them as extension requests. As the NRC Staff correctly states, his first request is untimely and is not supported by good cause, see NRC Staff Answer to Gomez Pet. at 31, and his second request is outside the scope of this adjudicatory proceeding. See id. at 32.

instead, referred it to the Office of the Executive Director for Operations for appropriate action. See Letter from Annette L. Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Aug. 9, 2018).

3. Contention 4 Is Not Admissible

In Contention 4, Mr. Gomez contends that the "unlined cooling canals are leaking a host of caustic poisonous chemicals and highly saline waste water into our water supply." Gomez Pet. at unnumbered p. 3. He refers to a "clean up regime" that "FPL has currently entered into . . . with Miami-Dade County via the Department of Environmental Resource Management," id., and he requests that the "License Renewal Applications be withheld and withdrawn until the current clean up . . . is completed" and "until any law suits related to potential clean water act violations stated within ongoing FPL law suits . . . [are] settled." Id. at unnumbered pp. 3–4.

This environmental contention fails to provide a specific statement of law or reference a specific portion of the application that is disputed, as required by 10 C.F.R. § 2.309(f)(1)(i) and (vi). Additionally, to the extent Contention 4 asserts that FPL's renewal application is deficient pursuant to NEPA until an environmental clean-up is completed and any law suits related to potential Clean Water Act violations within ongoing FPL law suits are settled, see Gomez Pet. at unnumbered pp. 3–4, it is outside the scope of this proceeding pursuant to section 2.309(f)(1)(iii), because, as explained supra Part III.A.1, NEPA "seeks to guarantee process, not specific outcomes." Massachusetts v. NRC, 708 F.3d 63, 67 (1st Cir. 2013). Contention 4 also fails to satisfy section 2.309(f)(1)(v), because none of its assertions is supported by specific facts or expert opinions. And because Contention 4 lacks proper support, it fails to raise a genuine dispute on a material issue of law or fact, as required by section 2.309(f)(1)(vi).

4. Contention 5 Is Not Admissible

Contention 5 is a contention of omission in which Mr. Gomez asserts that FPL's ER fails to comply with 10 C.F.R. § 52.99(c) because the "Alternative Energy Sources review [does] not include solar nor wind power in [its] analysis." Gomez Pet. at unnumbered p. 4.

The legal basis for Contention 5 is flawed, because the regulatory requirement on which Mr. Gomez relies, section 52.99(c), governs combined license (COL) applications, not license renewals, thus rendering the contention inadmissible pursuant to section 2.309(f)(1)(ii) and (iii) as lacking a basis and outside the scope of this proceeding. Moreover, Contention 5 is based on an erroneous factual predicate. Contrary to Mr. Gomez's assertion, FPL's ER does include an analysis of solar and wind power alternatives. See ER at 7-4, 7-6 to 7-7, 7-9 to 7-10. Contention 5 is thus also inadmissible for failing to raise a genuine dispute with the ER as required by section 2.309(f)(1)(vi).

5. Contention 6 Is Not Admissible

Contention 6 is a contention of omission in which, again relying on section 52.99(c), Mr. Gomez asserts that the ER is incomplete because it fails to include a discussion of whether FPL intends to seek any power uprates for Units 3 and 4 during the renewal period. See Gomez Pet. at unnumbered pp. 4–5. Such a discussion is required, he claims, because if FPL were to seek a power uprate, and if one were granted, it could cause the plant's "safe maximum operating temperature" to be exceeded and entail "the risk of further expanding the poisonous and high salinity plume" in the groundwater. Id.

The legal basis for Contention 6 is flawed, because the regulatory requirement on which Mr. Gomez relies, section 52.99(c), governs COL applications, not license renewals, thus rendering the contention inadmissible pursuant to section 2.309(f)(1)(ii) and (iii) as lacking a basis and outside the scope of this proceeding. Contention 6 is also outside the scope of this proceeding because power uprates are a matter related to current plant operations and governed by 10 C.F.R. Part 50, not the license renewal requirements in Part 51 (environmental)

or Part 54 (safety). Moreover, Mr. Gomez's concern that FPL might request an uprate sometime during the renewal period that might, in turn, implicate safety and environmental matters is based on unsupported conjecture and is therefore inadmissible pursuant to 2.309(f)(1)(v). Finally, Contention 6 fails to challenge a specific portion of FPL's application, much less raise a genuine dispute of material fact or law, as required by section 2.309(f)(1)(vi).

6. Contention 7 Is Not Admissible

In Contention 7, Mr. Gomez includes a block quote that appears to combine portions of "the current EIS, GEIS and SEIS and related supplements and [appendices]" to support his assertions that the ER is deficient because it is "based on the egregious misrepresentation and [sheer] lack of local governing sea level rise projections" and "how that impacts its high level waste and spent fuel onsite storage." Gomez Pet. at unnumbered p. 5.

To the extent that Contention 7 alleges that rising sea levels pose a potential risk to safe plant operations, including spent fuel storage, it raises a current licensing basis safety issue under 10 C.F.R. Part 50 that is outside the scope of this proceeding, contrary to section 2.309(f)(1)(iii). To the extent Contention 7 alleges an environmental issue concerning onsite storage of spent nuclear fuel, it raises a non-litigable and inadmissible Category 1 issue. See 10 C.F.R. pt. 51, subpt. A, app. B. Additionally, Contention 7 fails to satisfy section 2.309(f)(1)(v), because the block quote on which Mr. Gomez relies does not support his claim that there is an "egregious misrepresentation" or "lack of local governing sea level rise projections" in FPL's license renewal application.[77] Finally, Contention 7 fails to specify any

[77] The NRC Staff accurately states that Mr. Gomez's block quote is "unattributed, and its reliability or meaning cannot be discerned." NRC Staff Answer to Gomez Pet. at 39. The NRC Staff also observes that Mr. Gomez's Petition includes a "[s]upplemental page" that quotes an excerpt from the Commission's decision on FPL's application for COLs for Turkey Point Units 6 and 7, Fla. Power & Light Co., (Turkey Point Nuclear Generating Units 6 & 7), CLI-18-1, 87 NRC 39, 59 (2018), regarding sea level rise at the site. See NRC Staff Answer to Gomez Pet. at 39–40. We agree with the NRC Staff that Mr. Gomez's mere quotation from CLI-18-1 does nothing to advance the admissibility of Contention 7. See id.

portion of FPL's application that is inadequate, and thus fails to establish a genuine material dispute with the application, as required to section 2.309(f)(1)(vi).

