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 THE UNITED STATES OF AMERICA,
Respondents,
and
FLORIDA POWER & LIGHT CO.
Intervenor.

On Petition for Review of Orders of the
United States Nuclear Regulatory Commission

INITIAL BRIEF OF FEDERAL RESPONDENTS

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
JUSTIN D. HEMINGER
ERIKA KRANZ
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 307-6105
erika.kranz@usdoj.gov

MARIAN L. ZOBLER
General Counsel
ANDREW P. AVERBACH
Solicitor
ERIC V. MICHEL
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-0932
eric.michel2@nrc.gov

September 14, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors, and Amici

Petitioners are Friends of the Earth, Natural Resources Defense Council, Inc., and Miami Waterkeeper. Respondents are the United States Nuclear Regulatory Commission and the United States of America. Florida Power & Light Company has been granted leave to intervene in support of Respondents. Citizens Allied for Safe Energy has submitted an amicus brief.

(B) Rulings under Review

Petitioners identify the following documents as the rulings under review:

(1) NRC Record of Decision, Subsequent License Renewal Application for Turkey Point Nuclear Generating Unit Nos. 3 and 4 (Dec. 4, 2019) (JA___);

(2) Turkey Point Nuclear Generating Unit No. 3, Subsequent Renewed Facility Operating License DPR-31 (Dec. 4, 2019) (JA___); and

(3) Turkey Point Nuclear Generating Unit No. 4, Subsequent Renewed Facility Operating License DPR-41 (Dec. 4, 2019) (JA___).

(C) Related Cases

The case on review was not previously before this Court or any other court. There are no related cases pending in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Administrative Decisions

Federal Register Notices

GLOSSARY

AEA	Atomic Energy Act
APA	Administrative Procedure Act
EIS	Environmental Impact Statement
FPL	Florida Power & Light Company
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council

INTRODUCTION

Numerous jurisdictional and prudential hurdles preclude this Court from considering Petitioners' merits arguments. The Petition for Review purports to challenge the Nuclear Regulatory Commission's ("NRC" or "Commission")[1] renewal of two licenses to operate two nuclear power reactor units for an additional twenty-year term beyond their scheduled expiration date in 2032. But Petitioners are raising many of the same arguments before this Court as they have raised in an ongoing adjudicatory proceeding before the agency. This overlap forecloses the Court from considering the Petition, because no "final order" has been issued in an adjudicatory proceeding, a prerequisite to judicial review under the Hobbs Act.

Moreover, to the extent the Petition addresses any individual elements of the adjudicatory proceeding that could plausibly be characterized as "final," the Petitioners have not even challenged the correct order that includes the agency's "final" position—nor could they, since the prematurely filed Petition predates that Commission order. To make matters worse, Petitioners lack standing to pursue multiple claims that they are advancing.

---

[1] As used herein, the term "NRC" refers generically to the agency, while the term "Commission" refers specifically to the five-member collegial body that oversees the agency.

To the extent the Court finds the Petition properly reviewable, Respondents are prevented from taking a position on several substantive issues raised in the Petition because of their overlap with issues still pending in the agency adjudicatory proceeding. To the extent that Respondents are able to articulate a position, relief is not warranted because Petitioners fail to demonstrate that the agency has committed error with respect to any of the agency actions that are actually the subject of the Petition.

In sum, the Petition for Review should be dismissed or, in the alternative, denied. Alternatively, the Petition should be held in abeyance pending resolution of the adjudicatory proceedings before the agency.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(4), to review "final orders" of NRC proceedings described in Section 189(a) of the Atomic Energy Act ("AEA"), which includes proceedings for the granting of a license. 42 U.S.C. § 2239(a). *Id.* § 2239(b). In this case, Friends of the Earth, Natural Resources Defense Council, Inc. ("NRDC"), and Miami Waterkeeper (collectively, "Petitioners") sought a Section 189(a) hearing in the Turkey Point subsequent license renewal proceeding, were ultimately denied that hearing request by an NRC licensing board, and have sought Commission review and reconsideration of that denial. Rather than seek this Court's review of any

adjudicatory order that denied their request for a Section 189(a) hearing, Petitioners have sought review of actions taken by the NRC Staff (a party to the same adjudicatory proceeding).

As such, Petitioners have failed to seek review of any "final order entered in" a Section 189(a) proceeding, 42 U.S.C. § 2239(b), because the NRC Staff actions they challenge (to the extent they are even "orders") are not "orders" within the meaning of Section 189(a). Additionally, the Section 189(a) proceeding is not yet "final" because Petitioners have sought administrative reconsideration of the denial of their hearing request, rendering this Petition for Review incurably premature.[2]

STATEMENT OF THE ISSUES

1. Did the NRC take final agency action by authorizing an existing nuclear power plant to operate for an extended period of time beginning in 2032, when the Commission may cancel or modify this authorization through a yet-to-be-concluded administrative proceeding initiated by Petitioners? Moreover, may Petitioners seek judicial review of the agency's environmental analysis while

[2] Respondents previously moved this Court to dismiss this petition for lack of jurisdiction. The Court referred that motion to the merits panel and directed the parties to address issues presented in the motion to dismiss in their briefs and to also address whether the petition for review is incurably premature. Order, ECF Document No. 1846018 (June 8, 2020).

simultaneously seeking administrative reconsideration of the denial of a hearing concerning the same environmental analysis?

2. Have Petitioners suffered an Article III injury caused by the NRC's interpretation of its own regulation prescribing the information an applicant seeking license renewal must submit to the NRC? And, if so, can this Court redress that injury when the NRC's regulations preclude it from relying on the information that Petitioners allege was improperly excluded?

3. If the Court reaches the merits, can it meaningfully review the NRC's interpretation of its regulations when Petitioners failed to challenge the Commission order that actually sets forth the agency's official and authoritative interpretation of the regulations? And did the agency fail to take a "hard look" at the environmental impacts of a license renewal when it relied, in part, on conclusions that were previously evaluated on a generic basis and codified into the agency's regulations via notice-and-comment rulemaking, and did so after reasonably determining—through a holistic review that took into account text, history, purpose, and context—that those regulations were applicable to this first-of-a-kind proceeding?

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations are set forth in a separate addendum filed contemporaneously with this brief.

STATEMENT OF THE CASE

This Petition for Review concerns the NRC's issuance of renewed licenses to Florida Power & Light Company ("FPL") to operate two nuclear power reactor units (Units 3 and 4) at the Turkey Point Nuclear Generating Station near Homestead, Florida. The NRC previously issued renewed licenses for Turkey Point Units 3 and 4 in 2002 (an "initial" license renewal), which authorized operation of Units 3 and 4 through July 2032, and April 2033, respectively. Record of Decision, at 1 (JA___). In January 2018, FPL submitted an application to the NRC seeking a second license renewal for Units 3 and 4 (i.e., a "subsequent" license renewal), authorizing operation of Units 3 and 4 for an additional 20 years, through 2052 and 2053. *Id.* (JA___). The NRC issued the licenses to FPL on December 4, 2019, after completing a safety review required by the AEA and preparing an environmental impact statement ("EIS") required by the National Environmental Policy Act ("NEPA"). Issuance of Subsequent Renewed Facility Operating Licenses (JA___); 10 C.F.R. § 54.29.

Prior to the NRC's issuance of the renewed licenses, Petitioners sought to intervene in the licensing proceeding and challenge, through the adjudicatory

process afforded by Section 189(a) of the AEA, 42 U.S.C. § 2239(a), the adequacy of the environmental review performed by FPL and the NRC Staff. As described below, through a series of decisions from the Atomic Safety and Licensing Board ("Board"),[3] Petitioners were ultimately denied an AEA hearing. Petitioners are pursuing two administrative appeals of these Board decisions, which are still pending before the Commission.

I. Statutory and regulatory background

Section 103(c) of the AEA authorizes the NRC to issue licenses for commercial nuclear power reactors, with an initial license term up to forty years. 42 U.S.C. § 2133(c). The NRC has promulgated regulations (10 C.F.R. Part 54) that govern renewal of power reactor licenses. Such licenses can be renewed prior to expiration, for a maximum term of 20 years beyond the previous license term, and NRC regulations do not limit the number of times a license can be renewed. 10 C.F.R. § 54.31.

A. Environmental review of license renewals

In addition to a safety review that focuses on the effects of aging on plant systems, structures, and components, renewal of a power reactor license also

[3] The Atomic Safety and Licensing Board consists of a panel of administrative judges appointed by the Commission and authorized by Section 191 of the AEA to conduct hearings. *See* 42 U.S.C. § 2241.

requires the preparation of an EIS because it is considered a "major Federal action" under NEPA. *See* 42 U.S.C. § 4332(C); 10 C.F.R. § 51.20(b). The NRC has promulgated regulations implementing NEPA at 10 C.F.R. Part 51. Although the NRC is ultimately responsible for compliance with NEPA, these regulations provide that the process of creating an EIS begins with the license renewal applicant, which must submit an "environmental report" with its application. *See* 10 C.F.R. § 54.23 (requiring license renewal applicants to provide an environmental report); *id.* § 51.45 (providing the general requirements for the contents of environmental reports); *id.* § 51.53(c) (providing more specific requirements for the contents of environmental reports accompanying license renewal applications). The purpose of the environmental report is to provide information that can be drawn upon by the NRC Staff and inform the EIS that the agency is required to prepare. *See* 10 C.F.R. § 51.14 (defining "environmental report").

