ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1026

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, INC., AND MIAMI WATERKEEPER,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for Review of a Final Order of the
United States Nuclear Regulatory Commission

INITIAL REPLY BRIEF OF PETITIONERS

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GLOSSARY

APA	The Administrative Procedure Act
Board	The Atomic Safety and Licensing Board
Commission	The five-member board of Commissioners for the Nuclear Regulatory Commission
EIS	Environmental Impact Statement
FPL	Florida Power & Light Company
GEIS	Generic Environmental Impact Statement
Initial license renewal	The first 20-year operating license renewal following an original 40-year operating license
NEPA	The National Environmental Policy Act
NRC	The federal agency known as the Nuclear Regulatory Commission
Environmental Organizations	Petitioners Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper
SEIS	Supplemental Environmental Impact Statement
Subsequent license renewal	The second 20-year operating license renewal subsequent to the original 40-year operating license and one 20-year initial license renewal
Turkey Point	Turkey Point Nuclear Generating Station, Units 3 and 4

SUMMARY OF ARGUMENT

The Record of Decision and renewed licenses are "final orders" under the Hobbs Act. The record below is complete and judicial review is appropriate. Environmental Organizations have standing to pursue each of their claims under the National Environmental Policy Act (NEPA) now. This Court should vacate the Record of Decision and licenses and remand this case to the Nuclear Regulatory Commission (NRC) to ensure it fully complies with NEPA and its own NEPA regulations.

ARGUMENT

I. ENVIRONMENTAL ORGANIZATIONS HAVE STANDING.

Environmental Organizations have standing to pursue all of their claims because, as the NRC concedes, Environmental Organizations have standing for one of their NEPA claims. NRC Br. 49 (*citing* Silverstein and Bauman Declarations); *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013). An agency's procedural "deficiency need not be directly tied to the [organizational] members' specific injuries." *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017). A single concrete injury stemming from a deficient NEPA analysis provides standing for any alleged inadequacy in the agency's environmental review. *Id.*; *see also WildEarth Guardians*, 738 F.3d at 318.

The NRC's fatal blunder lies in ignoring the *form of relief* sought by Environmental Organizations. NRC Br. 41–42. Standing, rather, is measured by the relief sought, not the arguments made. *WildEarth Guardians*, 738 F.3d at 308 n.3 (noting the "familiar principle that a plaintiff must demonstrate standing for each *form of relief sought*") (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)) (emphasis added). Environmental Organizations "seek only one type of relief relevant here—the vacatur of the [Record of Decision and licensing] decision. They simply advance several arguments in support of that claim." *Id.* Each argument is based on the "'archetypal procedural injury'—an agency's failure to prepare (or adequately prepare) an [Environmental Impact Statement (EIS)] before taking action with adverse environmental consequences." *Id.* at 305.

Environmental Organizations' injuries are "tethered to [a] concrete interest adversely affected by the procedural deprivation," here, groundwater impacts (at a minimum). *Id.* This "injury follows from an inadequate [Final Supplemental Environmental Impact Statement (SEIS)] whether or not the inadequacy concerns the same environmental issue that causes [Petitioners'] injury." *Id.* at 307. Environmental Organizations may challenge "each of the alleged [NEPA] inadequacies … because each constitutes a procedural injury connected to their members' … injuries." *Id.* at 308. The NRC brief is incorrect. NRC Br. 47. This

Court can ultimately redress Environmental Organizations' injuries by vacating the Record of Decision and licenses, regardless of whether the "specific flaw" in the NRC's NEPA process relates to its analysis of groundwater impacts or some other procedural violation. *WildEarth Guardians*, 738 F.3d. at 307.

II. THE COURT HAS JURISDICTION TO REVIEW THE RECORD OF DECISION AND LICENSES BECAUSE THEY ARE "FINAL ORDERS."

The NRC fails to cite a *single* case holding an effective NRC license is not a "final order" under the Hobbs Act. Yet it cites several cases where courts have exercised Hobbs Act jurisdiction under situations similar to those here. NRC Br. 23 n.11 (citing *Vt. Dept. of Pub. Serv. v. United States*, 684 F.3d 149, 156 n.8 (D.C. Cir. 2012) (finding Hobbs Act jurisdiction based on "the license renewal itself" instead of an adjudicatory order)); NRC Br. 26 (citing *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991) (exercising Hobbs Act jurisdiction over "order allowing the plant to operate at full power pending the Commission's further review of the licensing issues")). These cases track the Supreme Court's "strong presumption in favor of judicial review." *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 102 (D.C. Cir. 2020) (citing two recent Supreme Court cases) (internal quotation marks omitted); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) ("The

[Administrative Procedure Act (APA)] establishes a basic presumption of judicial review [for] one suffering legal wrong because of agency action.") (internal quotation marks omitted). This presumption "requires courts to, where feasible, adopt a reading of a statute that accords with the basic principle that executive determinations generally are subject to judicial review." *Bhd. of Locomotive Eng'rs*, 972 F.3d at 102. (internal quotations and citations omitted).