7. Contention 8 Is Not Admissible

Contention 8 alleges the NRC improperly concluded in the "current EIS, GEIS and SEIS and related supplements and appendi[ces]" that the "[e]nvironmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource." Gomez Pet. at unnumbered p. 5. Mr. Gomez asserts that this conclusion "contradict[s] . . . current environmental facts" because "a federal law suit is in play related to potential EPA violations, [and] an increasing plume migrates and expands both easterly and westerly from the current position threatening both our water supply and our federally protected bay." Id.

Although Mr. Gomez does not give a specific citation for the quote on which he bases Contention 8, the NRC Staff identified this quote as "the NRC's general definition of a 'SMALL' impact, as presented in its environmental impact statements prepared pursuant to NEPA, without reference to any particular environmental issue." NRC Answer to Gomez Pet. at 41. Contention 8 thus neither references a specific relevant portion of the license renewal application, nor demonstrates that a genuine dispute exists with the applicant, as required by section 2.309(f)(1)(vi). Moreover, Mr. Gomez fails to provide support for his position, as required by section 2.309(f)(1)(v), because he fails to identify the federal lawsuit he relies on, and he fails to explain his assertion that the law suit represents the "current environmental facts." Gomez Pet. at unnumbered p. 5.

8. Contention 9 Is Not Admissible

In Contention 9, Mr. Gomez states that FPL "is currently in negotiation[s] with Miami-Dade [County] related to [reclaimed wastewater] required to recharge the current cooling canals to a low enough temperature to maintain the cooling function." Gomez Pet. at unnumbered p. 6. Mr. Gomez describes "fears that the waste water discharge may negatively impact [FPL's ability

through compliance with its consent order] to reduce [the introduction of] phosphorous and other caustic compounds into the bay and our water supply." Id. He requests that the application be "withheld and withdrawn until the water demand issue is resolved . . . for safe operation of the plant without further threatening our bay or drinking and agricultural water supply." Id.

Again, Mr. Gomez fails to provide alleged facts or expert opinions to support his assertion that the use of wastewater to recharge the cooling canals may present a threat to drinking water, groundwater, and safe operation of the plant, as required by section 2.309(f)(1)(v).[78] Nor does he refer to the specific sources and documents on which he intends to rely, as required by section 2.309(f)(1)(v). He also fails to reference a specific portion of the license renewal application that he disputes, as required by section 2.309(f)(1)(vi).

9. Contention 10 Is Not Admissible

In Contention 10, Mr. Gomez asserts that the license renewal application is deficient pursuant to 10 C.F.R. § 52.103(b) for the following reasons: (1) FPL allegedly projects a sea level rise of one foot by 2100,[79] which he asserts is inconsistent with projections of sea level rise by the United Nations, the U.S. Army Corps of Engineers, and the National Oceanic and Atmospheric Administration of, respectively, 31", 61", and 81"; and (2) FPL improperly fails to follow the POANHI – Process for Ongoing Assessment of Natural Hazard Information – SECY-15-0137 portion of the Post-Fukushima Near-Term Task Force Recommendations 2.2. See Gomez Pet. at unnumbered p. 6.

---

[78] Contention 9 does not even provide adequate support for the proposition that Turkey Point Units 3 and 4 will use reclaimed wastewater as an additional source of cooling and CCS freshening during the renewal period. See FPL Answer to Gomez Pet. at 23 ("[T]here is no firm expectation or assumption in the [license renewal application] that Turkey Point Units 3 and 4 will use reclaimed wastewater during the SLR period.").

[79] Mr. Gomez initially states that FPL's sea level rise projection is "1"" (i.e., one inch), but in a later sentence he states the projection is one foot. See Gomez Pet. at unnumbered p. 6. We agree with the NRC Staff's assumption that Mr. Gomez means one foot. See NRC Staff Answer to Gomez Pet. at 42.

The legal basis for Contention 10 is flawed, because the regulatory requirement on which Mr. Gomez relies, section 52.103(b), governs COL applications, not license renewals, thus rendering the contention inadmissible pursuant to section 2.309(f)(1)(ii) and (iii) as lacking a basis and outside the scope of this proceeding. Additionally, although Mr. Gomez asserts that the license renewal application projects a one-foot sea level rise by 2100, he fails to specify where this projection appears in the application, if at all, and he thus fails to raise a genuine dispute with the application, as required by section 2.309(f)(1)(vi). The POANHI process that Mr. Gomez asserts should be used by FPL pertains to operational safety issues under 10 C.F.R. Part 50 with respect to flooding hazards, rather than to the aging management safety issues involved in the license renewal process; accordingly, this aspect of Contention 10 is not within the scope of this proceeding, as required by section 2.309(f)(1)(iii). Finally, to the extent that Contention 10 endeavors to raise an environmental challenge, it fails to provide any support or explanation as to how sea level rise, in combination with the effects of the continued operation of Turkey Point, will impact the environment, as required by section 2.309(f)(1)(v).

E. MONROE COUNTY, FLORIDA MAY PARTICIPATE AS AN INTERESTED GOVERNMENTAL PARTICIPANT

As relevant here, a licensing board "will afford an interested . . . local governmental body (county, municipality or other subdivision) . . . that has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing." 10 C.F.R. § 2.315(c). Section 2.315(c) does not require a demonstration of standing from an entity that seeks to participate as an interested governmental participant. Rather, it requires the entity to (1) identify those contentions on which it intends to participate; and (2) designate a single representative for the hearing. See id. The designated representative may

> introduce evidence, interrogate witnesses where cross examination by the parties is permitted, advise the Commission without [being required] to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under section 2.341 with respect to the admitted contentions.

Id.