In 1996, in anticipation of receiving a significant number of applications for power reactor license renewals, the NRC published a Generic Environmental Impact Statement (the "Generic EIS") that identified and analyzed the reasonably foreseeable environmental impacts of power reactor license renewal. NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (May 1996) (JA___). This license renewal Generic EIS identified which

environmental impacts could be expected to occur on a generic basis (i.e., were common to all plants or a sub-category of similar plants), and which impacts could not be analyzed generically and would require supplemental NEPA analysis within a site-specific license renewal application and NRC Staff review. The NRC codified the findings of the license renewal Generic EIS in a notice-and-comment rulemaking. Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996).

In Table B-1 of the rule, the NRC classified the generic environmental impacts of license renewal as "Category 1" issues and the site-specific environmental impacts as "Category 2" issues. *See* 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1 ("Table B-1"). Table B-1 also reflects the agency's stated intent to review the information on a ten-year cycle and update the table via notice-and-comment rulemaking, as necessary. The NRC most recently updated both the license renewal Generic EIS and Table B-1 in 2013. NUREG-1437, Revision 1 (June 2013) (JA___); Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013).

After receiving an application for a power reactor license renewal, the NRC Staff prepares a draft EIS that incorporates the Category 1 findings in Table B-1 (i.e., those environmental impacts determined via rulemaking to be common to all plants) and includes site-specific analysis of Category 2 issues. 10 C.F.R.

§ 51.71(d). The draft EIS is then circulated for public comment, and after receipt and consideration of public comments, the NRC prepares a final EIS. *Id.* §§ 51.73, 51.91. In the final EIS, the NRC integrates the conclusions from the license renewal Generic EIS for Category 1 issues with site-specific analysis developed for Category 2 issues, considers any "new and significant information," and makes a recommendation concerning the environmental acceptability of the license renewal. *Id.* § 51.95(c)(4). Thus, in combination, the license renewal Generic EIS (incorporated into NRC regulations) and the site-specific EIS[4] "cover all issues [that] NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding." *NRDC v. NRC*, 823 F.3d 641, 646 (D.C. Cir. 2016) (quoting *Massachusetts v. United States*, 522 F.3d 115, 120 (1st Cir. 2008)). The NRC will then issue a "Record of Decision" that summarizes the decision made and the alternatives that were considered in the staff's NEPA evaluation. *Id.* §§ 51.102, 51.103.

[4] This site-specific EIS is referred to as a "supplemental" EIS (or "SEIS") because it supplements the NRC's previously prepared Generic EIS for license renewal.

B. Hearings on license renewals

Section 189(a) of the AEA requires that the NRC grant a hearing upon the request of "any person whose interest may be affected" by the granting of a license. 42 U.S.C. § 2239(a). NRC regulations in 10 C.F.R. Part 2 govern the conduct of such hearings, including requirements for the admissibility of "contentions."[5] Although NEPA itself does not provide hearing rights, *NRDC*, 823 F.3d at 652, the NRC permits parties to raise and litigate contentions concerning compliance with NEPA through the AEA hearing process.

When a license renewal application is submitted, those seeking a hearing on NEPA-related issues must submit contentions based on the contents of the applicant's environmental report. 10 C.F.R. § 2.309(f)(2). When the NRC staff publishes its successive environmental analyses (i.e., the draft and final EIS), contentions challenging the sufficiency of the applicant's environmental report can survive as contentions challenging those EIS documents, provided the information on which the contention is based remains substantially the same from document to document.[6] If information in the NRC Staff's environmental analyses materially differs from the applicant's environmental report, parties may file new or amended

[5] In NRC adjudicatory proceedings, a "contention" is a "specific statement of the issue of law or fact to be raised or controverted" that is material to the proceeding and supported by alleged facts or expert opinion. *See* 10 C.F.R. § 2.309(f)(1).

[6] This is referred to in NRC adjudicatory practice as the "migration tenet."

contentions. *Id.* The NRC does not permit parties to challenge the validity of a regulation in an individual adjudicatory proceeding, absent a waiver demonstrating special circumstances. *Id.* § 2.335. This prohibition includes challenges to "Category 1" issues in license renewal proceedings, which have been generically analyzed in a rulemaking and incorporated into Table B-1. *Massachusetts*, 522 F.3d at 127.

If a Board determines that a person seeking a hearing has standing and has proffered at least one admissible contention, it will grant the request and conduct a hearing under appropriate NRC procedures. 10 C.F.R. §§ 2.309(a), 2.310. If not, the Board will deny the request. In either event, decisions of the Board are appealable to the Commission. *Id.* § 2.311 (interlocutory appeals of orders concerning hearing requests); *id.* § 2.341 (review of final decisions of the presiding officer).

II. Agency proceedings

A. Petitioners' August 2018 Hearing Request and March 2019 Board Order

Petitioners submitted a joint request to the NRC for a hearing on the Turkey Point subsequent license renewal application. Petitioners alleged that FPL's environmental report had failed to consider mechanical draft cooling towers as a reasonable alternative to continued operation of the existing cooling canal system

and failed to consider the canal system's adverse environmental effects. Petitioners' August 2018 Hearing Request at 16, 30, 58 (JA___, ___, ___).

The NRC convened a Board to consider the Petitioners' five contentions and, in March 2019, it issued an order admitting in part two of the contentions. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245 (2019), slip op. at 63 (JA___) ("Board March 2019 Order"). Specifically, the Board admitted the Petitioners' contentions about the cooling towers as a reasonable alternative to the cooling canal system, as well as their contention that the application had failed to recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding the site. *Id.* n.82 (JA___).

The Board also made a threshold legal determination concerning the applicability of an NRC regulation, 10 C.F.R. § 51.53(c)(3), to subsequent license renewal proceedings. Section 51.53(c)(3) directs "applicants seeking an initial renewed license" to include specified information in their environmental report but provides that (1) the applicant need not include analyses of generically-resolved issues identified as Category 1 in Table B-1; and (2) the applicant must include analyses of the site-specific environmental impacts for issues identified as Category 2. 10 C.F.R. § 51.53(c)(3)(i), (ii). The Board determined, after engaging in a holistic review of the regulation, its purpose and history, and its interplay with other provisions of 10 C.F.R. Part 51, that "subsequent" license renewal applicants,

in addition to "initial" renewal applicants, need not include analyses of generically-resolved Category 1 issues in their environmental reports. Board March 2019 Order at 25 (JA___). As a result, the Board rejected the Petitioners' other contentions that alleged FPL's environmental report was lacking information concerning Category 1 issues.

Because this was a significant legal interpretation of first impression,[7] the Board certified its ruling to the Commission for interlocutory review. *Id*. n.46 (JA___). The Commission's review of the Board's interpretation of 10 C.F.R. § 51.53(c)(3) was still pending when Petitioners filed their Petition for Review in this Court. In April 2020, after Petitioners filed the Petition for Review, a majority of the Commission upheld the Board's interpretation. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-3, 91 NRC __ (2020) ("Commission April 2020 Order").

B. NRC Staff's Draft EIS and Petitioners' New Contentions

Shortly after the Board's March 2019 Order, the NRC Staff published its draft EIS for the Turkey Point subsequent license renewal. In June 2019, Petitioners moved to "migrate" their previously admitted contentions (alleging deficiencies in FPL's environmental report) as direct challenges alleging

[7] FPL's application was the first subsequent license renewal application considered by the NRC. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-3, 91 NRC __ (2020), slip op. at 4 (JA___).

deficiencies in the draft EIS. Petitioners' June 2019 Motion at 1-2 (JA___-___). Petitioners also sought to admit new contentions challenging the NRC Staff's analysis of groundwater quality degradation and water quality impacts. *Id.* Petitioners also submitted a waiver request, pursuant to 10 C.F.R. § 2.335(b), because their new contentions touched upon issues codified as Category 1 in Table B-1 (groundwater quality degradation). *Id.* at 25 (JA___); Petitioners' June 2019 Waiver Petition (JA___).

C. The Board's July 2019 and October 2019 Orders

In July 2019, the Board issued an order concluding that the two contentions it had previously admitted were now moot, because the NRC Staff's draft EIS provided the information that Petitioners argued was missing from FPL's application. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-6, 90 NRC 17 (2019), slip op. at 1, 6, 9 (JA___, ___, ___) ("Board July 2019 Order"). Although these contentions were dismissed, the Board retained jurisdiction over the proceeding because it was still considering Petitioners' June 2019 motion to admit new contentions challenging the sufficiency of the NRC Staff's environmental analysis. *Id.* at 11 (JA___).