A. The Record of Decision and licenses provide the Court jurisdiction under the Hobbs Act.

An effective NRC license is a "final order" for purposes of Hobbs Act review. The NRC misrepresents controlling precedent and claims that the Record of Decision and licenses do not provide jurisdiction under the Hobbs Act because they were not granted in an adjudicatory process. NRC Br. 21-22. The Supreme Court is clear: "Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Further, in *Vermont Department of Public Service v. United States*, this Court held that Hobbs Act jurisdiction attached to the "*final order* … the license renewal itself," not the proceeding order which resolved all challenges. 684 F.3d at 156 n.8 (emphasis added). If a "final order" were limited to a "final Commission order expressly terminating the adjudicatory proceeding,"

(NRC Br. 23 n.11) this Court would have dismissed the *Vermont* case for exceeding the statute of limitations.[1]

Environmental Organizations provided the NRC every opportunity, consistent with its regulations, to address the concerns raised here before it completed its NEPA review and issued the licenses. In the two cases the NRC relies on, the petitioners sought judicial review based on arguments they never presented to the agency. *See* NRC Br. 23 (citing *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) (rejecting jurisdiction over request for rulemaking that petitioner did not bring to agency first) and *Malladi Drugs & Pharm., Ltd. v. Tandy*, 552 F.3d 885, 889 (D.C. Cir. 2009) (rejecting jurisdiction where petitioner failed to exhaust mandatory administrative remedies)). No such problem exists here. Rather, the NRC is attempting to avoid judicial review by extending an already complete administrative process that resulted in a Final SEIS, a Record of Decision, and two effective licenses.

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[1] The NRC's attempt to distinguish *Vermont* is misplaced. NRC Br. 23 n.11. The NRC concedes this Court found jurisdiction for the petitioners' challenge was properly grounded in the license. The Court held, the "claimed aggrievement [was] the absence of a section 401 WQC when the license renewal itself issued," not the adjudicatory order from 10 days beforehand. *Vt. Dept. of Pub. Serv.*, 684 F.3d at 156 n.8.

B. The Record of Decision and licenses are "otherwise final" for purposes of judicial review.

The NRC is silent on the role §704 of the APA plays in the finality determination. *Compare* Pet. Br. 7–10 *with* NRC Br. 24–33. That section provides that an "otherwise final" agency action may be "final" even when on "appeal to superior agency authority." 5 U.S.C. § 704. *Bennett v. Spear* established the test for finality of agency actions under the first sentence of §704, not the language that determines finality for "otherwise final" agency actions. 520 U.S. 154, 177–78 (1997). Here, the issuance of the Record of Decision and licenses is "otherwise final" and the Commission is the "superior agency authority" under §704. 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

C. The NRC's issuance of effective licenses also satisfies the *Bennett v. Spear* finality test.

1. The NRC consummated its decisionmaking process once the licenses became effective.

Petitions for Commission review that predate the issuance of an effective license do not render the NRC's process incomplete. NRC Br. 25. "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its *action* was based." *Mozilla Corp. v. FCC*, 940 F.3d 1, 82 (D.C. Cir. 2019) (emphasis added) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Here, the actions are the Record of Decision and

licenses, and the record consists of each step of the NRC's process below leading up to those actions.[2]

Anything the Commission does now is *post hoc*, particularly for NEPA, which commands agencies to look before they leap. *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 523 (D.C. Cir. 2018) (NEPA "does not permit an agency to act first and comply later.").[3] The NRC does not dispute that "issuing the renewed licenses" are the "major federal actions" requiring the NEPA review. NRC Br. 31. Having taken these actions, the NRC cannot now add to the administrative record and drag out its administrative procedures to prevent judicial review. To rule otherwise would thwart the "environmental values protected by NEPA" that Congress declared "are of a high order," *Oglala Sioux*, 896 F.3d at 529, and would fail to "serve[] the interest of insuring prompt review by deterring lengthy and

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[2] The Record of Decision incorporates by reference the Final SEIS and represents that it is "NRC's final decision regarding the environmental review …." Record of Decision for the Subsequent License Renewal Application for Turkey Point Nuclear Generating Unit Nos. 3 and 4 at 5 (Dec. 4, 2019) (Rec._No._191) [JA-___].