As indicated supra Part I, Monroe County, Florida filed a request to participate as an interested governmental participant. The request explains that Monroe County borders Miami-Dade County and comprises natural resources including the Florida Keys, three national parks, four national wildlife refuges, and three state aquatic preserves. See Monroe County Request at unnumbered p. 1. Given its proximity to the Turkey Point facility,[80] Monroe County is concerned about the adverse impact of the CCS on (1) the County's drinking water; and (2) Biscayne Bay, which will threaten the tourism and fishing industries on which the County's identity and economy are based. See id. at unnumbered p. 2. Monroe County identifies SACE's two contentions as those in which it intends to participate, see id. at unnumbered p. 3, and it designates the Monroe County Board of County Commissioners as its representative. See id. at unnumbered p. 2.

We conclude that Monroe County satisfies the regulatory criteria for participating in this proceeding as an interested governmental participant, and we grant its request to participate on SACE's two contentions, as admitted.

[80] The NRC Staff advises that the Turkey Point facility and the CCS appear to be located about eight miles and four miles, respectively, from the nearest boundary of Monroe County. See NRC Staff Response to Monroe County at 5 n.23.

IV. CONCLUSION AND ORDER

For the foregoing reasons, we (1) grant SACE's hearing request, admitting Contention 1A and Contention 2 as framed by this Board;[81] (2) grant Joint Petitioners' hearing request, admitting Contention 1-E and Contention 5-E as framed by this Board;[82] (3) deny Mr. Gomez's hearing request; and (4) grant Monroe County's request to participate as an interested governmental participant.

Pursuant to 10 C.F.R. § 2.323(f)(1), we refer to the Commission our ruling infra Part III.A that section 51.53(c)(3) applies to the preparation of ERs in SLR proceedings. See supra note 46.

We deny as moot petitioners' motion dated January 15, 2019, which requested permission to respond to an FPL filing. See supra note 59.

This proceeding shall be conducted pursuant to the Simplified Hearing Procedures for NRC Adjudications described in Subpart L of 10 C.F.R. Part 2.

---

81 SACE Contention 1A (as admitted) states: The ER fails adequately to analyze the impacts (including cumulative) of continued CCS operation on the American Crocodile and its critical seagrass habitat. See supra p. 33.

SACE Contention 2 (as admitted) is identical to Joint Petitioners' Contention 1-E (as admitted) and states: In light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4. See supra p. 41.

82 Joint Petitioners' Contention 1-E (as admitted) is identical to SACE Contention 2 (as admitted) and states: In light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4. See supra p. 44.

Joint Petitioners' Contention 5-E (as admitted) states: The ER is deficient in its failure to recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding the site, and in its failure to analyze the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat. See supra pp. 52–53.

This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311(b) and (d)(1).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 7, 2019

Judge Abreu, Concurring in Part, and Dissenting in Part

I. Introduction

While I agree with the majority's rulings on standing and, to a degree, contention admissibility as outlined in section III below, I must dissent from an important aspect of their contention admissibility findings because I respectfully disagree with their opinion that 10 C.F.R. § 51.53(c)(3) applies to subsequent license renewal. The plain language of the regulation states that it applies to an initial not a subsequent renewal. The APA requires a regulation adopted through notice and comment to be amended through notice and comment. Especially here, where the majority's application of the regulation creates both a significant uncertainty about what regulatory standards are applicable and an obstacle to a petitioner's ability to know how to properly frame its contentions, proper notice is essential. Although the agency's approach to subsequent license renewals may have evolved since section 51.53(c)(3) was proposed in 1991, to use that evolution as an excuse for an adjudicatory body to de facto change the regulation would subvert the intent of the APA and potentially risk the agency's credibility as to the openness, clarity, and reliability of its regulations—three of the agency's "Principles of Good Regulation."[1]

II. Analysis of Section 51.53(c)(3)

FPL and the Staff ask us to ignore the plain language of section 51.53(c)(3) because, they claim, it does not reflect the Commission's intent. They would have us ignore the word "initial" and apply the rule to subsequent license renewal applications because, as FPL and the Staff assert, reading the regulation in accordance with its plain language leads to an "absurd" result.[2] The majority likewise frames the issue before us as a "question of Commission intent"

---

[1] See NRC Principles of Good Regulation (ADAMS Accession No. ML14135A076).

[2] FPL Surreply at 4; NRC Staff Response to FPL Surreply at 1–2.

and concludes that the Commission intended section 51.53(c)(3) to apply to all license renewal applications.[3] But the majority delves too deeply to find its answer. The regulation is clear on its face, and reading it in accordance with its plain language presents no absurdity or conflict with the agency's regulatory structure. Therefore, neither the Board nor the Commission has the authority to effectively amend a regulation to reflect new Commission "intent" outside of the notice and comment process.[4] When presented with an unambiguous regulation, an agency may not, "under the guise of interpreting [that] regulation, . . . create de facto a new regulation."[5] Because the NRC promulgated section 51.53(c)(3) through notice-and-comment rulemaking, it must use the same procedure if it wants to amend or repeal the rule.[6]

The "interpretation of any regulation must begin with the language and structure of the provision itself."[7] Contrary to the majority's characterization,[8] section 51.53(c)(3) is not "silent" as to its scope. The regulation is quite specific, and we must give all of its words full effect.[9] It applies to applicants: (1) seeking an "initial renewed license"; and (2) holding an operating

---

3 Majority at 13.

4 See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . . . When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

5 Christensen v. Harris Cty., 529 U.S. 576, 588 (2000).

6 See Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015) (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)) (describing the APA'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").

7 Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988).

8 Majority at 15.

9 Shoreham, ALAB-900, 28 NRC at 288.

license, construction permit, or combined license issued as of June 30, 1995.[10] These applicants must include in their environmental reports the information described in 10 C.F.R. § 51.53(c)(2), along with various "conditions and considerations" that, among other things, allow them to take advantage of the generic determinations in the GEIS for Category 1 environmental issues.[11] "[T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."[12] The oft-used principle, "expressio unius est exclusio alterius" (that is, the mention of one thing is the exclusion of the other), is instructive here.[13] Of the categories of license renewal applicants, the Commission chose "initial," thus implying that this was done to the exclusion of "subsequent."[14] Had the Commission meant "initial and subsequent," it could have said just that, or "initial" simply could have been deleted.

The majority relies on Federal Express Corp. v. Holowecki to support its approach to discerning the Commission's intent regarding the scope of section 51.53(c)(3).[15] But unlike here, Holowecki involved a statute and implementing regulations whose language left some

---

[10] 10 C.F.R. § 51.53(c)(3) (emphasis added).

