UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250-SLR
	)	& 50-251-SLR
(Turkey Point Nuclear Generating Station,	)	
Unit Nos. 3 and 4)	)	September 20, 2019
	)	

REPLY OF FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, AND MIAMI WATERKEEPER IN SUPPORT OF PETITION FOR REVIEW OF THE ATOMIC SAFETY AND LICENSING BOARD'S RULINGS IN LBP-19-3 AND LBP-19-06

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Florida Power & Light Company ("FPL") and NRC Staff ("Staff") oppose the Petition for Review, arguing that the Board committed no legal error or abuse of discretion. To the contrary, the Board committed legal and factual errors that the Commission should remedy.

1. *As to the standard of review*, contrary to FPL's and Staff's assertions,[1] the Commission will modify or overturn a board decision that "overlooked or misunderstood" evidence.[2] Intervenors' Petition fulfills this standard.[3] For questions of law, including whether 10 C.F.R. § 51.53(c)(3) applies to subsequent license renewals ("SLR"), the Commission's review is de novo.[4]

2. *As to 10 C.F.R. § 51.53(c)(3),* Staff and FPL argue that the Board conducted a "holistic" review of the regulatory history.[5] However, the regulatory language is simple, direct, and clear, making a review of the regulatory history impermissible.[6] The Board's construction conflicts with this plain meaning, which can only be changed through notice-and-comment rulemaking.[7]

Also, Intervenors' §51.53(c)(3) argument is not moot, as FPL argues,[8] since §51.53 requires that FPL publish a complete ER, including analysis of so-called "Category 1" issues.

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[1] FPL Ans. Opposing Int. Pet. at 2 (Sept. 10, 2019) ("FPL Br."); Staff Ans. Opposing Int. Pet. at 4 (Sept 10, 2019) ("Staff Br.").
[2] *Powertech (USA) Inc.*, CLI-16-20, 84 NRC 219, 228 (2016).
[3] *See, e.g.,* Petition for Review ("Pet.") (Aug. 9, 2019) at 9 ("[T]he Board overlooked the fact that…Contention 1-E does not 'focus' on the impacts to 'sensitive biota.'"); *id.* at 10 ("The Board erred, however, because it 'overlooked or misunderstood important evidence' [relating to Contention 2-E]."); *id.* at 12 ("[T]he Board overlooked or misunderstood the fact that the consent order *does not presume* Applicant will be able to remediate its environmental impact…."); *id.* at 13-14 ("[T]he Board overlooked or misunderstood…[that] the 2016 EIS does not discuss cumulative impacts from operating *Units 3 and 4 during the SLR period*."); *id.* at 21 ("The Board overlooked the fact that the 2016 EIS does not address cumulative impacts of operating Units 3 and 4; only Units 6 and 7.").
[4] *Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010).
[5] FPL Br. At 7; Staff Br. At 7.
[6] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Even if it were necessary to review the regulatory history, NRC intended the section to apply only to initial license renewals. Pet. at 6-7.
[7] *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).
[8] FPL Br. at 7. FPL and Staff also argue this is an interlocutory review. FPL Br. at 4; Staff Br. at 5. It is not. Pet. at 2-3; *see also Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit No. 1), 13 NRC 75, 77 n.2 (1981) (finding not interlocutory appeal because Board disposed of all contentions).

Failing to provide such analysis violates NEPA.[9] Further, as the DSEIS here has shown, Staff will include new analysis, come to new conclusions regarding Category 1 issues, and identify issues that are neither Category 1 nor 2.[10] Thus, an ER analyzing site-specific information for all "Category 1" issues would not "produce absurd results" but instead would better assist the Staff's review of new and significant information.

Further, assuming *arguendo* the issue is moot, the Commission should still address it because it falls within the "capable of repetition, yet evading review" exception to mootness. This exception applies when the challenge is "in its duration too short to be litigated, and there is a reasonable expectation that the same complaining party will be subject to the same action again."[11] Intervenors have long challenged NRC decisions like this one. The Commission can reasonably expect Intervenors will face this § 51.53(c)(3) issue in connection with future SLR applications, again with the same too-short duration to be fully litigated.

3. *As to the reliance on the Consent Order,* in applying the "presumption of regularity," the Board, Staff, and FPL have all conflated the Consent Order with a permit.[12] Permit compliance *prevents* environmental impacts, and is thus entitled to the presumption of regularity. But, compliance with the Consent Order *does not ensure* that environmental impacts will be remediated or prevented. Here, the Consent Order only requires that FPL undertake certain actions those parties hope will remediate existing environmental impacts from the hypersaline

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[9] *See* 10 CFR § 51.1 (noting Part 51 implements NEPA procedures).
[10] DSEIS at 4-21 to 4-27.
[11] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), 83 N.R.C. 463, 469 (June 2, 2016).
[12] *See e.g.,* LBP-19-3, 89 NRC __,__ (slip op. at 47 n. 66 and 48) (citing LBP-19-2 at Part III.B.2.a.iii, which begins at 36); Staff Br. at 17; FPL Br. at 5. The Board incorrectly characterized the contention as evidentiary issue and overlooked Intervenors' legal argument that the "presumption of regularity" does not apply to the Consent Order. Pet. at 12-13.

plume. But, FPL can comply with the Consent Order *even if it fails to remediate the plume and the environmental impacts persist*.[13] Thus, the Board's presumption of regularity for the Consent Order was erroneous as a matter of law because, even if FPL complies with the Consent Order, compliance would not ensure that environmental effects would be "small."[14]