[3] This Court can treat the Commission's *post hoc* decision on §51.53(c)(3) as supplemental authority consistent with the rule of civil procedure under which the NRC offered it. Notice of Suppl. Auth. at 1, ECF No. 1839720. It is not, however, part of the record on review. *See* Pet. Br. 29 n.15.

indefinite extensions of the NRC … review period." *Sierra Club v. NRC*, 862 F.2d 222, 225 (9th Cir. 1988). The NRC fails to offer a single case in support of its assertion a "major federal action" under NEPA is not also a "final order" that confers jurisdiction in this Court to review its NEPA compliance. NRC Br. 30–31.

The NRC's effort to distinguish *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) supports Environmental Organizations' point. NRC Br. 27–28. In the absence of "any statutory deadline that would otherwise trigger finality and enable judicial review," (NRC Br. 28), the NRC can keep petitioners in perpetual limbo and, as in *Allegheny*, effectively moot petitioners' claims. This result is what the Court sought to prevent in that case.[4]

2. The licenses grant legal rights and consequences now.

The NRC makes the bizarre argument that the renewed licenses "lack legal effect in a 'pragmatic' sense" for Florida Power and Light (FPL) and Environmental Organizations. FPL Br. 31–32. But renewal licenses are not abstract slips of paper that only matter once the previous licenses expire in the 2030s—they are legally "effective" now. 10 C.F.R. § 54.31(c). A renewed license

[4] The NRC wrongly highlights the choices of one of the Environmental Organizations in unrelated litigation involving drastically different circumstances. NRC Br. 29. Those choices have no bearing here.

does not start when the existing license is set to expire. Rather, it becomes "effective immediately upon its issuance, thereby superseding the … license previously in effect." *Id.*

While the NRC regulations recognize that further appellate review can "set aside" the subsequent renewed licenses and reinstate previous ones (unless the former licenses expire under their terms), this possibility does not render today's licenses without legal effect. The NRC's reliance on *NRDC v. NRC* on this point is misplaced. NRC Br. 32 (citing 879 F.3d 1202, 1210 (D.C. Cir. 2018)). In that case, this Court considered whether it was appropriate to remand to the NRC having found the NRC violated NEPA before issuing a license. The Court allowed the agency to cure the defects in an EIS after a license was issued, but *before* the EIS was challenged in court. *NRDC*, 879 F.3d at 1211. The Court referred to the "provisional" nature of the license for purposes of remand, not jurisdiction, as the NRC suggests here. *Id.* at 1210.

The currently effective subsequent renewed licenses obligate FPL to take certain actions by 2024—years before its prior licenses would have expired. *See, e.g.*, Turkey Point Nuclear Generating, Unit No. 3, Renewed Facility Operating License No. DPR-31 at 7 ¶ J(3) (Dec. 4, 2019) (Rec._No._192) [JA-___]. These obligations exist now, not sometime in the future. FPL is also now free to take any

actions it wishes to prepare for operating Turkey Point Units 3 and 4 until the 2050s. Neither the NRC nor FPL dispute that FPL has already used its new licenses to book savings by depreciating its decommissioning costs over the expanded operational lifetime of Units 3 and 4. Pet. Br. 8 n.7.

D. The "Incurably Premature" Doctrine Does Not Apply in This Case.

The NRC fails to cite any decisions where an appeal was "incurably premature" even though a party had no choice of forum for appeal. NRC Br. 33–36 (arguing choice of forum is not dispositive). Nor does the NRC respond to the unique circumstances presented here, namely that the NRC concluded its NEPA review and issued effective licenses before addressing Environmental Organizations' timely filed petitions for further agency review. Pet. Br. 12. There was no choice of forum available when those petitions were filed because the NEPA claims had yet to ripen. The procedural posture here is a far cry from those cases the NRC cites where petitioners sought *reconsideration* of an agency action *already taken*. NRC Br. 33–36. The NRC would have this Court cook up a recipe for agency abuse of the administrative review process that it flatly rejected in *Allegheny* while also turning NEPA on its head.

E. Environmental Organizations' claim is ripe.

NEPA is a procedural statute, and therefore when the procedure is not followed, a claim for failure to comply is ripe. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). Environmental Organizations' claims cannot get "any riper than at the time NEPA's obligation commenced and was disregarded," *i.e.*, when the action requiring an EIS becomes effective without an adequate NEPA review. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009).