[11] Id.

[12] Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878).

[13] See, e.g., Christensen, 529 U.S. at 582–83.

[14] The force of the "expressio unius" principle depends on context; the analysis "will turn on whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded." Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998). As discussed below, "initial," by definition, necessarily precludes "subsequent," and the regulatory history further supports its preclusive effect. Therefore, based on context, it is fair to say that the Commission, in choosing to include the word "initial," considered but nevertheless excluded all other alternatives. See id.

[15] See Majority at 15.

room for interpretation: what constitutes a "charge" when alleging unlawful age discrimination.[16] Here, using the word "initial" by definition limits the regulation's scope. Something is either "initial," i.e., first, or it is not.[17] No room exists for anything else.

Resorting to regulatory history is unnecessary when the meaning of a regulation is clear.[18] But even so, the regulatory history here supports an interpretation of the word "initial" as a limitation on the application of section 51.53(c)(3). In the Statements of Consideration for the 1991 proposed rule, the NRC anticipated that a licensee might file multiple license renewal applications, but nevertheless limited application of the efficiencies to be gained by the Part 51 amendments. The NRC stated that the safety considerations for license renewal application reviews outlined in Part 54 "could be applied to multiple renewals of an operating license for various increments," but in the very next sentence stated that the environmental considerations in the Part 51 amendments would apply only "to one renewal of the initial license for up to 20 years beyond [its] expiration."[19] This history of the Part 51 amendments demonstrates that the word "initial" in section 51.53(c)(3) was used with forethought. In 1991, the agency intended the Part 51 amendments for license renewal reviews to apply to one renewal, not multiple renewals.

When the final rule was promulgated in 1996, the Statements of Consideration analyzed the comments received and explained major changes in response to those comments—for example, the agency's decision to prepare a supplemental environmental impact statement for

---

16 Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008).

17 Initial, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) (defining "initial" to mean "of or relating to the beginning . . . placed at the beginning: first").

18 See, e.g., Conn. Nat'l Bank, 503 U.S. at 253–54.

19 Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,017 (Sept. 17, 1991) (emphasis added) [hereinafter 1991 Proposed Rule].

each license renewal application, rather than an environmental assessment.[20] The NRC did not repeat the "one-renewal" rationale, but to do so was not necessary; no comments about the one-renewal limitation on Part 51 were reported.[21] And the NRC reaffirmed that the changes in the final rule, while substantial, did not alter "the generic approach and scope" of the 1991 proposed rule.[22] Significantly, the final rule retained the word "initial" in section 51.53(c)(3).[23] Moreover, despite several changes to Part 51 since 1996, including changes to section 51.53(c)(3), "initial" remains in the rule to this day.[24]

Notably, in the 2009 proposed rule that accompanied the agency's proposed revisions to the GEIS, the NRC repeated the scope of section 51.53(c)(3) in the Statements of Consideration, explaining that it applies to "initial license renewal."[25] This slight phrasal change

---

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

21 See generally "Public Comments on the Proposed 10 CFR Part 51 Rule for Renewal of Nuclear Power Plant Operating Licenses and Supporting Documents: Review of Concerns and NRC Staff Response," NUREG-1529, vols. 1 & 2 (May 1996) (ADAMS Accession No. ML16362A344 (package)).

22 1996 Final Rule, 61 Fed. Reg. at 28,468.

23 See id. at 28,487.

24 See generally Final Rule, Miscellaneous Corrections, 79 Fed. Reg. 66,598 (Nov. 10, 2014) (making minor revisions for clarity and to correct typographical errors) [hereinafter Final Rule, Miscellaneous Corrections]; Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013) (updating the number and scope of the environmental issues to be addressed in license renewal proceedings consistent with the revised GEIS); Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed Reg. 49,352, 49,432 (Aug. 28, 2007) (adding "combined licenses" to section 51.53(c)(3)) [hereinafter Final Rule, Licenses, Certifications, and Approvals]; Final Rule, Changes to Requirements for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 64 Fed. Reg. 48,496 (Sept. 3, 1999) (expanding generic findings regarding transportation of spent fuel and waste); Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537 (Dec. 18, 1996) (making "minor clarifying and conforming changes and add[ing] language inadvertently omitted from Table B-1" of the 1996 final rule).

25 Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,128 (July 31, 2009).

from the rule's text (i.e., "initial renewed license") demonstrates the agency's awareness of the rule's scope, revealing much more than would a rote copy-and-paste, and shows that the rule means what it says: it applies to "initial license renewal," not to "any" renewal.[26]

It is quite a stretch to interpret the agency's failure to repeat the "one-renewal" rationale for Part 51 in the 1996 Statements of Consideration as signaling a complete abandonment of its original position. Nor does it make sense to further assume that retention of the word "initial" in the final rule was a mere ministerial error. Rather, it makes far more sense to assume that the agency meant what it said originally. Had the NRC abandoned its one-renewal limit on the 1991 Part 51 amendments without expressly explaining why, the agency's action would have been subject to challenge as "arbitrary and capricious."[27] And even if we assume that the word "initial" had been retained by mistake for several years, the Commission could have, and still could, fix the error with the same notice process it has used with past Part 51 changes.[28]

---

[26] Despite this, the majority maintains that there is "nothing in the regulatory history indicating that the scope of section 51.53(c)(3)—in 1996 or thereafter—was intended to be restricted to initial license renewals," Majority at 16 n.33, and avoids mentioning that nothing in the post-1996 regulatory history directly indicates that the regulation applies to subsequent license renewal. Moreover, the majority's observation is off target. Because the rule's stated application only to initial license renewals is unchanged to this day, the relevant regulatory history is the expressed intent when the rule was promulgated.

[27] See 5 U.S.C. § 706(2)(A).

[28] See, e.g., Final Rule, Miscellaneous Corrections, 79 Fed. Reg. at 66,600 (direct final rule; good cause found to waive notice and comment). If, as the majority asserts, the 1996 final rule's lack of mention of section 51.53(c)(3)'s "initial" qualifier shows intent not to limit the application of this regulation to one renewal, then why wasn't 51.53(c)(3) changed to reflect that intent in one of the several amendments that were made since 1996? See Majority at 16. Even if the lack of change was a simple oversight, the proper way to correct that oversight is through rulemaking. While the agency could try to justify a "good cause" waiver of the notice requirements in 5 U.S.C. § 553 for a quick fix to the rule, see 5 U.S.C. § 553(b)(3)(B), in my view, removing "initial" would have a substantive impact on subsequent license renewal applicants and hearing petitioners, thus requiring notice-and-comment rulemaking, but that is for the agency to decide.