In October 2019, the Board determined that Petitioners' new contentions were not admissible. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-8, 90 NRC 139 (2019), slip op. at 2 (JA___)

("Board October 2019 Order"). In doing so, the Board determined a rule waiver was necessary for Petitioners to challenge the analysis in the draft EIS with respect to groundwater quality degradation (a Category 1 issue), but that Petitioners' waiver request was unsatisfactory. *Id.* at 27 (JA___). The Board also found that the remainder of the Petitioners newly proffered contentions were not admissible. As relevant here, these included contentions that the draft EIS failed to adequately analyze the cooling tower alternative to the cooling canal system and failed to take a "hard look" at the groundwater impacts of Turkey Point's license renewal. *Id.* at 8, 19, 30, 35 (JA___, ___, ___, ___). With all contentions dismissed, the Board terminated the proceeding "at the Licensing Board level" and directed Petitioners to the regulation governing administrative appeals to the Commission. *Id.* at 41 (JA___).

D. Petitioners' Administrative Appeals and the NRC's Issuance of the Renewed Licenses

In August 2019, Petitioners sought Commission review of the Board's March 2019 and July 2019 Orders (JA___). Petitioners argued that the Board had erroneously interpreted 10 C.F.R. § 51.53(c)(3) by allowing FPL to forego site-specific review of Category 1 issues in its application (Petitioners' August 2019 Administrative Appeal at 3 (JA___)), and that the Board erred in a number of other respects by refusing or too narrowly admitting their contentions concerning the cooling tower alternative and groundwater impacts. *Id.* at 8-10, 12 (JA___-___,

___). The issues raised in Petitioners' August 2019 administrative appeal, other than the applicability of 10 C.F.R. § 51.53(c)(3) to subsequent license renewal proceedings (which was resolved in the Commission's April 2020 Order, *see infra,* pp. 50-51), remain pending before the Commission.

In November 2019, Petitioners also sought Commission review of the Board's October 2019 Order (JA___). In this administrative appeal, Petitioners argued that the Board had erroneously denied admission of their contentions alleging deficiencies with the NRC staff's assessment of the environmental impacts of continued operation of the cooling canal system, and the NRC Staff's evaluation of FPL's groundwater remediation efforts. Petitioners' November 2019 Administrative Appeal at 6-7, 14, 19 (JA___-___, ___, ___). This appeal also remains pending before the Commission.

The NRC Staff issued its final EIS for the Turkey Point subsequent license renewal in October 2019. NUREG-1437, 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 (JA___). On December 4, 2019, the NRC Staff issued a Record of Decision, in accordance with 10 C.F.R. § 51.103, and it issued the two renewed licenses. Record of Decision (JA___); Turkey Point Nuclear Generating Units No. 3 and 4 Subsequent Renewed Facility Operating Licenses (JA___). The Record of

Decision expressly recognized that multiple administrative appeals remained pending before the Commission. Record of Decision at 5-6 (JA___-___).

On January 31, 2020, Petitioners filed their Petition for Review in this Court, seeking review of the NRC staff's Record of Decision and the renewed licenses. The Petition for Review does not request that the Court review any of the Board's adjudicatory decisions or the Commission's April 2020 Order.

SUMMARY OF ARGUMENT

1. The Petition for Review should be dismissed for lack of jurisdiction. As an initial matter, what Petitioners challenge here—the NRC Staff's issuance of the renewed licenses—is not an order entered in an AEA Section 189(a) proceeding. Section 189(a) governs NRC hearings in licensing proceedings, and Petitioners do not challenge any of the agency's adjudicatory decisions that collectively denied their request for such a hearing. This Court should not permit Petitioners to side-step the Hobbs Act's jurisdictional channeling of judicial review of Commission orders in adjudicatory proceedings.

This Court also lacks jurisdiction over the Petition because the Turkey Point subsequent license renewal proceeding is not yet "final," as the Commission has yet to consummate its decisionmaking process. Petitioners are currently pursuing multiple administrative appeals to the Commission of the Board's denial of their hearing request. Although these renewed licenses are "immediately effective" upon issuance, NRC regulations expressly subject them to cancellation or modification depending on the outcome of the yet-to-be-concluded administrative proceeding. Because Petitioners sought Commission reconsideration of the Board's decisions, this Petition for Review is incurably premature. Upon the issuance of a final order concluding the Section 189(a) proceeding, Petitioners may

then seek timely judicial review of that order (assuming they have standing and are aggrieved by that final order).

Even if this Court were to determine that it had jurisdiction to review the NRC Staff's issuance of the renewed licenses, fundamental principles of ripeness counsel against doing so in advance of a Commission order resolving these administrative appeals, which could alter or even moot the issues raised before the Court. Deferral of this Court's review would not prejudice Petitioners, who argue that the NRC has not adequately evaluated the environmental impacts of the extended period of operation for Turkey Point, which does not begin until 2032.

2. Article III standing requirements also prevent this Court's review of certain claims in the Petition. Petitioners here do not have standing to raise their principal argument—that the NRC erroneously interpreted its own regulation governing what information an applicant must provide to the agency—because they are not plausibly harmed by this interpretation, nor could the Court redress such an injury. Petitioners also fail to carry their burden to demonstrate standing with respect to their argument about the NRC's reliance on the license renewal Generic EIS and Category 1 conclusions in Table B-1 because they make no effort to trace the NRC's alleged failure to consider Category 1 issues to the harms asserted to their members' interests. On this point, Petitioners essentially assert

harm, *ipso facto*, by an allegedly deficient EIS, which is not sufficient to establish standing.

3. Even if the Court were to reach the merits, Petitioners have failed to challenge the correct order for its two primary arguments about the interpretation of NRC regulations and the license renewal Generic EIS. Petitioners prematurely petitioned this Court for review *before* the Commission's April 2020 Order. The April 2020 Order provides the Commission's official and authoritative position on the interpretation of 10 C.F.R. § 51.53(c)(3) and the temporal scope of the license renewal Generic EIS. Any meaningful review of the agency's interpretation of its own regulations must address this authoritative position of the Commission, which Petitioners have failed to challenge (but will have an opportunity to challenge when the adjudicatory proceeding is complete).

With respect to the remainder of Petitioners' arguments specifically challenging the agency's review of groundwater impacts, these are precisely the same issues still pending in Petitioners' administrative appeals to the Commission. Respondents therefore are precluded from addressing these arguments because the Commission has not yet resolved those issues.

ARGUMENT

I. The Court should dismiss the Petition for Review, or hold it in abeyance, because Petitioners failed to challenge a final order of the Commission.

Under the Hobbs Act and the AEA, this Court's jurisdiction over NRC licensing decisions is limited to review of "final orders" in a "proceeding" for, among other things, the "granting, suspending, revoking or amending of any license." 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b)(1).[8] These conditions are not satisfied here.

A. Petitioners do not challenge an "order" entered in an AEA Section 189(a) "proceeding."

As an initial matter, Petitioners have failed to challenge an "order" issued in a "proceeding of the kind specified in" Section 189(a) of the AEA, as is required to sustain jurisdiction under the Hobbs Act. 42 U.S.C. § 2239(a)(1)(A), (b)(1); *see also* 28 U.S.C. § 2342(4). First, an NRC "Record of Decision" is not an "order." It is merely a summary document prepared by the NRC Staff that accompanies an "action for which a final [EIS] has been prepared." 10 C.F.R. §§ 51.102, 51.103. Second, although a "license" is considered an "order" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, the NRC license here is not an order

[8] The Hobbs Act still refers to the "Atomic Energy Commission." The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred all licensing and related regulatory functions to the NRC. 42 U.S.C. § 5841(a)(1), (f).

"entered in" a Section 189(a) proceeding, as required by 42 U.S.C. § 2239(b)(1). The NRC does not issue licenses pursuant to Section 189(a); it conducts *hearings* pursuant to that provision. The Petition for Review does not challenge any adjudicatory decision of the agency in the adjudicatory proceeding that was initiated by their hearing request. Rather, it purports to directly challenge the NRC Staff's decision to issue renewed licenses and its accompanying Record of Decision, without specifying for this Court's review any of the adjudicatory decisions that rejected many of the same arguments that Petitioners now raise before the Court.[9]

The Hobbs Act and AEA plainly channel judicial review of Commission orders entered through the agency's adjudicatory process.[10] Indeed, this Court has held that participation in the "appropriate and available administrative procedure"

---

[9] This Court recently recognized that the Hobbs Act varies in its jurisdictional reach, extending more broadly to "all final agency actions" for some agencies and more narrowly to specified kinds of "final orders" for others, including the NRC. *Bhd. of Locomotive Eng'rs and Trainmen v. Fed. R.R. Admin.*, (D.C. Cir. No. 18-1235) (Aug. 28, 2020), slip op. at 29-30.