The claim is also ripe now because withholding judicial review would foreclose reasonable alternatives. A NEPA-compliant EIS could lead the NRC to condition the granting of the licenses on selecting the cooling tower alternative as an environmentally-preferable means of addressing groundwater degradation problems caused by Turkey Point's cooling canal system. Neither the NRC nor FPL disputes that it could take nearly a decade for FPL to complete a cooling tower project. Pet. Br. 9–10. It is therefore necessary to complete the "hard look" demanded by NEPA in time to avoid foreclosing reasonable alternatives.[5]

[5] This Court should reject the NRC's request to hold this Petition in abeyance for these reasons. *See* NRC Br. 39.

III. NRC FAILED TO TAKE A HARD LOOK AT ENVIRONMENTAL IMPACTS OF OPERATING TURKEY POINT FOR 80 YEARS.

A. 10 C.F.R. §51.53(c)(3) and the GEIS are plainly limiting in their applicability.

Environmental Organizations endorse 10 C.F.R. § 51.53(c)(3) as it is written. The NRC, on the other hand, seeks to circumvent APA requirements by "interpreting" the unambiguous plain meaning of §51.53(c)(3) out of the regulation. *See* Pet. Br. 30–38.[6] Because the NRC ignored the plain meaning of its own regulations, the NRC failed to take a hard look at environmental effects of extending the Turkey Point licenses demanded by NEPA.

NRC adopted §51.53 through notice-and-comment rulemaking. Therefore, for NRC to "adopt[] a new position inconsistent with" the plain language of §51.53 requires notice-and-comment. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citing *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992)); *see also* Pet. Br. 35–36 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015)). Because "[t]he regulation is clear on its face … [no party] has the authority to effectively amend [it] to reflect new

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[6] By merging all license renewal applications into one category the NRC would not only delete "initial" from the regulation, it would also strike the exception for reactors licensed prior to "June 30, 1995" (another 15 words). *See* Pet. Br. 35.

Commission 'intent' outside of the notice and comment process." *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Station Units 3 and 4), LBP-19-3, 89 NRC 245, 303–304 (Abreu dissent) (2019) (hereinafter "Board Order") (Rec._No._116) [JA-___]. Any lesser action (such as the interpretation FPL claims NRC's action to be, FPL Br. 22, would be the NRC illegally "creat[ing] *de facto* a new regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

Deference from the Court is not due because §51.53(c)(3) is not ambiguous, as FPL suggests it is. FPL Br. 27. Courts review whether a regulation is ambiguous *de novo*. *See* Pet. Br. 29 (citing *Cajun Elec. Power Coop. Inc v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)). Deference to an agency's interpretation is due only where a regulation remains "genuinely ambiguous" after "exhaust[ing] all the traditional tools of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (internal quotations omitted).

FPL erroneously invokes the canon of interpretation "*expressio unius est exclusion alterius*," to suggest §51.53(c)(3) is "silent" as to its application. FPL Br. 28–29. This is a red herring. Environmental Organizations' argument rests on "the court's duty to give effect, if possible, to every clause and word" of a regulation. *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008) (internal citations omitted); *see* Pet. Br. 31–36. The NRC's interpretation of §51.53(c)(3)

would "negate[] its plain text." *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017).

The *expressio unius* canon applies "when circumstances support a sensible inference that the term left out must have been meant to be excluded." FPL Br. 29 (citing *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)). But the "circumstances" here support the plain language that the NRC meant to limit the section only to applicants seeking initial license renewals. *See* Pet. Br. 37–42. FPL cannot suggest the drafters of §51.53 made a mistake in including the word "initial" in subsection (c)(3). The NRC adopted §51.53(c)(3) and the Generic Environmental Impact Statement (GEIS) with the intent that both apply only to initial license renewals. *Id.*

Furthermore, the GEIS only analyzed a single 20-year extension of the original license to a total of 60 years; it did not examine the environmental impacts of operating nuclear reactors beyond that. *Id.* 38–42. The NRC's and FPL's arguments to the contrary are almost exclusively definitional. NRC Br. 54; FPL Br. 18. The NRC cannot discharge its NEPA obligations to assess the impact of operating a nuclear reactor for 80 years by citing the conclusions of the GEIS addressing 60 years of operations. *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Station Units 3 & 4), CLI-20-03, __ NRC __ (slip op. Baran dissent at

9) (Apr. 23, 2020) [JA-___] ("[T]he 2013 GEIS alone does not provide the required environmental review for operating a reactor beyond the initial twenty-year license renewal … the majority's retroactive expansion of the scope of the GEIS is essentially unlimited … the GEIS could be referenced to definitively address every Category 1 issue for a license renewal from 80 to 100 years, from 100 to 120 years, or even from 200 to 220 years.").