FPL and the Staff can conceive of no reason why the Commission might place a limit on the use of the GEIS determinations in the environmental report beyond one renewal of a power reactor license.[29] Similarly, the majority finds that reading the rule consistent with its plain language would "undermine the regulatory purpose" of injecting efficiencies into the license renewal process.[30] But limiting the use of the rule for preparation of environmental reports to one license renewal was not an unreasonable approach for the agency to take, considering its obligations under NEPA. The Commission has recognized "the NRC's continuing duty to take a 'hard look' at new and significant information for each 'major federal action' to be taken."[31] So the agency reasonably could have determined that after a certain point—here, following the term of the initial license plus twenty years—the environmental impacts of license renewal should be considered afresh in the environmental report. The GEIS (in its original and revised form) bears this out. As Petitioners point out, references throughout the GEIS indicate that it contemplates only the forty-year term of the original license plus twenty years, for a total of sixty years—not the eighty or more years allowed for subsequent license renewal.[32] Of note, as part of the discussion of severe accidents, the revised GEIS expressly states that "the revision only

---

29 See FPL Surreply at 4, 9–10; NRC Staff Response to FPL Surreply at 11–13.

30 Majority at 18.

31 Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 216 (2013) (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989)).

32 See Pet'rs. Response to FPL Surreply at 5–8. As its discussion makes clear, see Majority at 18–19, the majority basically accepts FPL's argument that "[t]he Commission's decision to retain the 10-year GEIS review and update provision in its 2013 revisions to Part 51 would make no sense if it had intended for the GEIS and Table B-1 to apply only to initial operating license renewals." FPL Surreply at 6. But the fact that the Commission expressed an intent to update the GEIS periodically in no way means that the GEIS analyses cover the temporal scope of a subsequent license renewal. Rather it simply means that when the GEIS is used the information it contains is reasonably up-to-date. Certainly, an applicant may reference the GEIS to make preparation of its environmental report more efficient, but it may not use section 51.53(c)(3)'s protections until the regulation is updated to include subsequent license renewals.

covers one initial license renewal period for each plant (as did the 1996 GEIS)," confirming that both the revised and the original GEIS look only at the temporal period of one license renewal.[33]

FPL and the Staff nonetheless assert, and the majority agrees, that the plain language of section 51.53(c)(3), with its use of the word "initial" in the environmental report instructions, cannot be reconciled with the rules governing the preparation of an environmental impact statement in sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B, which refer generally to license renewal.[34] FPL and the Staff argue that the Staff is required to incorporate information from the GEIS for Category 1 issues for all power plant license renewal applications, initial and subsequent.[35] But the more general reference to license renewal in sections 51.95 and 10 C.F.R. Part 51, Subpart A, Appendix B dates to the 1991 proposed rule when the NRC explained that the "[P]art 51 amendments apply to one renewal of the initial license for up to 20 years."[36] And the 1996 final rule included 10 C.F.R. § 51.71(d) and the general reference to the "license renewal" stage, but within the context of a rule that retained the same "generic approach and scope" of the proposed rule.[37] The use of the plural to describe the amendments to Part 51 as a whole, not just section 51.53(c)(3), is telling. Therefore, if one wanted to resort to regulatory history, as the majority does, to reconcile the language of these sections in a manner consistent with each other, the word "initial" would need to be read into sections 51.71(d), 51.95(c), and 10 C.F.R. Part 51, Subpart A, Appendix B, rather than out of

---

33 2013 GEIS at E-2.

34 See FPL Surreply at 7–9; NRC Staff Response to FPL Surreply at 16–19; Majority at 17–18 & n.35.

35 See FPL Surreply at 8–9; NRC Staff Response to FPL Surreply at 16–17.

36 1991 Proposed Rule, 56 Fed. Reg. at 47,017 (emphasis added); see also id. at 47,029.

37 1996 Final Rule, 61 Fed. Reg. at 28,468.

section 51.53(c)(3), as the majority effectively suggests, even though that is not the outcome they seek.[38]

The Staff further argues that section 51.53(c)(3) must apply to subsequent license renewal applications, notwithstanding the word "initial," because "the Commission has not promulgated any other requirements that specifically apply to an environmental report submitted for [a subsequent license renewal application]."[39] But this is not really an issue.[40] Applicants seeking a subsequent license renewal still must meet the requirements in 10 C.F.R. § 51.53(c)(1) and (c)(2). Section 51.53(c)(2) requires a license renewal applicant to include in the environmental report a description of the proposed action, a detailed description of the "affected environment around the plant," "the modifications directly affecting the environment or any plant effluents, and any planned refurbishment activities," as well as "the environmental impacts of alternatives and any other matters described in [10 C.F.R.] § 51.45."[41] Section 51.45, in turn, provides general requirements for environmental reports, with the exception, cross-referenced as section 51.53(c) and reflected in section 51.53(c)(2), that license renewal

---

[38] See 1991 Proposed Rule, 56 Fed. Reg. at 47,017. Further, section 51.53(c)(3)'s greater specificity, that it applies only to initial renewal, rather than any renewal, is an indicator that "initial" should not be ignored. "Ordinarily, where a specific provision conflicts with a general one, the specific governs." Edmond v. United States, 520 U.S. 651, 657 (1997) (citing Busic v. United States, 446 U.S. 398, 406 (1980)); see also Union of Concerned Scientists v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983) (determining that between the general provisions in the APA and the more specific requirements in the Atomic Energy Act, the Atomic Energy Act controls). To be clear, I do not advocate that "initial" should now be read into other sections of Part 51. I am simply saying that the 1991 proposed regulations had inconsistencies. Given that, we must look at the plain language, which is supported by the Statements of Consideration, for the foundation of the interpretation of section 51.53(c)(3), regardless of the inconsistencies. These inconsistencies must be addressed through rulemaking.