[10] Jurisdiction also extends to NRC orders that decline to initiate a proceeding described in Section 189(a), such as a Staff denial of a request to modify, suspend, or revoke a license. The Supreme Court has held that jurisdiction over those decisions is vested in the courts of appeals, regardless of whether any hearing was actually held. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985).

is the "statutorily prescribed prerequisite" for Hobbs Act jurisdiction. *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1217 (D.C. Cir. 1973). And this Court has held that principles of exhaustion counsel against review of claims prior to the Commission concluding its adjudicatory proceeding. *Vermont Dept. of Pub. Serv. v. NRC*, 684 F.3d 149, 156-57 (D.C. Cir 2012).[11] Petitioners here have initiated and participated in the unfinished Section 189(a) proceeding. These same principles should preclude them from jettisoning that process early and seeking judicial review of agency action undertaken within the context of that proceeding before the Commission concludes it. *See Malladi Drugs & Pharm., Ltd. v. Tandy*, 552 F.3d 885, 891 (D.C. Cir. 2009) (courts should not countenance "side-step" of "normal administrative remedies" which might have "cured or rendered moot the very defect later complained of in court") (quoting *McGee v. United States*, 402 U.S. 479, 483 (1971)). Judicial review will, of course, be available when the adjudicatory proceedings that Petitioners have commenced become final. But dismissal for lack of jurisdiction is therefore warranted for this reason alone.

[11] For purposes of identifying the Hobbs Act's 60-day jurisdictional window, the Court in *Vermont* permitted petitioners to ground their challenge in the Staff's issuance of the license itself, rather than the final adjudicatory order. But judicial review only occurred after the issuance of a final Commission order expressly terminating the adjudicatory proceeding. 684 F.3d at 156 n.8. And no such order has been issued here.

B. The "orders" that Petitioners challenge are not final.

Nor, given the pendency of the adjudicatory proceedings, are the "orders" that Petitioners challenge final. This Court has held that "finality" under the Hobbs Act is to be "narrowly construed" and occurs "usually at the consummation of an administrative process." *Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (internal citations omitted). This helps ensure that this Court's review occurs when the proceeding has "reached a stage where judicial review will not disrupt the orderly process of adjudication[.]" *Id*. Judicial review prior to the consummation of the agency's decisionmaking process may result in a "waste of judicial time and effort" if forthcoming agency action alters or even moots the issues before the Court. *State of Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992). Moreover, premature judicial review may deprive the Court of "a useful record for subsequent judicial consideration." *Qwest Corp. v. FCC*, 482 F.3d 471, 475 (D.C. Cir. 2007) (internal quotation marks omitted).

"Finality" of agency action is determined by the familiar framework established by the Supreme Court in *Bennett v. Spear*: the challenged agency action must (1) "mark the consummation of the agency's decisionmaking process" and "must not be of a merely tentative or interlocutory nature"; and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (internal citations and

punctuation omitted). Failure to satisfy either prong of *Bennett* means that the agency action is nonfinal. *Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019). Here, neither prong is satisfied.

i. The NRC has not consummated its decisionmaking process because Petitioners' administrative appeals are still pending before the Commission.

As previously stated, two administrative appeals remain pending before the Commission: (1) Petitioners' August 2019 administrative appeal of the Board's March 2019 and July 2019 Orders, which collectively dismissed all of the contentions submitted in Petitioners' original hearing request; and (2) Petitioners' November 2019 administrative appeal of the Board's October 2019 Order, which rejected the additional environmental contentions that Petitioners filed after the NRC staff published its draft EIS. These administrative appeals render the NRC staff's issuance of the renewed licenses "non-final" for purposes of the Hobbs Act.

Indeed, the Commission could overturn elements of these Board decisions, set aside the renewed licenses, and direct further administrative proceedings, thereby deferring the need for judicial review or avoiding it altogether. Alternatively, the Commission could wholly affirm the Board's orders and fully terminate the adjudicatory proceeding, in a then-appealable "final order" that provides its factual and legal reasoning for doing so. Or the Commission could take action that falls somewhere in between—granting some form of partial relief

that revives the adjudicatory proceeding or otherwise requires the NRC staff to revisit or supplement its NEPA analysis in a way that satisfies Petitioners. This spectrum of forthcoming Commission action compels the conclusion that the agency's decisionmaking process is not yet consummated. *Bennett*, 520 U.S. at 177.

Petitioners argue, citing *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998), that the renewed licenses are "final" because the "order granting or denying the license is ordinarily the final order." Br. at 6. Respondents do not dispute that, in "certain circumstances," an agency order may be considered "final" even where it is not the last order, chronologically, entered in a proceeding. *NRDC v. NRC,* 680 F.2d 810, 815-16 (D.C. Cir. 1982) (agency order is final if it imposes an obligation, denies a right, or fixes some legal relationship, "usually at the consummation of an administrative process"); *see also Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015) (whether administrative action is final is determined by "realistic assessment of the nature and effect of the order sought to be reviewed") (internal quotations omitted); *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991) (court had jurisdiction under Hobbs Act to review order of Commission authorizing licensee to begin operating at full-power for the first time, even though a contested adjudication remained pending, because "significant legal consequences" flowed from action). This is inherent in the *Bennett*

framework, which instructs courts to view finality through a "pragmatic" lens. *U.S. Army Corps of Eng'rs v. Hawkes Co.. Inc.*, 136 S. Ct. 1807, 1815 (2016).

But this is not one of these circumstances. The NRC's decisionmaking process cannot realistically or plausibly be considered "consummated" when the Commission is, at the invocation of the same Petitioners, still considering whether further administrative proceedings are necessary.

City of Benton is not to the contrary. *City of Benton* did not involve any still-pending agency adjudication at the time the petition for judicial review was submitted. Rather, in *City of Benton*, the petitioners admitted that they had sought review of the wrong order in an already-completed proceeding for the transfer of an operating license, but they pressed the Court to find the interlocutory order incorrectly named in its petition to be final and appealable, and the Court declined to do so. 136 F.3d at 825. The statement in *City of Benton* upon which Petitioners rely, Br. at 6, is not only dicta but confirms the existence of situations—such as this one, where an adjudication is still pending—where the issuance of a license is not the last act that opens the window to Hobbs Act jurisdiction.

On this point, Petitioners also reference this Court's recent en banc decision in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020), arguing that the NRC is improperly "block[ing] judicial review of the licenses while they remain in effect." Br. at 6. However, *Allegheny Defense Project* is clearly

distinguishable. In that case, this Court held that administrative "tolling orders" issued by FERC could not extend a statutory deadline within the Natural Gas Act that expressly deemed FERC's failure to act upon an application for a rehearing within 30 days as a denial triggering jurisdiction for judicial review. 964 F.3d at 15 ("[T]he Commission has no authority to erase and replace the statutorily prescribed jurisdictional consequences of its inaction."). In this case, the NRC has not taken administrative action in contravention of, or purported to extend, any statutory deadline that would otherwise trigger finality and enable judicial review. Jurisdiction here is governed by the Hobbs Act and its limitation of review to "final" NRC orders in Section 189(a) proceedings. Under this Court's case law (and given that the adjudicatory proceedings contemplated by Section 189(a) are not complete), the NRC has not yet taken final action that would confer jurisdiction upon this Court.

Petitioners also claim that Respondents have taken the opposite position with respect to finality in previous cases (i.e., that the NRC staff's issuance of a license is the "final order" triggering Hobbs Act jurisdiction), citing a 2014 Motion to Dismiss in another license renewal proceeding. Br. at 6. However, the 2014 Motion to Dismiss repeatedly contends—as Respondents do in this case—that a final order *terminating the proceeding* is what ordinarily triggers this Court's jurisdiction. *See, e.g.,* 2014 Motion to Dismiss at 10 (ECF Document No.

1479284) ("If the agency proceeding is not yet complete when judicial review is sought, it would be imprudent for the reviewing court nonetheless to take up the case."); *id*. at 15 ("NRDC's participation in the [license renewal proceeding] is far from terminated or concluded.").[12]

In any event, the facts of an analogous and more recent example (involving one of the Petitioners in this case) confirm Respondents' consistent position with respect to finality. In *NRDC v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018), the NRC Staff had issued an immediately effective license authorizing uranium recovery activities in April 2014, before the conclusion of an AEA Section 189(a) hearing. The petitioners (including NRDC, a Petitioner here) sought Commission review of the hearing results, which the Commission provided in a June 2016 final order terminating the proceeding. *Strata Energy, Inc.* (Ross *In Situ* Recovery Uranium Project), CLI-16-13, 83 NRC 566, 571 (2016). The petitioners in that case sought judicial review only after the issuance of the June 2016 Commission order—over two years after the NRC staff had issued the license—and Respondents did not

[12] Case No. 13-1311 was eventually dismissed as moot following NRDC's filing of a subsequent petition for review (Case No. 14-1225) days after the NRC issued a final order denying its request to intervene as a party in the license renewal proceeding. There, as here, the licensing proceeding became "final" for purposes of judicial review once the NRC adjudicatory proceeding was terminated.

contest this Court's jurisdiction. Final Brief of Federal Respondents at 1, *NRDC v. NRC*, No. 16-1298 (D.C. Cir. Feb. 17, 2017) (ECF Document No. 1662007).