Environmental Organizations "raise[d] and forcefully present[d]" before the NRC their argument that the GEIS analyzes only an initial 20-year extension of operation, contrary to the NRC's depiction. NRC Br. 55–56. Environmental Organizations specifically detailed their GEIS argument to the Atomic Safety and Licensing Board (Board) in a 20-page filing. Petitioners' Response to Applicant's Surreply (Oct. 1, 2018) [JA-___] (included sub-headings "The temporal scope of the 1996 GEIS is clearly limited to the 40-year initial license term plus one renewal term" and "The NRC did not expand the temporal scope of the License Renewal GEIS in the 2013 Revised GEIS"). The Board, in referring its interpretation of §51.53(c)(3) to the Commission, included the argument regarding the temporal scope of the GEIS. Board Order, 89 NRC at 269–70 (Rec._No._116) [JA-___]; *id.* at 307–08 (Abreu dissent) [JA-___]. The Commission's *post hoc* Order also addressed this argument, making it perfectly clear that it has never been

abandoned. *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Station Units 3&4), CLI-20-03, __ NRC __ (slip op. at 16) (Apr. 23, 2020) [JA-___]; *id.* (slip op. Baran dissent at 6–10) [JA-___].

Environmental Organization's argument has been consistent: the NRC is required to adhere to NEPA's hard look doctrine, APA notice-and-comment rulemaking, and NRC's own regulations. NRC's failure to do so for the environmental review of extending Turkey Point's license to 80 years renders its decision to grant the Record of Decision and licenses arbitrary and capricious, and this Court should vacate them.

B. The NRC's erroneous application of §51.53(c)(3) to the Environmental Report infected the Draft and Final SEIS, rendering the entire NEPA review deficient.

The NRC's application of §51.53(c)(3) to the Turkey Point subsequent license renewal was an early procedural violation that set the agency up to fail its duty to take a hard look at most environmental impacts. Had the NRC required FPL to analyze all Category 1 issues on a site-specific basis in the Environmental Report, as §51.53 requires, then the agency would have had the full panoply of information that its own regulations require it have before completing its environmental review. Instead, NRC failed to do this by erroneously applying

§51.53(c)(3) to FPL's Environmental Report, and wrongly relying on the inapplicable GEIS.

The NRC made the choice to require an environmental report as the first mandatory step in the agency's NEPA process, contrary to FPL's inaccurate dismissal of the report. FPL Br. 15–18, 23; *see NRDC v. NRC*, 823 F.3d 641, 652 (D.C. Cir. 2016) (where a statute does not create procedures, agency procedures control). It is the original source of information upon which the NRC bases the draft and final SEIS. *See e.g.*, 10 C.F.R. § 51.14(a) (its purpose is to "aid the Commission in complying with Section 102(2) of NEPA"); *see also id.* at §§ 51.41, 51.45(b)(3) & (c). Further, the environmental report is also the first step in the NRC's public review process, as NRC regulations require a petitioner to challenge the environmental report before mounting a challenge to the SEIS. *Id.* at § 2.309(f)(2). Without the benefit of information from a complete environmental report, some of which (like the recalibrated salinity model) may not be public, the NRC cannot fully discharge its NEPA responsibilities. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) ("[T]he purposes of NEPA's EIS requirement [are] to ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process ….").

The importance of the environmental report's early and initial presentation of environmental impacts is not diminished by other NRC regulations. Reading the NRC regulations to "*compel*" the agency to rely exclusively on the GEIS's discussion of Category 1 issues and ignore all other information, as NRC and FPL suggest, would lead to absurd results.[7] NRC Br. 54 (emphasis in original); *see also* FPL Br. 18 (citing 10 C.F.R. §§ 51.71(d), 51.95(c)(4)). For example, if the environmental report's site-specific review demonstrated that the hypersaline plume would render the drinking water for Miami-Dade County unpotable, would the NRC be compelled to ignore those findings and rely exclusively on the "small impact" conclusions in the GEIS? Of course not. In the Final SEIS, even though groundwater is a Category 1 issue, the NRC diverged from the GEIS and instead attempted a (deficient) site-specific analysis for the term of the subsequent renewed license. Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Final Report, 4-

[7] In fact, it would be less absurd to read "initial" into the NRC regulations, as dissenting Board Judge Abreu suggests, as that would ensure the agency complies with NEPA by taking a hard look at all environmental impacts. Board Order, 89 NRC at 308–10 (Abreu dissent) (Rec._No._116) [JA-___].