4. *As to Contention 2-E*, Intervenors presented sufficient evidence that the ER failed to address climate-change-related cumulative effects on water resources from overtopping the cooling canal system ("CCS").[15] Neither Staff nor FPL dispute that the Board overlooked or misunderstood (1) FPL's own projections for flood hazards at Turkey Point that demonstrate overtopping of the CCS[16] and (2) Dr. Kopp's expert opinion that anticipated sea level rise will increase the duration and intensity of flooding.[17]

Regarding environmental impacts from the CCS's flood-related releases, Intervenors explained—and FPL does not dispute—that the Consent Order addresses only two types of pollutants. Sediment, most importantly, is not covered.[18] The Board ultimately overlooked or misunderstood the fact that the CCS is an industrial wastewater system. If the sediment and other waste washed out of the CCS, industrial wastes would contaminate the surrounding lands and

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[13] The Consent Order allows FPL to develop a "Plan B" if "Plan A" fails. Pet. 12-13.
[14] Reply in Support of Request for Hearing and Petition to Intervene Submitted by [Intervenors] (Sept. 10, 2018) (ML18253A280) at 31. *See also*, *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (holding the "mere existence of permit requirements overseen by another . . . state permitting authority cannot substitute for a proper NEPA analysis."). Further, the DSEIS categorizes the impacts as "moderate" negates the presumption of regularity for the Consent Order.
[15] FPL Br. at 11; Staff Br. at 18.
[16] Pet. at 37 n.166 (citing FP&L, Letter, "NEI 12-06, Revision 2, Appendix G, G.4.2, Mitigating strategies Asssessment (MSA) for FLEX Strategies report for the New Flood Hazard Information," (ML17012A065) (Dec. 20, 2016). This letter references a March 11, 2013 FPL record (incorrectly marked ML13095A216) that includes a representative cross section of the plant (ML13095A197 at Figure 4-37).
[17] Pet. to Intervene at 33–36.
[18] FPL Br. at 13 (citing the DSEIS to support claim that ammonia is a nutrient managed under the Consent Order, and that tritium impacts below regulatory levels are "small," but not addressing Intervenors' argument that the Consent Order fails to address sediment).

waters, including Biscayne National Park, Biscayne Bay Aquatic Preserve, and the Florida Keys National Marine Sanctuary. FPL's and Staff's reliance on FPL's duty to manage salinity and nutrients in the CCS under the Consent Order misses the pollutants the Consent Order does not require FPL to manage.[19]

Regarding the ER's failure to adequately address cumulative impacts on groundwater during the SLR period, Staff and FPL err in suggesting that the ER's references to the 2016 EIS for proposed Units 6 and 7 ("2016 EIS") sufficiently addressed cumulative impacts on groundwater for Units 3 and 4. Staff claims the ER was adequate because the 2016 EIS "contemplates" operating Units 3, 4, 6, and 7 "at the same time."[20] While the 2016 EIS might "contemplate" all four units operating before the SLR period starts, its analysis ends there. For example, the 2016 EIS cumulative impacts analysis "explicitly considered the changes in impacts of operation of the radial collector wells [for Units 6 and 7] that would occur with reduced inland recharge (e.g. drought) and increased sea level."[21] But neither the Board, FPL, nor the Staff have identified any similar analysis of impacts specific to Units 3 and 4—such as the impact of freshening the CCS and remediating the hypersaline plume under these climate change conditions.[22] Thus, incorporating the 2016 EIS by reference does not cure the ER's omission or the Board's error.[23]

5. *As to Contention 4-E*, Staff and FPL, like the Board, fail to reconcile the ER's use of *today's* environment as the baseline for evaluating environmental impacts with the

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[19] FPL Br. at 13; Staff Br. at 16.
[20] Staff Br. at 20.
[21] 2016 EIS at I-5.
[22] FPL also fails to identify a single example from the 2016 EIS involving the explicit evaluation of cumulative impacts from operating Units 3 and 4 during the SLR period. *See* FPL Br. at 15 n.70.
[23] *See also,* Intervenors' Reply Br. at 36–37.

Commission's 2016 determination that "climate change will provide a new environment that the operations of [Units 3 and 4] will affect."[24] FPL's argument, which focuses on the phrase "reasonably foreseeable," ignores this point.[25] Staff further argues *post-hoc* that the GEIS somehow "adds to [today's] baseline by describing, on a generic basis, the environmental impacts that could occur" from climate change.[26] If that were true, Section 3 of the ER (Affected Environment) would state as much and Section 4 of the ER (Environmental Consequences and Mitigating Actions) would discuss environmental impacts on the "new" environment—they do not.[27] An agency's use of an inadequate baseline for evaluating environmental impacts violates NEPA.[28] The Board should have admitted Contention 4-E on that basis alone.

Respectfully submitted,

/Signed electronically by/

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September 20, 2019

[24] *See, e.g.,* Pet. at 20 (citing 2016 EIS at I-1).
[25] FPL Br. at 21.
[26] Staff Br. at 23. Staff's argument also ignores the 2013 GEIS, which states that climate change impacts on affected resources will be treated on a "plant-specific" basis. Pet. to Intervene at 31 (citing 2013 GEIS at 1-30).
[27] FPL also erroneously claims that Intervenors never argued the 2016 EIS only discusses cumulative climate change impacts with respect to Units 6 and 7. Intervenors plainly did. Intervenors' Reply Br. at 36, cross referenced from p.51 ("With respect to climate change effects, such as sea level rise and higher temperatures, the Units 6 and 7 EIS only address cumulative impacts associated with operating those units.")
[28] *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Reply of Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper in Support of Petition for Review of the Atomic Safety and Licensing Board's Rulings in LBP-19-3 and LBP-19-06" was served upon the Electronic Information Exchange ("EIE," the NRC's E-Filing System), in the above-captioned docket, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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