[39] NRC Staff Response to FPL Surreply at 10 (emphasis omitted).

[40] And if it were an issue, the agency would need to promulgate regulations through the rulemaking process.

[41] 10 C.F.R. § 51.53(c)(2).

environmental reports "need not discuss the economic or technical benefits and costs of either the proposed action or alternatives except if these benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation."[42] Sections 51.53(c)(1) and (c)(2), together with the cross-reference to the general requirements in section 51.45, thus would seem to ensure that sufficient information is available to aid the Staff in the development of an environmental impact statement, which as the majority notes, is the intended purpose of an environmental report.[43]

Even if applying the plain language of section 51.53(c)(3) may be inefficient in some instances, applying the regulation as written is not what produces a "discordant," "untenable," or even an "absurd" result, as the majority asserts.[44] Instead, what has created this inefficiency is the agency's change of policy without a parallel change to the implementing regulation. As discussed above, the agency made the conscious policy decision to limit the use of the Part 51 amendments to one renewal per reactor unit when the rule was proposed in 1991, which was not changed in the 1996 final rule. But if the agency now finds this policy objectionable or inefficient, we are not the ones to provide a remedy in this adjudication. When faced with a similar choice in Griffin v. Oceanic Contractors, the Court declined to ignore the plain language of a statute, observing that it has "refus[ed] to nullify statutes, however hard or unexpected the particular effect."[45] The Court further reasoned that "'[l]aws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be

---

42 Id. § 51.45(c); see also id. § 51.53(c)(2).

43 See Majority at 17–18.

44 Id. at 24–25.

45 458 U.S. 564, 575 (1982) (holding under terms of statute, district court was required to impose $300,000 penalty on ship owner for failing, without good cause, to promptly pay a seaman $412.50 in earned wages).

mischievous, absurd or otherwise objectionable. But in such case, the remedy lies with the law making authority, and not with the courts.'"[46]

Just as the "remedy for . . . dissatisfaction with the results [of applying the plain language of a statute] lies with Congress, and not with th[e] Court," the remedy for dissatisfaction with the results of applying section 51.53(c)(3) according to its plain text lies with the NRC in its rulemaking authority, not the Board.[47] If the Commission wishes to abandon its "initial renewal" provision, it has a clear path to do so: the NRC must amend the regulation the same way in which the regulation was adopted—through the rulemaking process.[48]

FPL and the Staff also claim, and the majority agrees, that the Staff Requirements Memorandum for SECY-14-0016 compels an interpretation of the regulations that would require use of the GEIS determinations when preparing the environmental report in subsequent license renewal proceedings.[49] This argument fails for two reasons. First, the documents associated with the Commission's action on SECY-14-0016 do not support such an interpretation. Although the Staff, in its paper, discussed its activities relative to the environmental impacts of license renewal, the Staff dismissed the need to amend Part 51 in a single sentence, stating that it "does not recommend updating the environmental regulatory framework under 10 [C.F.R.] Part 51 . . . because environmental issues can be adequately addressed by the existing GEIS and through future GEIS revisions."[50] At the same time, the options laid out for Commission

---

46 Id. (citation omitted).

47 Id. at 576.

48 See Mortg. Bankers, 575 U.S. at __, 135 S. Ct. at 1206.

49 See Majority at 20; FPL Surreply at 12–14; NRC Staff Response to FPL Surreply at 10–11, 13.

50 "Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal," Commission Paper SECY-14-0016 (Jan. 31, 2014) at 5, encl. 1 (ADAMS Accession No. ML14050A306) [hereinafter SECY-14-0016]. A common-sense view of how we got to this point is that the word "initial" in 51.53(c)(3) has simply been overlooked when

action in the Staff's paper, as well as the Staff's recommended option, all pertained to safety concerns.[51] And the voting record for SECY-14-0016 reflects that the Commission was responding to the safety aspects of subsequent license renewal and whether changes should be made to 10 C.F.R. Part 54, rather than any potential changes to the environmental regulations in Part 51.[52]

Second, even were we to assume that the Staff Requirements Memorandum for SECY-14-0016 implies a Commission determination that no change to Part 51 was necessary because the rules and the GEIS already applied to subsequent license renewal, neither the Commission's nor the Staff's interpretation is sufficient to amend section 51.53(c)(3).[53] FPL and

---

Part 51 has been reviewed the past several years while the requirements for subsequent license renewal were being considered. If not this, then how else could the Staff tell the Commissioners in this SECY paper that updating Part 51 is not recommended? But just because "initial' has been overlooked, this does not give the Board authority to change its meaning to what the Staff wants today.

[51] SECY-14-0016, at 1–2, 5–9.

[52] See Commission Voting Record, "SECY-14-0016—Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal" (Aug. 29, 2014) (ADAMS Accession No. ML14245A118). Rather than approving anything, the Commission disapproved the Staff's recommendation to initiate a rulemaking pertaining to Part 54. Staff Requirements—SECY-14-0016—Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor Subsequent License Renewal (Aug. 29, 2014) (Adams Accession No. ML14241A578) [hereinafter SRM-SECY-14-0016].

Also, it seems strange that these distinctly amorphous circumstances are the best evidence of Commission intent FPL and the Staff (and the majority) can point to in the context of what is apparently the last instance in which the Commission dealt with the rule provisions in question. Given its obvious significance, if the Commission had been fully aware of this section 51.53(c)(3) issue, surely some definitive indication of the Commission's "intent" would have been expressed. Perhaps the first opportunity the Commission may actually have to directly express its "intent" on this subject may be in response to this Board's referred ruling on this issue. See 10 C.F.R. § 2.323(f)(1).

[53] See, e.g., Christensen, 529 U.S. at 588 (declining to defer to an agency interpretation that conflicted with an unambiguous regulation because to do so "would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation"). The same rationale applies to FPL's reference to the July 2018 status report the agency sent to the U.S. Senate Committee on Environment and Public Works, which FPL claims demonstrates "that the Commission views the current Part 51 regulatory framework," including the GEIS, "as

the Staff argue that we should accept their interpretation of section 51.53(c)(3) because to do otherwise would lead to an "absurd result." But it is far more absurd to read out of the regulation a word that has been retained over the course of several years and that was the product of a rulemaking involving broad public participation, including public meetings and workshops, at the time it was adopted.[54] Nor do we have the authority to do so.