21–4-29 (NUREG-1437) (Oct. 2019) (hereinafter "Final SEIS") (Rec._No._191) [JA-___]; *see also* FPL Br. 24[8] (acknowledging site-specific analysis of groundwater).

To be clear, NRC's deficient analysis of a single Category 1 issue in no way cures the failure to take the requisite hard look. As discussed in Section IV below, NRC did an inadequate job of analyzing groundwater impact. And, groundwater is just one of approximately 78 Category 1 issues for which the NRC did not have the full set of information. *See* Pet. Br. 19 (NRC relied on GEIS for approximately 78 environmental issues).

C. Environmental Organizations' claims are present in the Administrative Record and justiciable now.

The record before the NRC at the time it issued the Record of Decision and licenses is before this court now—including the NRC's application of §51.53(c)(3) and the GEIS as laid out in the Environmental Report, Draft and Final SEIS, and Board Orders. *Dep't of Homeland Sec.*, 140 S. Ct. at 1907 ("It is a foundational principle of administrative law that judicial review of agency action is limited to

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[8] Even though the NRC included the groundwater analysis as potentially "new and significant information," it does not change the fact that NRC needed to consider such information for all Category 1 issues because the GEIS only analyzes the first 20 years after an initial license, not the subsequent license renewal time frame.

the grounds that the agency invoked when it took action.") (internal citations omitted). The Commission's post-license Order is not "the official and authoritative interpretation of" §51.53(c)(3) for this licensing proceeding (as the NRC suggests at NRC Br. 50–53), because the agency issued the Order *after* issuing the Record of Decision and licenses. Had the NRC wished the Commission's Order to be part of the record, it could have withheld issuing the Record of Decision and the licenses to await the Commission's Order. Because the NRC chose not to wait on the Commission, the Order can never be more than a *post hoc* supplemental authority. Reaching the merits here is therefore not a "pointless exercise," *id*. 52, but rather an appropriate review of the administrative record at the time the NRC made its decision.

IV. THE NRC FAILED TO MAKE AN INFORMED DECISION AS REQUIRED BY NEPA BECAUSE ITS ANALYSIS OF GROUNDWATER IMPACTS WAS ARBITRARY AND CAPRICIOUS.

No valid scientific evidence supports the NRC's conclusion that extended operation will have "small" impacts on groundwater because FPL will effectively

manage salinity in the cooling canal system. Consequently, the NRC failed to take a hard look at Turkey Point's impacts on groundwater.[9]

A. The record is devoid of valid scientific evidence predicting that FPL can control groundwater impacts through mid-century.

There is only one scientific study in the Final SEIS that predicts FPL can control salinity in the cooling canal system through mid-century, and that model produced "skewed" results that overpredict the beneficial impact of freshening. *See* Pet. Br. 52–53. Neither FPL nor the NRC deny the model in fact produced skewed results or point to any evidence in the record to suggest otherwise. *See* FPL Br. 31–43. FPL represents that it developed a "newer, refined model" that indicates a "longer period of time" is needed to "reduce" salinity levels in the event of an "extended dry period or drought." FPL Br. 40.[10] There is no evidence that the NRC reviewed the refined model. Instead, the NRC assumed, on the basis of the skewed model, without any further scientific evidence, data, or inquiry, that FPL would fully control salinity by 2032. *See, e.g.*, Final SEIS at 4-28 to 4-29

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[9] FPL incorrectly characterizes Environmental Organizations' claims. FPL Br. 36. Environmental Organizations are not asking the NRC to wait to act. *Id*. Rather, Organizations argue that the NRC failed to take a hard look at the mitigation measures currently in place. *See* Pet. Br. 46–49.

[10] The "newer, refined" model is not in the record and was never subject to public scrutiny. *See* Pet. Br. 53 n.19. Neither FPL nor the NRC dispute this fact.

(Rec._No_191) [JA-___]. This leap of faith is arbitrary and capricious, and fails to take a "hard look" at the problem. *See Pub. Employees for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1082–83 (D.C. Cir. 2016) (agency's EIS failed to take a "hard look" by relying on inadequate data); *see also Am. Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018) (holding that "it was irrational for [agency] to cast [] significant environmental impacts aside in reliance on some sort of mitigation measures, which the [agency] was content to leave as 'TBD.'").