Petitioners also argue that the "potential for future actions by the Commission does not render the licenses any less final for purposes of judicial review." Br. at 10. But unlike the cases Petitioners cite as precedent, Respondents here are not arguing that the Commission's "*sua sponte* review power" renders the licenses non-final (*Sierra Club v. NRC,* 862 F.2d 222, 225 (D.C. Cir. 1988)), or that the agency's position, in the abstract, is "subject to change" and a "mere possibility" for reconsideration exists. *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)). Here, *Petitioners* have specifically invoked the adjudicatory authority of the Commission by filing administrative appeals. Having done so, they must await resolution of their appeals, to which they are entitled, before seeking judicial review.

Petitioners also argue, with respect to finality, that even if the Commission vacated the licenses and remanded to the Board for further proceedings, it "would not alter the fact that the NRC has already taken the action requiring an [EIS]." Br. at 10-11. But Petitioners conflate "finality" for purposes of the Hobbs Act with the separate NEPA requirement to prepare an EIS before undertaking a "major federal action." 42 U.S.C. § 4332(2)(C). The undertaking of a NEPA "major federal

action" is not what triggers this Court's jurisdiction. NEPA mandates a process for agency decisionmaking, and the NRC staff complied with NEPA's procedural mandates by preparing a final EIS prior to issuing the renewed licenses (i.e., the "major federal action"). Petitioners have separately sought, through the hearing process afforded by the AEA, to challenge the sufficiency of the NRC's NEPA compliance. Under the Hobbs Act, Petitioners must wait until that AEA proceeding is "final" before seeking judicial review.

ii. The renewed licenses currently lack "legal consequences" for Petitioners.

Although this Court should dismiss the Petition for failure to satisfy the first *Bennett* prong alone, *Valero Energy*, 927 F.3d at 536, Petitioners' failure to satisfy the second prong provides an additional, independent reason for dismissal. With respect to the second prong of *Bennett*, the Supreme Court has stated that determining whether legal consequences flow from any agency action is a "pragmatic" inquiry, *Hawkes Co.*, 136 S. Ct. at 1815, and this Court has stated that such a determination must be "based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it." *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (internal quotation marks omitted).

Here, the specific regulations that govern the NRC's renewal of power reactor licenses (10 C.F.R. Part 54) make clear that the renewed licenses lack legal

effect in a "pragmatic" sense—not only for FPL, but particularly for Petitioners, who will not be unfairly prejudiced if the Court defers judicial review until the conclusion of the Commission adjudicatory proceeding.

NRC regulations provide that a renewed power reactor license is "effective immediately upon its issuance" and supersedes the license previously in effect. *Id.* § 54.31(c). However, that regulation goes on to state that a renewed license can be "subsequently set aside upon further administrative or judicial appeal," at which point the previous license goes back into effect. *Id.* The "administrative appeal" referred to in this regulation is the AEA hearing process, and NRC regulations governing AEA hearings confirm that, in a contested proceeding for the renewal of an operating license, a decision of the presiding officer (which can include either the Board or, on appeal, the Commission) can direct the NRC staff to "issue, deny, or appropriately condition" the license. *Id.* § 2.340(a)(2)(i). Thus, until the Commission concludes its review of the Petitioners' administrative appeals, the renewed licenses issued to FPL are, by design, subject to alteration or revocation. *See, e.g., NRDC*, 879 F.3d at 1210 (immediately effective NRC license issued prior to the conclusion of an adjudicatory proceeding was "provisional in the most meaningful sense," given that NRC regulations made clear that the license was still subject to revision based on the outcome of that proceeding).

Pragmatism especially warrants this conclusion with respect to any "legal effect" felt in this case, which concerns the authorization of an extended period of operation for Turkey Point that does not begin until 2032. This is not a situation where the NRC has issued a license that materially disrupts the status quo (e.g., an order authorizing the construction or operation of a new facility), or where there is practical risk that the "die may be cast" in such a way that meaningful analysis is precluded. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Turkey Point is an already-existing facility that, even without the subsequent renewed licenses at issue in this case, FPL would be authorized to operate for another twelve years. There is simply no need for the Court to entangle itself in this dispute, at this odd procedural juncture, in advance of a more meaningful and useful administrative record that includes the final views of the Commission. Petitioners' assertion that "real-world momentum" may soon foreclose reasonable alternatives if judicial review is delayed (Br. at 9-10) is entirely speculative, especially where pending administrative appeals before the Commission may yet provide them in the near term with some or all of the relief that they seek from this Court.

C. The petition for review is also incurably premature.

In *Flat Wireless, LLC v. FCC*, this Court stated that a "pending request for administrative reconsideration renders an agency action nonfinal and unreviewable

with respect to the party who made the request" and renders the petition for review "incurably premature." 944 F.3d 927, 933 (D.C. Cir. 2019). This case is materially indistinguishable from *Flat Wireless*. Indeed, *Flat Wireless* even further clarifies that this doctrine of "incurable prematurity" extends to challenges of the same issues, even if petitioners are not challenging the same underlying "order" in each forum. *Id.* That is also the case here, where Petitioners have sought administrative reconsideration of multiple Board orders that collectively denied their opportunity for an AEA Section 189(a) hearing, yet conspicuously forego any direct challenge to those same adjudicatory orders in this Court, choosing instead to directly attack the licenses and Staff Record of Decision accompanying its EIS. *Flat Wireless* makes clear that even this distinction is immaterial—Petitioners are concurrently seeking administrative consideration of the same issues for which they seek review in this Court, thus rendering their petition "incurably premature."

Petitioners argue that "*Flat Wireless* and its antecedents apply when a petitioner has a choice of seeking agency reconsideration or judicial review and chooses both." Br. at 11. However, a closer examination of the precedents cited by Petitioners do not reveal that "choice" in a forum is dispositive—each case broadly articulates the general rule that the *existence* of a pending administrative appeal, in and of itself, renders an associated judicial petition for review "incurably premature."

For example, in *TeleSTAR Inc. v. FCC*, this Court's statement that its holding applies "only to situations where a party must choose between rehearing before the agency or immediate court review" was made to clarify that its holding did not supersede specific statutory mandates governing the timing of judicial review. 888 F.2d 132, 134 (D.C. Cir. 1989). Indeed, this Court later described its holding in *TeleSTAR* as applying to "*any* petition for review filed while petitioner's request for reconsideration was pending before an agency." *Energy Transp. Group, Inc. v. Mar. Admin.*, 956 F.2d 1206, 1211 (D.C. Cir. 1992) (emphasis added).

Similarly, in *Tennessee Gas Pipeline Co. v. FERC*, the Court noted that petitioners there "chose" to file an administrative request for reconsideration as a matter of discretion, but it restated the "well-established" rule, in general terms, that a "party may not simultaneously seek both agency reconsideration and judicial review of an agency's order." 9 F.3d 980 (D.C. Cir. 1993); *see also United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989) (finding "no reason" to deviate from rule that judicial review of agency action is unavailable "where the agency has not acted on a petition for reconsideration filed by the petitioning party").

The rationale for this general rule is that simultaneous judicial review could result in a "pointless waste of judicial energy" if the agency changes its position on

reconsideration or otherwise obviates the need for review by the court. *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002) (citing *TeleSTAR*, 888 F.2d at 134). This rationale applies with equal force regardless of whether the pending administrative appeal could be characterized as compulsory or a matter of choice. Its mere existence, and the potential it holds to alter the underlying agency decision, is enough to render that agency decision non-final for purposes of judicial review, unless a statutory scheme dictating the timing of judicial review mandates otherwise. *TeleSTAR*, 888 F.2d at 134; *Allegheny Def. Project*, 964 F.3d at 15.

Nor, as Petitioners assert, Br. at 7-8, 13, does *Darby v. Cisneros*, 509 U.S. 137 (1993), compel a different result. In *Darby*, the Supreme Court held that federal courts cannot require plaintiffs to exhaust administrative remedies beyond the statutory requirements for exhaustion in the APA and an agency's organic statute. 509 U.S. at 154. The question of whether Petitioners were, in the present circumstances, required to seek Commission review of the Board's decisions before seeking judicial review under the Hobbs Act is not before the Court here; Respondents are not seeking to require Petitioners to exhaust an administrative remedy that Petitioners have foregone. Rather, Petitioners have *already* pursued

an available administrative remedy (i.e., an appeal to the Commission), and that decision renders the petition for review incurably premature.[13]

D. The ripeness doctrine counsels against consideration of the Petition.

Even if this Court were to determine that the license renewals at issue and the Record of Decision are "final orders" for purposes of Hobbs Act jurisdiction, the Court should still conclude that judicial review is not sufficiently ripe because of the pending administrative appeals before the Commission. In making this determination, this Court evaluates (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Both prongs here support holding this case in abeyance until the Commission acts on Petitioners' administrative appeals.

