

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket Nos. 50-250-SLR
)	50-251-SLR
FLORIDA POWER & LIGHT COMPANY)	
)	
(Turkey Point Nuclear Generating Station, Unit Nos. 3 and 4))	March 21, 2022
)	
)	

**VIEWS IN RESPONSE TO CLI-22-02 OF FRIENDS OF THE EARTH, NATURAL
RESOURCES COUNCIL, AND MIAMI WATERKEEPER**

I. Introduction

As directed by the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-02, ___ NRC ___, slip op. at 15 (Feb. 24, 2024) (“CLI-22-02”), Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (together “Environmental Organizations”) submit their views on the practical effects of the Turkey Point subsequent renewed licenses continuing in place versus the previous licenses being reinstated.

Environmental Organizations concur with Beyond Nuclear.¹ The Commission should vacate the subsequent renewed licenses and reinstate the previous licenses but order NRC Staff to impose Florida Power and Light Company’s (“FPL”) revised Aging Management Plan as a condition of continued operation.

¹ Beyond Nuclear’s Response to Constellation Energy Generation, LLC’s Petition for Partial Reconsideration of CLI-22-04 and Beyond Nuclear’s Views in Response to CLI-22-04 (Mar. 17, 2022) (ADAMS Accession No. ML22076A089) (“Beyond Nuclear Response”).

II. Argument

The “ordinary practice” for violations of the National Environmental Policy Act (“NEPA”) is vacatur.² While the Commission ultimately has discretion whether to allow the subsequent renewed licenses to remain in place or reinstate the previous licenses,³ only “severe consequences of vacating the [licenses] warrant a deviation from the standard remedy.”⁴ FPL should bear the burden of persuasion that any deviation from vacatur is appropriate here.⁵

Reinstating the previous renewed licenses will not cause disruptive practical effects, let alone “severe consequences.”⁶ FPL should have been aware that the subsequent renewed licenses issued by the NRC Staff were not final and could still be modified or vacated. As the Commission has explained, until a hearing process and any appeals are complete, the Commission has the authority to “modify, suspend, or revoke” a license.⁷ Commissioner Baran’s

² *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng’rs*, 985 F.3d 1032, 1050-51 (D.C. Cir. 2021) (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citing 5 U.S.C. § 706(2)) (citing *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (observing that vacatur is the “standard remedy” for an “action promulgated in violation of NEPA”); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) (“As a general matter, an agency action that violates the APA must be set aside.”)). See also, *N.Y. v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (finding that the NRC had violated NEPA in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule, and vacating both).

³ *Standing Rock Sioux Tribe*, 985 F.3d at 1051.

⁴ *Nat’l Parks Conservation Ass’n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). See also, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 471 F. Supp. 3d 71, 80 (D.D.C. 2020) (“In fact, to the Court’s and the parties’ knowledge, only twice has a court (once the Circuit, once the district court here) *not* vacated agency action that violated NEPA because of a missing or defective EIS.”). For example, courts have determined vacating a license would be “futile” as the agency had already cured the NEPA violation, though through a procedure that was not at all “ideal or even desirable.” See, *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1210 (D.C. Cir. 2018); *Friends of the River v. FERC*, 720 F.2d 93 (D.C. Cir. 1983).

⁵ See *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 532 (D.C. Cir. 2018) (explaining that the NRC’s previous practice of leaving a license in effect, even with an acknowledged deficient NEPA, unless the challenging party can show irreparable harm would result was inappropriate).

⁶ *Nat’l Parks Conservation Ass’n*, 422 F. Supp. 3d at 99.

⁷ CLI-22-02, slip op. at 6, 13 (citing *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-8-13, 67 NRC 396, 400 (2008) (“A license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review.”)).

dissent in CLI-20-03⁸ was certainly sufficient to provide FPL with notice that the Environmental Organizations’ then-pending Petition for Review before the Commission challenging the NRC Staff’s interpretation of 10 C.F.R. § 51.53 could result in rescission of the subsequent renewed licenses issued by the Staff.⁹ Thus, FPL could not have reasonably assumed that the subsequent renewed licenses were final. Indeed, when the Environmental Organizations appealed the NRC Staff’s license decision to the United States Court of Appeals for the District of Columbia, NRC Staff and FPL argued vehemently that the licenses were not a final decision of the Commission.¹⁰