The so-called "measure of success" that FPL's efforts have yielded does not demonstrate groundwater impacts will be "small." *See* FPL Br. 33. Impacts today are "moderate," and could only become "small" if FPL were to fully control its salinity problems. FEIS at 4-28. There is no valid scientific evidence in the record demonstrating FPL will attain that goal. Thus, the NRC's conclusion was arbitrary and capricious because it is unsupported in the record.

B. This Court owes no deference to the NRC's unscientific conclusions on groundwater impacts.

Because FPL fails to identify *any* valid scientific support for the NRC's conclusion that groundwater impacts will be "small,"[11] this Court owes the NRC no deference, even on this "technical subject." FPL Br. 39.[12] This Court has a duty to perform a "thorough, probing, in-depth review" of the NRC's NEPA review under the APA. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The NRC "cannot rely on reminders that its scientific determinations are entitled to deference in the absence of reasoned analysis to cogently explain" itself. *See NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (internal quotation marks omitted). Nothing in the NRC's or FPL's briefs justifies deference to the NRC's conclusions on groundwater impacts. *Cf.*, *New York, et al v. NRC*, 681 F.3d 471, 481 (D.C. Cir. 2012) (refusing to give NRC deference when

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[11] The NRC defines "small" as "not detectable or … so minor that they will … [not] noticeably alter any important attribute of the resource." Final SEIS at 1-4 (Rec._No_191) [JA-___].

[12] If any agency were owed deference here, it would be the U.S. Environmental Protection Agency, which is tasked with protecting groundwater and called for a reopener in the FPL licenses in light of uncertainty over the success of FPL's freshening efforts. *See* Pet. Br. 50.

agency claimed future leaks would not occur merely because past leaks were harmless and a compliance program was in place).

1. The NRC's mere "review" of FPL's freshening plans does not deserve deference or satisfy NEPA's "hard look" standard.

The NRC did not "thoroughly address[]" the groundwater issue merely because it "reviewed" the *skewed* model and failed to identify any "significant issues." FPL Br. 39–40.[13] The NRC can "review" a mountain of information and still overlook critical information or rely on inadequate scientific information in reaching its conclusions. The record demonstrates, moreover, that the NRC's "review" of FPL's modeling was not "detailed." Tr. of Proceedings at 367, Fla. Power & Light Co. (Turkey Point Nuclear Generating Station Units 3 & 4) (50-250-SLR and 50-251-SLR) (NRC Sep. 9, 2019) (Rec._No._180) [JA-___]. The NRC did not "question whether the state was correct or not in accepting results or in getting whatever modifications to the studies that they may have determined to be appropriate." *Id.* at 366. The Final SEIS merely describes FPL's comments, it does not describe the results or provide public access to the new model.

[13] The *skewed* model forms the lynchpin of FPL's freshening plan, a fact that neither FPL nor the NRC dispute.

2. The NRC's bare disclosure of "uncertainty" in modeling does not deserve deference or satisfy NEPA's "hard look" standard.

Merely disclosing that uncertainty exists is an ultimately meaningless observation. *See* FPL Br. 41 ("[T]he SEIS fully discloses and considers this source of uncertainty in the modeling."). The key issue is the *degree* of uncertainty and whether the conclusions are within the range of acceptable outcomes. *Cf. Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 647 (D.C. Cir. 1973) (it would "seem incumbent on the [agency] to estimate the possible *degree* of error in [its] prediction") (emphasis added). Here, the NRC never addressed the degree of uncertainty in its groundwater impacts analysis or how that uncertainty effected its conclusions. FPL's claim that the NRC's analysis "contemplated the possibility of a substantial margin of error in the modeling (*i.e.*, 13 years rather than 4 years)" is simply false. *See* FPL Br. 42.

Nor did the NRC exercise "caution" or take a "conservative" approach. FPL Br. 41–42. To the contrary, when faced with uncertainty, the NRC chose the least conservative path. For example, FPL had so little confidence in its original model that it commissioned a new refined model, yet the NRC continued to rely on the original model that overpredicted success. The NRC never even explained why FPL's admission that the original model produced skewed results was not a "significant" issue. *See* FPL Br. 40 (the NRC did not find any "significant" issues

with FPL's modeling). When faced with FPL's admission that drier conditions would take more time and water to lower salinity levels sufficiently, the NRC speculatively (and conveniently) concluded FPL would reach the target levels by 2032 and maintain them thereafter. *See* FPL Br. 41–42 (quoting Final SEIS at A-103 to A-104 (Rec._No_191) [JA-___]). Likewise, the NRC acknowledged climate change conditions will make it harder for FPL to meet the salinity targets, yet it failed to discuss the magnitude of the impact or reconcile them with its ultimate conclusion that groundwater impacts will be "small." *See* FPL Br. 43.[14] The NRC did not exercise caution; it threw caution to the wind.