With respect to the first prong, determining the "fitness" of an issue for judicial resolution depends on whether it is a "purely legal" issue, whether

[13] Relying on 10 C.F.R. § 2.341(b)(1), Petitioners assert that they were "compelled by NRC regulations" to file an appeal to the Commission as a prerequisite to judicial review. Br. at 13. Yet, when quoting this provision, they omit the proviso to this regulation—"Unless authorized by law." If Petitioners are correct—and 5 U.S.C. § 704 "authorizes" immediate judicial review in the present circumstances (Br. at 7-8)—then they have no basis to assert that they were "compelled" to seek Commission review as a prerequisite to judicial review or that their voluntary election to do so does not render their Petition incurably premature under *Flat Wireless*.

consideration of the issue would benefit from a more concrete setting, and whether the agency's actions are sufficiently final. *In re Aiken County*, 645 F.3d 428, 434 (D.C. Cir. 2011). As explained above, the renewed licenses are not "sufficiently final" because the Commission, acting on the administrative appeals before it, could still rescind the renewed licenses and revert the parties back to the *status quo ante*, as expressly contemplated by NRC regulations. 10 C.F.R. § 54.31(c). Petitioners have also not validly raised "purely legal" claims in this proceeding;[14] rather, Petitioners have raised several highly fact-specific claims concerning groundwater contamination and whether record evidence supports conclusions made by the NRC Staff in its EIS. Br. at 44-58. As explained further, *infra* pp. 56-57, these precise groundwater issues remain squarely before the Commission on administrative appeal, and this Court would certainly benefit from a final Commission order that directly addresses these issues. As it stands now, the NRC does not yet have a position with respect to the arguments that Petitioners have raised and, were the Court to entertain the Petition now, it would be required to resolve the issue without hearing from either the Commission or its attorneys on the merits.

[14] Respondents concede that Petitioners have raised one "purely legal" claim (i.e., the interpretation of 10 C.F.R. § 51.53(c)(3)). However, no petitioner has Article III standing to pursue this claim. *See infra*, pp. 42-45.

With respect to the second prong—whether there would be hardship to the parties in withholding judicial review—the extended period of operation authorized by the Turkey Point renewed licenses does not begin until 2032. This entire case concerns whether the environmental impacts of an extended period of operation beginning over a decade from now have been sufficiently considered. There is simply no need for the Court to entangle itself in this challenge prior to a Commission final order that concludes the adjudicatory proceeding (and which could potentially revert the renewed licenses back to the *status quo ante*), especially where there is no imminent harm associated with pausing this case.

As such, Respondents request that, in the event this Court finds that the renewed licenses at issue are "final orders" for purposes of the Hobbs Act, the Court hold the Petition for Review in abeyance, for prudential reasons, pending the Commission's resolution of the administrative petitions for review that remain pending.

II. Petitioners lack standing to pursue most of their claims.

In addition to the other jurisdictional problems precluding judicial review of their petition, Petitioners also lack standing to pursue most of their claims.

As a threshold matter, Petitioners state (Br. at 23) that the Commission "did not contest" that "Petitioner Organizations have Article III standing." Of course, even if that were true, this Court has an "independent obligation to assure that

standing exists." *Frank v. Autovest, LLC*, 961 F.3d 1185, 1187 (D.C. Cir. 2020) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). Petitioners' statement refers to a Board determination (which the NRC Staff did not contest) that Petitioners had "standing" to intervene in the *administrative proceeding*. Board March 2019 Order at 42 (JA___). In order to obtain a hearing in a proceeding held under AEA Section 189(a) (which bestows hearing rights to "any person whose interest may be affected" (42 U.S.C. § 2239(a)(1)(A))), prospective intervenors must demonstrate standing. *See* 10 C.F.R. § 2.309(d). The Commission applies "contemporaneous judicial concepts of standing," but it has also established a "proximity presumption" in licensing proceedings, which is a "shortcut" that confers administrative standing on individuals who live within a 50-mile radius of the reactor facility. Board March 2019 Order at 6 (JA___). The Board relied on this presumption when determining Petitioners' standing to seek an AEA hearing. *Id.* at 42 (JA___).

However, "geographic proximity" alone does not confer standing in the federal courts. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002). To establish Article III standing, a petitioner must demonstrate (1) an injury in fact, which is both "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical"; that is (2) fairly traceable to the challenged agency decision; and (3) that will likely be redressed by a favorable decision. *Kansas*

Corp. Comm'n v. FERC, 881 F.3d 924, 929 (D.C. Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Petitioners bear the burden of establishing these elements, especially where, as here, Petitioners are not the object of the agency action they challenge. *Id.* (citing *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). Organizations that seek review on behalf of their members must demonstrate that such members "would otherwise have standing to sue in their own right." *Sierra Club v. EPA*, 926 F.3d 844, 848 (D.C. Cir. 2019) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). Furthermore, standing is not "dispensed in gross"—at least one petitioner must demonstrate standing for each claim advanced in the petition for review. *Owner-Operator Independent Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 346 (D.C. Cir. 2018); *City of Boston Delegation v. FERC*, 897 F.3d 241, 250 (D.C. Cir. 2018).

Petitioners fundamentally raise three distinct claims: (1) that the NRC permitted FPL, through an erroneous interpretation of 10 C.F.R. § 51.53(c)(3), to submit a deficient license renewal application (Br. at 30-37); (2) that the NRC has, *ipso facto*, failed to take a "hard look" at the environmental impacts of the Turkey Point subsequent license renewal because it relied on Category 1 conclusions from the NRC's license renewal Generic EIS, rather than conducting supplemental site-specific analysis on these issues (Br. at 38-44); and (3) that the NRC has, more

specifically, failed to take a "hard look" at the impacts of Turkey Point's cooling canal system on groundwater (Br. at 44-58). Petitioners point to the declarations they submitted to the Court with their March 6, 2020, Docketing Statement, to establish that their members live in "close proximity to Turkey Point and rely on the environmental resources it impacts"; that these members suffer "procedural harm" from the NRC's failure to produce a satisfactory NEPA analysis; and that their members are "reasonably concerned" that Turkey Point's continued operation will negatively affect their water resources, health and safety, property values, and use and enjoyment of the environment. Br. at 22. But those declarations do not establish an Article III injury or redressability as to the first claim and fail to trace any Article III injury to the second claim.

A. No Petitioner has Article III standing to challenge the NRC's interpretation of 10 C.F.R. § 51.53(c)(3).

None of the Petitioners has standing to press the first claim concerning the NRC's interpretation of 10 C.F.R. § 51.53(c)(3). Petitioners have suffered no concrete or particularized injury from the agency's interpretation of this particular regulation, which prescribes what information an *applicant* must provide to the NRC.

Section 51.53(c)(3) instructs "applicants seeking an initial renewed license" what information to include in their "environmental report," the purpose of which is to "aid the Commission in complying with Section 102(2) of NEPA."

Id. § 51.14. The Board determined that this provision was silent as applied to subsequent license renewal applicants, like FPL, and that it was not intended to be applied exclusively to "initial" license renewal applicants. Board March 2019 Order at 15-25 (JA___-___). Under the Board's interpretation, all license renewal applicants need not provide site-specific analysis of generically determined Category 1 issues in their applications, absent any "new and significant information" of which the applicant is aware. *Id*. (JA___). Petitioners assert that this interpretation is incorrect—that only "initial" renewal applicants may utilize section 51.53(c)(3), and "subsequent" renewal applicants like FPL must conduct site-specific analysis of all environmental impacts when submitting an application to the NRC. Br. at 28.

Even if the Board's interpretation were incorrect, Petitioners have not and cannot plausibly allege that they suffer an Article III injury simply because the NRC accepts an allegedly deficient license application. After all, the NRC (not the applicant) is required to prepare an EIS and comply with NEPA. To the extent that Petitioners argue that acceptance of an allegedly deficient license application increases the chances of a deficient EIS prepared by the NRC, such an alleged injury would be entirely speculative and would also overlook that Petitioners remain free (as they have done) to challenge the adequacy of the NRC's environmental analysis. At best, this claim for Petitioners represents a purely

"procedural" violation by the agency which, in the absence of a concrete and particularized injury, cannot support Article III standing. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009) ("[O]mission of a procedural requirement does not, by itself, give a party standing to sue.").