There is no pressing need to implement the subsequent renewed licenses. The initial license renewals for Turkey Point are not scheduled to expire until 2032 and 2033 – a decade from now. Moreover, the NRC “timely renewal doctrine” states that, upon submission of an application for license renewal, an “existing license will not be deemed to have expired until the application has been finally determined.”¹¹ If FPL’s initial renewed licenses are reinstated, FPL and the NRC Staff have plenty of time to do either a site specific or generic environmental analysis, and FPL will also have plenty of time for any construction required, as the Commission acknowledged in its decision.¹² In the unlikely event that these actions take longer than ten years,

⁸ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-03, 91 NRC 133 (Apr. 23, 2020).

⁹ Friends of the Earth’s, Natural Resources Defense Council’s, and Miami Waterkeeper’s Petition for Review of the Atomic Safety and Licensing Board’s Rulings in LBP-19-3 and LBP-19-06 (Aug. 9, 2019) (ADAMS Accession No. ML19221B677) (challenging the Board’s determination that 10 C.F.R. 51.53(c)(3) applies to the preparation of an environmental report in a subsequent renewed license proceeding).

¹⁰ See Brief of Federal Respondents at 21-33, *Friends of the Earth v. NRC* (D.C. Cir 2020) (No. 20-1026); Brief of Intervenor Florida Power & Light Company at 3, *Friends of the Earth v. NRC* (D.C. Cir 2020) (No. 20-1026).

¹¹ 10 C.F.R. 2.109.

¹² CLI-22-02, slip op. at 14.

the timely renewal doctrine will maintain FPL’s right to operate the Turkey Point plant under the renewed licenses until the subsequent renewed license application is fully determined.

If the Commission allows the subsequent renewed licenses to continue in place now it would signal that the NRC has prejudged that the NEPA review will produce no meaningful insights or changes in the license. But the Commission’s ruling “acknowledge[s] that the environmental review is incomplete”¹³ because “the 2013 [Generic Environmental Impact Statement] did not address subsequent license renewal.”¹⁴ Vacating the license, on the other hand, would give the public, tribal governments, and state and local governments greater confidence in the seriousness of the agency’s commitment to NEPA’s procedures for considering environmental impacts before taking potentially significant actions.¹⁵

Vacatur is the standard remedy for good reason. NEPA is an action-forcing statute, which serves not to generate paperwork or litigation, but *to provide for informed decision making and foster excellent action*. The goal of informed and excellent decision making can only take place if agencies take the required hard look *before* taking [the proposed] action.¹⁶

As Commissioner Baran explained in a prior dissent, “[A] core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action. If the Commission allows a Board to supplement and cure an inadequate NEPA document after the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.”¹⁷

¹³ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-03, __ NRC __, slip op. at 4 (Feb. 24, 2024).

¹⁴ CLI-22-02, slip op. at 2.

¹⁵ *Robertson v. Methow Valle Citizens Council*, 490 U.S. 332, 350 (1989).

¹⁶ *Friends of the Earth v. Haaland*, No. CV 21-2317 (RC), 2022 WL 254526, at *25 (D.D.C. Jan. 27, 2022) (citing 40 C.F.R. § 1500.1(a); *Oglala Sioux Tribe*, 896 F.3d at 532) (internal citations omitted) (emphasis added).

¹⁷ *Oglala Sioux Tribe*, 896 F.3d at 526 (D.C. Cir. 2018) (citing *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219 (Dec. 23, 2016)).

Leaving the subsequent renewed licenses in place but shortening the terms to match the end dates of the previous licenses fails to meet the requirements of NEPA. The Commission's opinion acknowledged that the NRC Staff approved the subsequent renewed licenses for Turkey Point without considering a proper up-to-date environmental analysis. Without such an analysis, there is no way to tell whether the terms are adequately protective of environmental values. Even assuming, for purposes of argument, that they were, NEPA does not give the NRC authority to forgive "harmless" violations of NEPA,¹⁸ let alone complete failures to consider the vast majority of environmental impacts of the proposed action.