C. The NRC's ultimate reliance on state and county oversight of FPL's freshening efforts does not meet NEPA's "hard look" standard.

The NRC abdicated its responsibility under NEPA not by "taking state and county oversight into account," FPL's strawman argument, but by arbitrarily concluding this oversight alone will guarantee "small" groundwater impacts. *See* FPL Br. 34–35. The consent order between FPL and Florida Department of

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[14] Environmental Organizations cannot make sense of FPL's argument at 41 claiming our arguments are "internally inconsistent." Environmental Organizations have never argued freshening will not "improve" salinity levels. FPL Br. 41. Rather, the evidence does not support the NRC's conclusion that FPL's freshening efforts will control salinity levels and result in "small" groundwater impacts through mid-century.

Environmental Protection makes no guarantee that water quality impacts will be minimal, so it is arbitrary to assert that the order will achieve that effect. *See* Pet. Br. 47. *City of Oberlin v. FERC* is inapposite. FPL Br. 35. There, the agency "*explained in detail* how … compliance with [the relevant regulatory] standards would address the specific [] concerns that commenters raised." 937 F.3d 599, 610 (D.C. Cir. 2019) (emphasis added). Here, FPL already violated the applicable standards and the consent order represents an *attempt* to bring the reactor impacts back into compliance. Pet. Br. 47–48. The NRC's evaluation is akin to *American Rivers v. FERC* and *New York, et al. v. NRC* where the agencies relied on unproven mitigation measures. 895 F.3d at 54; 681 F.3d at 481.

EarthReports, Inc. v. FERC does not support FPL's argument either. FPL Br. 35, 39. In that case the agency substantially relied on relevant Coast Guard rules that supplied "best management practices" for handling ballast water. 828 F.3d 949, 957 (D.C. Cir. 2016). These *preventative* measures were both known and proven. *See id.* The agency also "independently evaluat[ed] the relevant impacts" and "concluded that existing [ballast water control] measures are adequate." *Id.* Here, in contrast, the NRC did not independently evaluate FPL's revised model to determine whether the freshening efforts will succeed. Even for the models it did review, the NRC "rel[ied] upon [the relevant] agencies to

establish appropriate goals and to *assure themselves* that the technical analyses that [were] provided by … Florida Power and Light [were] adequate." Tr. of Proceedings at 366, Fla. Power & Light Co. (Turkey Point Nuclear Generating Station Units 3 & 4) (50-250-SLR and 50-251-SLR) (NRC Sep. 9, 2019) (emphasis added) (Rec._No._180) [JA-___]. Here too, the NRC admitted to "uncertainty in timing and ultimate effectiveness" of the freshening plan. Pet. Br. 55 (quoting Final SEIS at A-89 (Rec._No_191) [JA-___]); *see also id.* at 50 (EPA asked the NRC to include a reopener clause in the license due to this uncertainty). The NRC cast these concerns aside "[b]ecause the regulatory oversight is anticipated to remain in place and the regulatory agencies retain the authority to require FPL to continue its current freshening activities." Final SEIS at A-89 (Rec._No_191) [JA-___].[15]

[15] Nor is this a case of adaptive management. FPL Br. 37. In *Theodore Roosevelt Conservation P'ship v. Salazar*, this Court identified several features of adaptive management that are absent here. 616 F.3d 497, 515–17 (D.C. Cir. 2010) (recognizing that the adaptive management plan at issue "outline[d] various performance goals" and "incorporate[d] a detailed, thirteen-page list of specific protective measures that the review team is to consider"). There too, the Record of Decision "outlined relatively detailed mitigation measures … accompanied by discussions of environmental studies supporting the Bureau's decisions." *Id.*

CONCLUSION

Environmental Organizations respectfully request that this Court vacate the Turkey Point subsequent renewed licenses and remand this matter to the NRC.

Respectfully Submitted,

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Here, the NRC merely speculates that the impacts can be addressed by some unspecified future plan.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,287 words, excluding the parts of the brief excluded by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on October 23, 2020 I electronically filed the foregoing Reply Brief of Petitioners with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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