Although the Commission has not issued a formal statement directly addressing the issue before us, such an interpretive rule would also put the agency at risk. As the Court has cautioned, "when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions," the agency may be challenged under the "arbitrary and capricious standard."[55] Under the APA, an agency must "provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests [in the written regulation] that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"[56]

---

applicable to [subsequent license renewal applications]." FPL Surreply at 14–15. Even assuming the status report is an expression of that intent, the report to Congress would not be enough to overcome the plain language of section 51.53(c)(3). See Christensen, 529 U.S. at 588.

[54] See 1996 Final Rule, 61 Fed. Reg. at 28,469 (describing several public meetings and workshops over a rulemaking history spanning almost ten years). The majority describes a hypothetical that "would result in the wasteful expenditure of private and governmental resources." Majority at 25. This brings to mind TVA v. Hill, in which use of a federally funded multi-million-dollar dam project was halted to protect a small fish. Although not operating the dam similarly could have been described as a "wasteful expenditure," the Court declined to use such an excuse to go beyond the plain meaning of the Endangered Species Act. 437 U.S. 153, 187 (1978). Congress thereafter passed legislation to exempt the dam from the Endangered Species Act so that the dam could operate. See Pub. L. No. 96-69, 93 Stat. 437, 449–50 (1979). The legislature fixed the problem it created, rather than the Court.

[55] Mortg. Bankers, 575 U.S. at __, 135 S. Ct. at 1209.

[56] Id. (quoting Fox Television, 556 U.S. at 515).

Sidestepping the rulemaking process denies the public an opportunity to comment on a not-insignificant change to the NRC's regulations. And, in this case, that change would add another hurdle for petitioners. In past license renewal adjudicatory proceedings, a petitioner raising a challenge to a Category 1 issue had to meet the requirements for a waiver petition in 10 C.F.R. § 2.335, in addition to the contention admissibility requirements in 10 C.F.R. § 2.309, because such a contention would have been a challenge to the rule.[57] In those proceedings, however, applicants were seeking the initial renewal of their licenses, and therefore section 51.53(c)(3) plainly applied. To expect this case's petitioners to have sought a waiver of a regulation that does not clearly apply to this subsequent license renewal proceeding would be unfair.[58]

While I agree that the agency's current intent is to streamline the subsequent license renewal process, the agency has not amended 51.53(c)(3) to keep up with the evolved policy. The agency's expressed intent at the time the regulation was proposed was clearly that it applies only to initial license renewal. Looking to current intent while trying to explain away the expressed original intent of the regulation is a bridge too far. The agency's intent today may not be the same as the agency's intent when the regulation was created, but that original intent is what ultimately matters for regulatory interpretation. As the Appeal Board explained in the Shoreham proceeding, "[a]lthough administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that

---

[57] See Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384, 386 (2012); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 16 (2007); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 22–23 (2001).

[58] Cf. Limerick, CLI-13-7, 78 NRC at 203 (offering a belated opportunity to submit a waiver petition after resolving "an apparent ambiguity in [the] license renewal regulations").

regulation."[59] The majority's tortuous approach to determining the regulation's applicability wipes away the plain meaning and the original regulatory intent, and instead skips to the Staff's more recent guidance documents and to the inconsistency the agency created when it did not update section 51.53(c)(3) to match that new intent.

The agency's new position clearly conflicts with the plain language of the rule, and we may not fix the problem in this adjudication.[60] To do so would run afoul of the APA and set a troubling precedent that might encourage the agency to take short cuts to amending its regulations in future adjudicatory proceedings. The majority points out the inefficiency of admitted contentions then becoming inadmissible if the regulations are applied as written,[61] but this inefficiency was created by the agency that is responsible for ensuring that the regulations are up-to-date. An agency may not create a situation that is inconsistent with an existing regulation and then use that disparity as an excuse to make a de facto amendment without notice and comment. For example, if the agency can change the meaning of "initial," what is to

---

59 Shoreham, ALAB-900, 28 NRC at 288.

60 See "Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants," NUREG-2192 at 1.1-2 (July 2017) (ADAMS Accession No. ML17188A158) (providing that the Staff reviewer will check that the applicant has prepared its environmental report "in accordance with the guidelines in NUREG–1555, 'Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal,'" which refers generally to license renewal applicants); accord "Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications," Reg. Guide 4.2 (supp. 1, rev. 1) (June 2013) (ADAMS Accession No. ML13067A354) (referring generally to "license renewal applications") [hereinafter Reg. Guide 4.2]. But see Reg. Guide 4.2 at 33 (guiding the applicant to show the relationships between plant operation and resource attributes, and "[i]f any adverse impacts are identified," guiding the applicant to describe "the mitigation measures that have been used to reduce the adverse impacts during the initial license period or that are expected to be used during the license renewal period and their expected effects") (emphasis added)).

61 Majority at 24–25.

stop it from changing the June 30, 1995, limitation in section 51.53(c)(3) without notice and comment?[62]

If the NRC truly wants section 51.53(c)(3) to apply to subsequent license renewals, it must amend its regulations via the rulemaking process. Until that is completed, a short-term solution might be for the NRC to allow FPL and similarly situated subsequent license renewal applicants the option to reference the information in the GEIS for Category 1 issues in their environmental reports (rather than generating that information anew), thus gaining the procedural efficiencies that the Staff and the Commission may desire for subsequent license renewal.[63] But until section 51.53(c)(3) is revised to include subsequent license renewal

---

[62] The NRC might again be presented with a need to amend section 51.53(c)(3) when the time comes for a combined license holder to seek a renewed license. Although the agency amended the regulation in 2007 to include "combined licenses," section 51.53(c)(3) is limited to license holders as of "June 30, 1995," at which time no combined license had been issued, thereby precluding its use for those licensees. See Final Rule, Licenses, Certifications, and Approvals, 72 Fed. Reg. at 49,432, 49,513; Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC 63, 122 (2012) (authorizing issuance of the first combined licenses). The "June 30, 1995," restriction also appears in Part 51, Subpart A, Appendix B, but this appendix does not include combined licenses among the types of licenses that may be renewed using the GEIS-associated efficiencies in the rule.