Another "fundamental flaw that normally requires vacatur" includes "failure to provide the required notice and to invite public comment."¹⁹ The Commission acknowledges that, "[t]o provide a meaningful opportunity for public comment, the agency must adequately describe its intentions to the public."²⁰ As Beyond Nuclear explained, the NRC Staff failed to provide public notice that the 1996 License Renewal Generic Environmental Impact Statement, or its 2013 update, applied to any NRC decisions other than initial license renewal.²¹

To restore the initial renewed licenses, it would not be necessary or appropriate, however, for the Commission to reinstate now-outdated safety programs that applied to the initial license renewal term. Having completed a safety review and offered an opportunity for a public hearing on FPL's revised Aging Management Plan, the Commission may declare that FPL's initial

¹⁸ *Id.* at 533.

¹⁹ *Standing Rock Sioux Tribe*, 985 F.3d at 1052 (quoting *Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (emphasis added)).

²⁰ CLI-22-02, slip op. at 10.

²¹ Beyond Nuclear Response at 10, citing CLI-22-02, slip op. at 10 ("Even if the Staff had intended to address subsequent license renewal in the [Generic Environmental Impact Statement], the occasional ambiguous phrasing did not put the public on notice of such an intention, particularly given the language in section 51.53(c)(3) confining its applicability to initial license renewal applicants. To provide a meaningful opportunity for public comment, the agency must adequately describe its intentions to the public.").

renewed licenses have effectively been amended, with the required procedures for fairness and due process, to incorporate the revised Aging Management Plan. This step would be consistent with *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-8-13, 67 N.R.C. 396, 400 (2008) (cited in CLI-22-04, slip op. at 3) and would also be an appropriate exercise of the Commission’s “ultimate responsibility to ensure the safe operation of the facilities that it licenses.”²²

Finally, we note that this is a problem of the NRC’s making. NRC regulations require “the NRC staff ... to promptly issue its approval or denial of [a license] application,” even “[d]uring the pendency of any hearing.”²³ This is therefore not the first time that the NRC has issued a license only to later discover that it has violated NEPA by issuing the license without an adequate environmental review. Every time this occurs, the NRC, applicants, local governments, the public, interested parties, and courts must spend precious time and resources debating what the correct remedy is. Often it is already too late – contrary to NEPA’s purpose, the federal action commenced without a full consideration of its environmental impacts.²⁴

There is a simple solution – the NRC should update its regulations to better comply with NEPA by not requiring Staff to issue a license until the full NEPA proceeding is complete.²⁵ While there may be some instances when immediate issuance of a license is important – and

²² *Yankee Atomic Electric Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 12 (1991).

²³ *Nat. Res. Def. Council v. NRC*, 879 F.3d at 1207 (citing 10 C.F.R. § 2.1202(a)).

²⁴ *Id.* at 1210.

²⁵ Commissioner Baran suggested this solution in a prior hearing also addressing the issue of a deficient NEPA analysis after the issuance of a license. *Strata Energy, Inc.* (Ross in Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 604 (June 29, 2016) (Commissioner Baran, Concurring in Part and Dissenting in Part) (“For example, the Staff could wait until the end of the hearing process on contested environmental contentions prior to issuing a license. In this circumstance, a Board or Commission decision could revise the NEPA analysis prior to the issuance of the license, which would ensure that the decisionmaker considers the complete NEPA analysis prior to the completion of the federal action.”).

hence why the regulation was passed in the first place – there is no good reason to issue a renewed license or subsequent renewed license before the full NEPA proceeding is complete. Such processes begin years if not decades in advance and therefore afford plenty of time *before* a license is approved for the completion of a NEPA proceeding, avoiding the confusion and claims of harm on all sides. In addition to updating its regulations relating to the Generic Environmental Impact Statement, the Commission should direct NRC Staff to update the regulation requiring immediate issuance of a license.

III. Conclusion

The Commission should vacate FPL’s subsequent renewed license but order the Staff to impose FPL’s Aging Management Plan as a condition of continued operation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2022, I posted copies of the foregoing VIEWS IN RESPONSE TO CLI-22-02 OF FRIENDS OF THE EARTH, NATURAL RESOURCES COUNCIL, AND MIAMI WATERKEEPER on the NRC's Electronic Information Exchange System.

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