Furthermore, this claim is not redressable, because even if the Court were to agree with Petitioners' preferred interpretation and determine that FPL should have provided in its application the information Petitioners' seek, separate NRC regulations would in any event preclude the NRC staff from relying on this newly obtained information when preparing its NEPA analyses. That is, regardless of whether FPL evaluated Category 1 issues on a site-specific basis in its license renewal application, "unambiguous regulations" elsewhere in 10 C.F.R. Part 51 *require* the NRC staff to incorporate the generically-determined Category 1 environmental conclusions from the license renewal Generic EIS and Table B-1 into its draft and final EIS documents. Board March 2019 Order at 17 (JA___) (citing 10 C.F.R. § 51.71(d) (draft EIS for license renewal will rely on conclusions designated as Category 1 in the Generic EIS and Table B-1); *id.* § 51.95(c)(4) (final EIS for license renewal "shall integrate the conclusions in the [Generic EIS] for issues designated as Category 1")).

When interpreting 10 C.F.R. § 51.53(c)(3), the Board recognized the "senseless" and "absurd result" that Petitioners' interpretation compelled, namely that FPL's environmental report "would contain an overwhelming amount of information [on Category 1 issues] that would be of no assistance to the NRC Staff in its preparation of the [draft EIS]." *Id.* at 18, 25 (JA___, ___).[15] Thus, regardless of whether Petitioners were to prevail on their arguments concerning the inadequacy of the environmental report, this Court could not redress any injury suffered by Petitioners (to the extent one even exists) because "the status quo is held in place by other forces," *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1278 (D.C. Cir. 2007), namely, other NRC regulations dictating how the NRC Staff must employ Table B-1 in compiling an EIS for all varieties of license renewal.

B. Petitioners have only established standing for their claims specifically challenging the NRC's groundwater analysis.

With respect to Petitioners' two remaining claims, which concern whether the NRC has taken a "hard look" at the environmental impacts of the license renewal, Petitioners' declarations are largely (though not wholly) deficient to establish standing. As an initial matter, these declarations overwhelmingly rely on

[15] As discussed *infra*, p. 51, the Commission reached the same conclusion in its April 2020 Order.

proximity to the Turkey Point facility and the potential harm that would result to human health, the environment, or property in the event of an "accident," "disaster," or other unintentional release of radioactivity, or express concerns generally with the continued safe operation of Turkey Point for an additional 20 years.[16] To be sure, these declarations are sufficient to establish "standing" in an AEA hearing under the Commission's "proximity presumption," but merely alleging proximity to an already-existing power reactor facility and the harms that could befall in the event of an accident are too speculative and hypothetical for purposes of Article III. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."); *New York Republican State Committee v. SEC*, 927 F.3d 499, 513 (D.C. Cir. 2019) ("[W]e have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and allegations of possible future injury are not sufficient.") (internal citations and punctuation omitted).

Even if one generously accepts these concerns as sufficiently "concrete and particularized," concerns over the safe operation of Turkey Point and its ability to

[16] *See, e.g.*, Declaration of Parobok, ¶ 7; Declaration of Stoddard, ¶¶ 6, 7, 9, 12; Declaration of Thomas, ¶¶ 4, 5; Declaration of Feuer, ¶¶ 5-11, 13; Declaration of Bauman, ¶¶ 5-12.

withstand "disasters" or "accidents" are not fairly traceable to the claims pressed by Petitioners in this Court. Nowhere do Petitioners allege that continued operation of Turkey Point will be *unsafe*, in that the NRC's renewal of the operating licenses create some increased risk of radiological accidents for their members living near the facility. Nor could they, since Petitioners have argued, since the beginning of their participation in the administrative proceeding, that their concerns are "focused on environmental and public health impacts" and not "safety/aging management issues." Petitioners August 2018 Hearing Request at 14 (JA___). Thus, concerns over an "accident" or radiological release from Turkey Point do not support standing in this proceeding, because Petitioners make no demonstration that this type of injury is one their members are suffering or likely to suffer as a result of the NRC's action. *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996).

With respect to Petitioners' second claim—that the NRC Staff improperly relied on conclusions in its license renewal Generic EIS, rather than conducting a complete site-specific evaluation of all environmental impacts (Br. at 38-44)—Petitioners make no effort whatsoever to identify what concrete and particularized harm this allegedly deficient EIS has caused to their members' interests. Petitioners merely allege that reliance on the license renewal Generic EIS and Table B-1 means, *ipso facto*, that the environmental impacts of subsequent license

renewal have not been fully analyzed or considered. The NRC has codified dozens of Category 1 environmental findings into Table B-1; Petitioners make no effort to connect any of the Category 1 issues that the NRC has allegedly neglected here (beyond blanketly asserting that all have been neglected) to the environmental concerns in their members' declarations (e.g., recreational use of nearby surface waters, personal and professional interests in observing wildlife, etc.). In other words, Petitioners have failed to show how the harms alleged in their members' declarations are fairly traceable to the NRC staff's reliance on the license renewal Generic EIS and Table B-1 to satisfy its NEPA obligations with respect to Category 1 impacts. Petitioners cannot rely solely on the "procedural harm" that derives from alleged NEPA noncompliance; Article III requires the demonstration of some causal relationship between the final agency action and the injuries alleged. *Am. Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 592-93 (D.C. Cir. 2019) (petitioner organization alleging procedural injury must demonstrate that procedural failure "demonstrably increased some specific risk of environmental harms that imperil the members' particularized interests") (internal

citations and quotation marks omitted). As such, Petitioners have not met their burden of establishing standing on this claim either.[17]

With respect to Petitioners' third claim—that the NRC has specifically failed to take a "hard look" at groundwater impacts from Turkey Point's cooling canal system (Br. at 44-57)—at least one member of each individual Petitioner organization has *specifically* alleged harm traceable to this exact concern,[18] and thus Respondents do not contest standing on the claim raised in this portion of Petitioners' brief.

III. To the extent Respondents can address Petitioners' merits arguments, those arguments do not warrant relief.

A. Petitioners do not challenge any agency order interpreting 10 C.F.R. § 51.53(c)(3), and they do not undermine the Commission's interpretation of that provision.

Petitioners assert that the NRC erroneously interpreted its own regulation (10 C.F.R. § 51.53(c)(3)) governing the contents of applications for power reactor license renewal applicants, and they ask the Court to engage in a *de novo* review of the plain meaning of the regulation. Br. at 29. Even if the Court were to reach the

[17] Although courts do relax redressability and imminence requirements in "procedural injury" cases, the requirement to tether a concrete, "injury in fact" to the alleged procedural deprivation remains a "hard floor" for Article III standing. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).

[18] See Silverstein Declaration, ¶¶ 7, 9 (member of both Miami Waterkeeper and NRDC); Bauman Declaration, ¶ 10 (member of Friends of the Earth).

merits of this issue, it would not find an interpretation—or even a passing mention—of 10 C.F.R. § 51.53(c)(3) in the three documents that Petitioners have identified for this Court's review (the two renewed licenses and the NRC Staff's Record of Decision). In the Turkey Point subsequent license renewal proceeding, the NRC issued "orders" interpreting this regulation on two occasions. The first was the aforementioned Board March 2019 Order, which Petitioners cite (Br. at 29-38) but do not directly challenge in their Petition for Review. But even this Board order does not reflect the authoritative or official position of the NRC—that would instead be found in the Commission's April 2020 Order.[19] The Commission's April 2020 Order—which was issued in response to a referred ruling from the Board (JA___) that was still pending when Petitioners sought judicial review—provides the Commission's reasoned interpretation of 10 C.F.R.

[19] Petitioners characterize this Order as a "*post hoc*" rationalization, Br. at 29 n.15, while simultaneously drawing heavily from favorable language included in its dissenting opinion. Consistent with our arguments concerning finality, Respondents dispute that this order is a *post-hoc* rationalization. The Commission has not acted belatedly; Petitioners filed too early. Moreover, Respondents' consent to inclusion of the Commission's April 2020 Order in the Joint Appendix is solely for the convenience of the Court; Respondents do not suggest that this Order is (nor could it be) within the scope of the administrative record where, as here, Petitioners allege the renewed licenses at issue were "final" months prior to its issuance, and the Order post-dates both the allegedly final decision and the Petition for Review.

§ 51.53(c)(3), and why, in its judgment, the most sensible and holistic reading of the regulation is the one reached by the Board.

Specifically, the Commission found that the regulatory language was genuinely ambiguous (JA___); that the interpretation proffered by Petitioners would render the provision "incompatible with the other license renewal provisions in Part 51" that *require* the NRC Staff to employ Table B-1 when preparing an EIS for *all* license renewal applicants (JA___), and would be inconsistent with the "explicitly stated regulatory purpose" of the NRC's 1996 license renewal rulemaking. (JA___). The Commission also concluded that, on balance, the regulatory history of the provision and the text of the license renewal Generic EIS supported the Board's interpretation (JA___).