[63] Applicants for subsequent license renewal still retain the efficiencies accorded under Part 54, as contemplated in the original rulemaking and reaffirmed by the Commission in SECY-14-0016. See, e.g., 1991 Proposed Rule at 47,017 ("The [P]art 54 rule could be applied to multiple renewals of an operating license for various increments."); SRM-SECY-14-0016 (disapproving the Staff's recommendation to initiate a rulemaking to amend Part 54 for power reactor subsequent license renewal). I recognize that in the long run, the outcome is not in question: section 51.53(c)(3) will end up applying to any renewal, either because the Commission upholds the majority's decision or because the agency changes the regulation via the notice-and-comment process. The real issue is what road the Commission takes to get there. And given the short-term solution proposed above, no immediacy exists here that might counsel in favor of taking action outside the rulemaking process and risking an APA violation. In the interim, the Staff has the option of incorporating information from the GEIS in the supplemental environmental impact statement. But given that there is some question as to whether the GEIS contemplates the temporal scope of subsequent license renewal, see supra Dissent notes 32–33 and accompanying text, the Staff should ensure that its environmental review of subsequent license renewal applications is sufficiently forward-looking. Cf. New York v. NRC, 681 F.3d 471, 478–79, 483 (D.C. Cir. 2012) ("[A] generic analysis must be forward looking and have enough breadth to support the Commission's conclusions."), and petition for review denied, 824 F.3d 1012 (D.C. Cir. 2016).

applicants, petitioners must be allowed to challenge the substantive viability of any GEIS analyses incorporated by reference, without having to request a section 2.335 waiver, provided that they meet the standards for intervention in section 2.309. Requiring petitioners to meet only the contention admissibility standards would not shift the burden, as FPL would have it,[64] but instead maintains the status quo, given that contentions challenging environmental report Category 1 issues in subsequent license renewal proceedings do not challenge the regulations as currently written.[65]

III. Standing and Contention Admissibility

I concur with the majority's rulings on standing for SACE and the Joint Petitioners and on the admission of limited portions of contentions related to the discussion of the cooling tower alternative, the effects on the American crocodile, the source of surface water ammonia, and the impacts of ammonia discharges.[66] I concur with the majority not to admit all other contentions, or portions of contentions, whose inadmissibility was based on reasons that did not include the need for a section 2.335 waiver.

I also concur with allowing Monroe County to join as an interested government participant regarding SACE's two admitted contentions. And finally, I concur in the majority's determination to refer its ruling on the section 51.53(c)(3) matter to the Commission pursuant to 10 C.F.R. § 2.323(f)(1).

---

[64] See Tr. at 65–66.

[65] By the same token, if any admitted contentions challenging Category 1 issues were outstanding if and when a rulemaking change to section 51.53(c)(3) becomes effective (thus precluding Category 1 items from being subject to adjudicatory consideration in a subsequent license renewal proceeding), the sponsors of those contentions should be afforded a reasonable opportunity, in accordance with section 2.335(b), to submit a rule waiver petition regarding the subject matter of those contentions.

[66] Regarding the admission of ammonia-related issues, although section 51.53(c)(3)(ii)(E) is referenced, the Joint Petitioners also noted that if section 51.53(c)(3) does not apply to subsequent license renewal applications, section 51.53(c)(1) and (c)(2) (along with section 51.45) apply in the alternative. Joint Pet'rs Pet. at 16 n.71.

Relative to the contentions the majority has judged inadmissible due to, at least in part, the need for a section 2.335 waiver to challenge a Category 1 issue, I abstain from endorsing that result due to my conviction that section 51.53(c)(3), as written, cannot apply to subsequent license renewal applications.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250-SLR
	)	50-251-SLR
(Turkey Point Nuclear Generating Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting the Hearing Requests of SACE and Joint Petitioners, Denying the Hearing Request of Albert Gomez, Granting Monroe County's Request to Participate as an Interested Governmental Participant, and Referring a Ruling to the Commission) (LBP-19-3)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk (*).

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E. Roy Hawkens, Chairman
Sue Abrue, Administrative Judge
Taylor A. Mayhall, Law Clerk
Joseph D. McManus, Law Clerk
E-mail: Roy.Hawkens@nrc.gov
Sue.Abrue@nrc.gov
Taylor.Mayhall@nrc.gov
Joseph.McManus@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
Anita Ghosh, Esq.
Brian Harris, Esq.
Esther R. Houseman
David E. Roth, Esq.
Sherwin E. Turk, Esq.
Jeremy L. Wachutka, Esq.
Mitzi A. Young, Esq.
Krupskaya T. Castellon, Paralegal
E-mail: Anita.Ghosh@nrc.gov
Brian.Harris@nrc.gov
Esther.Houseman@nrc.gov
David.Roth@nrc.gov
Sherwin.Turk@nrc.gov
Jeremy.Wachutka@nrc.gov
Mitzi.Young@nrc.gov
Krupskaya.Castellon@nrc.gov

Florida Power & Light Company
801 Pennsylvania Ave. NW Suite 220
Washington, DC 20004
Steven C. Hamrick, Esq.
E-mail: steven.hamrick@fpl.com

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
Paul M. Bessette, Esq.
Stephen J. Burdick, Esq.
Ryan K. Lighty, Esq.
Martin J. O'Neill
E-mail: Paul.Bessette@morganlewis.com
Stephen.Burdick@morganlewis.com
Ryan.Lighty@morganlewis.com
Martin.Oneill@mrganlewis.com

Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
Geoffrey H. Fettus
E-mail: gfettus@nrdc.org

Southern Alliance for Clean Energy
1725 DeSales Street N,W., Suite 500
Washington, DC 20036
Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, LLP
E-mail: dcurran@harmoncurran.com

Counsel for Miami Waterkeeper, Inc.
The Super Law Group
180 Maiden Lane, Suite 601
New York, NY 10038
Edan Rotenberg, Esq.
Email: edan@superlawgroup.com

Albert Gomez*
3566 Vista Court
Miami, FL 33133
E-mail: albert@icassemblies.com

Monroe County, Florida
Derek Howard, Esq.
Assistant Monroe County Attorney
1111 12th Street, Suite 408
Key West, FL 33040
E-mail: howard-derek@monroecounty-fl.gov

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of March, 2019