Having failed to challenge the Commission's April 2020 Order, Petitioners cannot obtain review of the Commission's reasonable and definitive interpretation of 10 C.F.R. § 51.53(c)(3), which provides the agency's official position that no error occurred with respect to this regulation in the Turkey Point subsequent license renewal proceeding. And because Petitioners have not taken any steps to amend or file a new petition for review to incorporate the Commission's April 2020 Order, this Court is without jurisdiction to review the order, which did not even exist at the time the Petition for Review was filed. *TeleSTAR*, 888 F.2d at 134 (prematurely filed petitions for review do not automatically "ripen" or secure

appellate jurisdiction upon subsequent agency action). Additionally, any review of the Commission's April 2020 Order by the Court (or any reliance on the Order by Respondents) as a justification for the actions that are actually under review would violate the *Chenery* principle, in that the "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) (quoting *SEC v. Chenery*, 318 U.S. 80, 87 (1943)).

In the end, if the Court were to reach the merits of this issue in the present case, which is confined to the four corners of the administrative record as it existed at the time of the decision(s) that Petitioners challenge, it would require the Court to engage in the entirely pointless exercise of reviewing an interlocutory Board interpretation of an NRC regulation (which, we note, is itself not even the subject of the Petition for Review), while ignoring the official and authoritative interpretation from the head of the agency. But the Court need not go down this rabbit hole. The procedural limbo in which the Commission's April 2020 Order currently resides can be resolved via a proper petition for review, filed at the conclusion of the NRC's Section 189(a) adjudicatory proceeding, at which point

the April 2020 Order would be included within the administrative record, and Petitioners can challenge the Commission's conclusions.[20]

B. Petitioners have likewise failed to properly challenge the temporal scope of the license renewal Generic EIS, and their arguments lack merit.

Petitioners also argue that the NRC impermissibly relied on its license renewal Generic EIS (and the conclusions from that Generic EIS codified into Table B-1) when issuing its final EIS because these analyses "were never intended to apply to—and moreover, do not analyze the impacts of—subsequent license renewals." Br. at 38. But again, Petitioners have failed to challenge an order that addresses this issue. The Commission's April 2020 Order expressly provides the authoritative and official position on this issue as well. Order at 1 (JA___) ("[We] hold that the NRC Staff may rely on the [license renewal Generic EIS] and [Table B-1] to evaluate environmental impacts of Category 1 issues."); *id.* at 16-18 (JA___-___) (concluding that a "plain reading" of the license renewal Generic EIS, as well as its regulatory history, demonstrates that the NRC "considered subsequent license renewal in its analysis of Category 1 issues in the 2013 updates to the GEIS and provided the public with notice and an opportunity to comment.").

[20] This assumes that the Court reaches the merits and does not agree with Respondents, *supra* p. 42, that Petitioners lack Article III standing for this claim, an infirmity that would still exist in a later challenge.

Any judicial review of this issue must necessarily take into account the Commission's decision, which postdates the Petition for Review.

Nor are Petitioners' arguments compelling on the merits. As previously stated (*supra* p. 44) the NRC Staff was *compelled* by NRC regulations (10 C.F.R. §§ 51.71(d), 51.95(c)(4)) to incorporate the Category 1 conclusions from the license renewal GEIS and Table B-1 into its draft and final EIS documents. Petitioners fail to identify any legal error on the part of the NRC Staff, which conducted its environmental review in reliance on NRC regulations that expressly required incorporation of these generically resolved matters. And Petitioners fail to address the conclusion, ultimately confirmed in the Commission's April 2020 Order, that the license renewal Generic EIS does *in fact,* by its terms, cover the impacts of both an initial renewal term and a subsequent term. *See* Commission April 2020 Order at 16-17 (JA___-___) (citing Board March 2019 Order at 22 (JA___)) (noting that the Glossary of the license renewal Generic EIS defines "license renewal term" to make clear that the agency's analysis applies to environmental impacts associated with each twenty-year renewal period, regardless of whether that period follows the original license or an already once-renewed license).

Finally, when Petitioners argue that the NRC Staff acted improperly by following these regulations, they effectively challenge the regulations themselves,

which in an individual adjudicatory proceeding would require a rule waiver. 10 C.F.R. § 2.335. Petitioners did pursue this argument, briefly, during the early stages of the adjudication (i.e., that the license renewal Generic EIS was never intended to apply to subsequent license renewals and did not adequately consider the environmental impacts associated with 80 years of operation). Petitioners' October 2018 Response to Applicant's Surreply at 5-8 (JA___-___). But the Board considered and rejected that argument in its March 2019 Order as an impermissible attempt to challenge an NRC regulation without a waiver. Board March 2019 Order at 21-22 n.40 (JA___-___). Petitioners dropped this claim at this procedural juncture; when they sought Commission review of the Board's March 2019 Order, they did not specifically seek review of the Board's determination concerning the temporal scope of the license renewal Generic EIS.[21]

It is a general tenet of administrative law that parties must actually raise and forcefully present arguments before the agency at the appropriate procedural juncture in order to preserve them for judicial review. *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 655 (D.C. Cir. 2011) (internal citations and

[21] In fact, after the Board rejected this argument, Petitioners effectively took the *opposite position* when seeking a waiver to allow them to submit contentions challenging specific Category 1 conclusions, acknowledging that the NRC's license renewal GEIS had been issued "for subsequent license renewal proceedings." Petitioners' June 2019 Waiver Petition at 8-9 (JA___-___).

quotations omitted). Here, Petitioners have resurrected their previously dropped argument concerning the temporal scope of the license renewal GEIS, now wielding the dissenting opinion of a Commission Order that did not even exist at the time the Petition for Review was filed. If the Court reaches the merits of the Petition, it should not countenance Petitioners' belated revival of this argument, which Petitioners had "effectively abandoned" at the time the Petition was filed by not including it in their administrative appeals. *KPMB, LLP v. SEC*, 289 F.3d 109, 120-21 (D.C. Cir. 2002).

C. Petitioners' specific arguments concerning groundwater impacts are before the Commission on administrative appeal.

Petitioners argue that the NRC Staff failed to take a "hard look" at groundwater impacts from Turkey Point's cooling canal system. Br. at 44-58. Respondents are unable to respond to these arguments on the merits because they are identical to issues the Petitioners have raised in their administrative appeals, which are currently pending before the Commission.

This conundrum is illustrated by comparing the Petitioners' arguments in their brief with the arguments they are pursuing in their administrative appeal to the Commission. *Compare* Br. at 46 ("The NRC's reliance on state and county regulators to cure Turkey Point's groundwater contamination does not satisfy the agency's NEPA obligation to evaluate environmental impacts.") *with* Petitioners' November 2019 Administrative Appeal at 16 (JA___) (faulting the Board for

relying on the existence of state and county enforcement and oversight); Br. at 49, 51-52 ("The NRC ignored significant evidence in the record indicating FPL's current mitigation efforts will not control Turkey Point's groundwater contamination," including reliance on a "skewed" freshening plan that was based on a "particularly wet" year of weather data) *with* November 2019 Administrative Appeal at 7 (JA___) (alleging Board error based on same "skewed" model); Br. at 52, 54 (arguing that FPL's freshening plan is not achieving the necessary salinity reductions or its annual salinity target) *with* November 2019 Administrative Appeal at 9, 14 (JA___, ___) (faulting Board for disregarding Petitioners' evidence of applicant's failure to lower salinity and achieve same annual target); Br. at 54 (NRC staff failed to reconcile its findings with forecasted climate change conditions) *with* November 2019 Administrative Appeal at 10 (JA___) (arguing that EIS failed to analyze less favorable climate conditions).

Respondents cannot substantively engage with these arguments because there is, as of now, no official Commission position to convey, due to Petitioners' invocation of the Commission as the appellate adjudicatory authority in the Turkey Point licensing proceeding. Once the Commission issues a "final order" that responds to these arguments, Petitioners may, if adversely affected, challenge that final order in this Court. And, of course, Respondents' inability to provide the Court with its position only serves to confirm what we have asserted in Part I,

supra—that the decisions that are the subject of the Petition for Review are not final and that it would not be prudent for the Court to exercise jurisdiction over Petitioners' arguments now.

CONCLUSION

This Court should dismiss this Petition for Review for lack of jurisdiction, or in the alternative, hold this Petition for Review in abeyance pending the Commission's resolution of the still-pending administrative appeals filed by Petitioners. With respect to the issues about which Respondents can present a position, the Petition should be denied.

Respectfully submitted,

/s/ Erika Kranz
JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
JUSTIN D. HEMINGER
ERIKA KRANZ
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
erika.kranz@usdoj.gov
(202) 307-6105

/s/ Eric V. Michel
MARIAN L. ZOBLER
General Counsel
ANDREW P. AVERBACH
Solicitor
ERIC V. MICHEL
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
eric.michel2@nrc.gov
(301) 415-0932

September 14, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28(b) and 32(g)(1), I hereby certify:

The foregoing Initial Brief of Federal Respondents complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 12,928 words, as calculated by the word-processing software program with which the Brief was prepared.

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

/s/ Eric V. Michel
ERIC V. MICHEL
Counsel for Respondent U.S. Nuclear Regulatory Commission